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Examining the Conditions for the Divisibility of Real Security and Its Effects in Iraqi Positive Law

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ABSTRACT

Real security and collateral security constitute some of the most important legal institutions in the Iraqi civil law system, playing a fundamental role in ensuring the performance of financial obligations, preserving trust in commercial transactions, and protecting the rights of creditors. In this form of security, a specific asset—particularly in the form of a mortgage—is designated as collateral for the payment of a debt, and the creditor may, in the event of non-performance, satisfy the claim directly from that asset without the need to have recourse to the debtor’s personal liability. The Iraqi Civil Code has expressly recognized this institution, particularly in Articles 1285 et seq. The main issue of the present study is to examine the possibility or impossibility of the divisibility of real and collateral security under Iraqi law; that is, whether the mortgaged property may be divided into parts, each securing a portion of the debt, or whether the principle of indivisibility prevails such that the entire property always guarantees the whole debt. This issue produces significant legal consequences in several practical situations, including partial payment of the debt, sale of part of the mortgaged property, plurality of secured assets, or the creation of a mortgage over jointly owned property. The objective of this research is to clarify the legal foundations, limits, and conditions of the divisibility of real and collateral security within the framework of Iraqi civil law and to analyze its practical effects on the legal relationship between creditor and debtor. The research method is descriptive–analytical and is based on library research of statutory texts, legal doctrine, and judicial decisions in Iraq. The findings indicate that the Iraqi Civil Code, in Article 1294, adopts the principle of indivisibility with respect to the registered mortgage; however, the law remains silent regarding other forms of real security, and judicial practice has interpreted the statutory provisions restrictively. It appears that, in certain cases, the question of divisibility of security warrants reconsideration.

Keywords: *Real security; collateral security; divisibility of security; Iraqi law*

Introduction

Real security, and in particular collateral security (al-rahn al-taʾmīnī), is among the most important institutions for securing debts in Iraqi civil law, alongside personal security, and plays a fundamental role in safeguarding creditors’ rights and establishing confidence in transactional relations (1-3). Unlike personal security, which constitutes an obligation incumbent upon the guarantor’s personal estate, real security designates a specific asset as collateral for the debt, and the creditor is entitled, in the event of non-performance, to satisfy the claim directly from that asset

(4, 5). The most significant and widespread form of real security in Iraqi law is the collateral mortgage, which is recognized and regulated in Articles 1285 et seq. of the Iraqi Civil Code (1, 2).

One of the fundamental issues in the domain of real and collateral security is the question of the divisibility or indivisibility of security. By "divisibility of security" is meant whether, in cases involving multiple causes of liability, responsibility for compensation arising from the secured obligation may be apportioned among guarantors, or not. In Iraqi law, as indicated, the issue of divisibility of real security—particularly as manifested in the collateral mortgage—raises the question of whether the mortgaged property may be divided into parts, each serving as security for a portion of the debt, or whether the governing principle is indivisibility, such that the entire mortgaged property always secures the whole debt (6, 7). This problem generates significant legal consequences in numerous practical situations, such as partial payment of the debt, the sale of part of the mortgaged property, the plurality of secured assets, or the survival of part of the debt after partial satisfaction (3, 8).

The Iraqi Civil Code, in Article 1294, explicitly proclaims the principle of the indivisibility of the registered mortgage, stipulating that every part of the mortgaged property guarantees the entire debt and that every part of the debt is secured by the whole of the mortgaged property (1, 6). The content of this provision indicates that partial payment of the debt or disposition of part of the mortgaged property does not affect the persistence of the mortgagee's right over the whole property. Moreover, the provisions governing the right of retention in Article 280 of the Iraqi Civil Code implicitly emphasize the non-divisible character of substitutes and financial obligations (2, 7).

Nevertheless, the Iraqi Civil Code does not expressly regulate the conditions and circumstances that may lead to the divisibility of real security or to a reduction in its scope. This legislative silence, combined with the strict approach of judicial practice, has generated ambiguity and interpretive tension concerning the scope of Article 1294. Accordingly, the principal question is whether the principle of indivisibility in Iraqi law is absolute, or whether, within the framework of party autonomy, the nature of the contract, or particular transactional circumstances, recognition may be given to the possibility of dividing real and collateral security (6, 8).

On this basis, the present article seeks, by focusing on the texts of the Iraqi Civil Code and by analyzing the doctrine and governing concepts of real and collateral security, to examine and clarify the conditions under which the divisibility of real security may arise and its legal consequences in Iraqi law, and to determine the degree of flexibility of this institution in responding to the practical needs of financial transactions (3, 7).

Review of the Literature

The principle of the indivisibility of real security and the continuity of collateral until full satisfaction of the debt has deep roots in Islamic jurisprudence and is directly reflected in the civil laws of Islamic countries, including Iraq (1, 9, 10). In classical jurisprudential sources, this issue is primarily examined within the chapters on mortgage and guarantee, and its theoretical foundation rests upon the notions of "unity of collateral" and "complete dependency of the security on the debt" (9, 10).

In the sphere of Iraqi positive law, the Civil Code explicitly establishes the rule of indivisibility of the registered mortgage in Article 1294, providing that every part of the mortgaged property guarantees the whole debt. In addition, Article 280(1) of the Iraqi Civil Code, within the context of the right of retention, implicitly affirms the non-divisibility of reciprocal obligations. These two provisions constitute the principal normative basis for legal analyses of the indivisibility of real and collateral security in the Iraqi legal system (1, 6, 7).

Within legal doctrine, the rule of the indivisibility of mortgage has been addressed in detail in the context of accessory real rights, where scholars emphasize the necessity of maintaining security until the full satisfaction of the debt on the basis of the unity of collateral and the established principles governing accessory real rights (4, 5, 8). These analyses provide a firm theoretical foundation for the present research.

Despite these doctrinal discussions, no independent scholarly work has been identified that specifically and comprehensively examines the conditions for the divisibility of real and collateral security in Iraqi positive law in light of the foundations of Islamic jurisprudence. Most existing works adopt a general approach to the institution of guarantee. This research gap underscores both the necessity and the originality of the present study (3, 6).

Conceptual Framework

For a clearer understanding of the subject under discussion, the first step is a semantic examination of the term "guarantee" (ḍamān) and its related concepts, since without identifying its linguistic roots, historical development, and textual usages, comprehension of the jurisprudential and legal doctrines remains incomplete. The term ḍamān has evolved through its interaction with other concepts, and its contemporary meaning is the result of this process. Accordingly, the present study, through etymological analysis and an examination of its usage in Islamic sources, seeks to establish a more precise and profound understanding of this concept.

Ḍamān in Language and Terminology

The word "ḍamān" is derived from the root "ḍ-m-n." It is said that water contained in a vessel is "within" (ḍimn) the vessel (11). In its original sense, ḍamān signifies assuming, encompassing, and accepting responsibility for something (12). The expression *ḍamintu al-shayʾ ḍamānan* means "I guaranteed the thing," hence the speaker becomes a guarantor; and *ḍammanthuhu al-shayʾ taḍmīnan fa-taḍammanahu ʿannī* means "I entrusted something to him so that he would guarantee it" (13).

According to al-Fayyumi, when the phrase *ḍamintu al-māl* is used in the triliteral form, it denotes that the speaker has assumed responsibility for the property and placed it upon himself (14). It is also stated that the term may convey the meaning of rendering someone liable and obligating him to perform an undertaking (15). The expression *takaffaltu bi-kadhā* means "I guaranteed such a thing," and *kafaltu fulānan* means "I guaranteed a person" (16).

Ḍamān is likewise understood intrinsically as denoting preservation and protection (17, 18). Ibn Manẓūr also defines guarantee as preservation, which appears to stem from the usage of the term guarantor for a sponsor or surety; in *Lisān al-ʿArab*, the application of "guarantor" to the imam is regarded as an indication of a secondary meaning of guarantee (19). In *al-Makāsib*, Shaykh al-Anṣārī characterizes guarantee as the attachment of something and its loss to the liability of the guarantor (20).

The technical definition of ḍamān closely approximates its linguistic meaning and generally denotes obligation and the assumption of liability for property. In technical usage, guarantee signifies that a person who is not originally a debtor undertakes the payment of property and binds himself to perform it (10).

Real Security in Iraqi Law

"Real security," in the sense employed today in legal doctrine and positive law, is a product of modern legal development and is particularly derived from French law and Egyptian law (Egyptian Civil Code of 1949). The Iraqi Civil Code No. 40 of 1951 was inspired by these two systems and in several instances even adopted their provisions verbatim (1, 5). The most important and prominent manifestation of real security in Iraqi law is the contract of mortgage (*rahn*), whether in the form of the registered mortgage (*al-rahn al-rasmī*) or the possessory mortgage (*al-rahn al-ḥiyāzī*), in addition to two other forms of real security, namely the right of retention and the retention of title clause, all of which belong to the category of accessory real rights (2-4).

One of the fundamental and unquestionable rules governing these forms of real security—following French and Egyptian law—is the rule of the indivisibility of real security. According to this rule, every part of the mortgaged property secures the whole debt, and every part of the debt is secured by the entire mortgaged property (1, 6).

This rule, known in French and Egyptian law as the "indivisibility of mortgage," is expressly stated in Iraqi law only in Article 1294 with respect to the registered mortgage, whereas with regard to the right of retention and the retention of title clause, the Iraqi legislator has not provided an explicit provision (6, 7). Because many of the Iraqi Civil Code provisions on mortgage (Articles 1179–1307) are direct translations or adaptations from Egyptian law and ultimately from French Napoleonic law, reference must necessarily be made to French statutory provisions and Egyptian jurisprudence and doctrine in order to fill legislative gaps and ensure proper legal interpretation (1, 8).

Article 1294 of the Iraqi Civil Code expressly provides that every part of the mortgaged property or properties secures the entire debt and that every part of the debt is secured by all the mortgaged property or properties (1, 6).

Although the Iraqi legislator has explicitly affirmed the rule of indivisibility only with respect to mortgages and has remained silent concerning the right of retention and the retention of title clause, the fact that all three institutions fall within the category of real securities justifies examining whether the rule of indivisibility extends to these two additional forms of security as a subsidiary objective of this research (3, 7).

Through doctrinal and jurisprudential examination of the rule of indivisibility of security, it becomes evident that civil law scholars have defined the rule and clarified its scope. Having explained the concept of guarantee and its forms, the analysis now turns to the central issue of this research: the divisibility of real security in Iraqi law (6, 7).

Definition of the Rule of Indivisibility in Iraqi Law

In defining this rule, Iraqi legal scholars, relying on statutory texts and judicial interpretations, have formulated multiple definitions that are substantively identical though linguistically varied (1, 3). Al-Sanhuri defines the rule of indivisibility of mortgage as follows: "Every part of the debt is secured by the whole mortgage, and every part of the mortgage secures the entire debt" (1). The same meaning is confirmed by Abdel Rahman in similar terms (3).

Likewise, contemporary Iraqi scholars explain that mortgage is indivisible both with respect to the mortgaged property and the secured debt; thus, the entire mortgaged property and every part thereof secure the whole debt and every part of it (2, 4). Another formulation of this rule holds that the entire mortgaged property and each of its parts secure the whole debt and every part of it (2).

Accordingly, the rule of indivisibility of mortgage has two essential dimensions: first, every part of the mortgaged property secures the entire debt, even if the mortgagor sells part of the property; second, every part of the debt is secured by the entire mortgaged property, even if almost the entire debt has been paid and only a minimal balance remains (4, 5).

Legislative Position on the Divisibility of Security

French civil law historically affirmed this rule, and both Egyptian and Iraqi law adopted it through legislative reception. Egyptian law reproduced the French provision almost verbatim, and Iraqi law in Article 1294 likewise declares that every part of the mortgaged property secures the whole debt and every part of the debt is secured by all the mortgaged property (1, 8).

In Iraqi law, earlier legal sources such as the *Majallat al-Aḥkām al-ʿAdliyya*—which remains influential in certain contexts—also reflect the principle of indivisibility, particularly by recognizing the creditor's right to retain the entire collateral until full satisfaction of the debt (9, 21).

However, unlike the *Majalla*, which addressed only specific applications of the rule, the Iraqi Civil Code, though explicit in Article 1294, refrains from providing a conceptual definition of indivisibility. This legislative technique reflects the philosophy that rigid definitions may hinder doctrinal development and judicial adaptation to emerging factual situations (1, 7).

Judicial Practice Concerning the Divisibility of Security

With respect to the judiciary's position on defining the rule of the indivisibility of mortgage, it is observed that courts have not focused on formulating a conceptual definition of the rule; rather, they have addressed its applications. This is because many judicial holdings merely reiterate what the statutory texts provide—namely, that every part of the mortgaged property or properties secures the entire debt, and that every part of the debt is secured by the whole of the mortgaged property or properties (1, 6).

In this regard, a ruling of the Egyptian Court of Cassation states: "The registered mortgage is an indivisible right, whether with respect to the mortgaged immovable or with respect to the secured debt; therefore, if part of the debt is extinguished, the mortgaged immovable remains security for what remains of it." Accordingly, the mortgage is not released to the extent corresponding to the extinguished part of the debt.

In addition, courts have clarified, in their judgments, the effect of partial performance of the secured debt on the mortgagee creditor's right to request a judicial sale of the property. In one decision of the Iraqi Court of Cassation, it was held: "If the mortgagor performs part of the debt secured by a mortgage but does not perform the remaining part, such partial performance does not affect the mortgagee's right to request the sale of the mortgaged property due to non-performance of the remainder of the debt." That is, the mortgagee may request the sale of the mortgaged property notwithstanding partial payment. (22)

From judicial rulings, it appears that courts have addressed only the division of the secured debt and its effect on the mortgage, without addressing the division of the mortgaged property itself. They have held that partial payment of the debt does not result in the release of the mortgage from a corresponding part of the mortgaged asset, because the mortgage is indivisible. Moreover, partial performance does not affect the mortgagee's right to request the sale of the property to recover what remains of the debt (22).

On this basis, the rule of the indivisibility of mortgage in Iraqi law is portrayed as an ancillary rule and as inherently indivisible. Doctrine has articulated it with clarity, whereas the legislator has confined itself to enacting the text, and the judiciary has applied its effects in practice (1, 3, 6).

Examining the Rule of the Indivisibility of Mortgage in Iraqi Law

In examining the rule of the indivisibility of mortgage from the perspective of Iraqi law, several points must be considered.

1. Indivisibility of Mortgage as a Rule, Not a General Principle

The indivisibility of mortgage is not a "general principle," but rather a "rule." The term "principle" should not be applied to the rule of mortgage indivisibility. The reason is that a principle operates across most contracts—such as the principle of consensualism in contracts or the principle of good faith—whereas the rule of mortgage indivisibility applies only to mortgage and other real securities such as security rights and privileges.

Some civil law scholars have characterized the rule of "indivisibility" as an exception to the rule of "accessoriness of the mortgage to the secured debt," reasoning that, under accessoriness, "what is extinguished from the debt is extinguished from the mortgage," but the exception of indivisibility prevents such proportional release (23).

The prevailing view is that mortgage indivisibility is not an exception to accessoriness, because accessoriness does not require the "extinction of part of the mortgage" in return for the "extinction of part of the debt"; rather, the effects of accessoriness are realized by the extinction of the mortgage in its entirety upon full satisfaction of the debt. Therefore, "indivisibility" is a rule applicable to mortgage and other real securities, not a general principle. This is because multiple exceptions may operate upon it, and a rule admits exceptions, whereas a principle does not.

2. The Rule of Indivisibility as a Default Rule

The rule of indivisibility is a default rule, rather than a mandatory rule or a rule of public order. Civil law scholars generally agree that "the rule of mortgage indivisibility is not among the rules of public order" and is not among the "essential characteristics of mortgage"; rather, it is a default rule that supplements party autonomy (1, 8).

Since mortgage indivisibility is a default rule, contracting parties may expressly agree on the divisibility of the mortgage; the legislator may depart from the rule and provide for divisibility in specific cases; and the mortgagee (creditor) may unilaterally waive this protection.

3. The Position of Iraqi Judicial Practice

An examination of Iraqi judicial practice concerning the nature of the rule of mortgage indivisibility shows that courts have not directly set out an explicit doctrinal characterization of the rule. However, by analyzing decisions in which courts have deemed mortgage divisibility permissible in specific situations, it may be inferred that the judiciary treats the rule as a default rule governing the mortgage contract, rather than as a mandatory rule. This inference is supported by the fact that courts have, in exceptional cases, permitted modification of the rule; as is known, exceptions can attach to a rule, but not to a principle.

In this regard, the Iraqi Court of Cassation has ruled that "the mortgaged property secures every part of the debt, and every part of the debt is secured by the whole mortgaged property, unless there is an agreement to the contrary." (22)

In another decision of the same court, it was stated that "every part of the debt is secured by the whole mortgaged property, unless otherwise agreed." (22)

Foundations of the Rule of Indivisibility in Civil Law

Although civil law scholars have devoted most of their attention to determining the content of the rule of the indivisibility of mortgage, its scope of application, and the exceptions thereto, they have devoted comparatively less effort to investigating its original foundation and underlying rationale. Nevertheless, from certain scattered statements in their writings, these foundations may be discerned. It is also appropriate to consider the position of civil legislation and judicial practice in clarifying the roots of this rule (1, 5).

There exist multiple justifications and rationales for the rule of the indivisibility of mortgage upon which one may rely in order to extract its true foundation. These justifications are principally threefold: the common intention of the contracting parties, the right of the mortgagee creditor, and the relationship of dependency between the debt and the security. Each of these foundations will be examined below.

1. The Common Intention of the Contracting Parties

The mortgage contract is a purely consensual and intention-based agreement. Its origin lies in the mutual consent of the mortgagor and the mortgagee, and its effects are governed by their shared intention. For this reason, one of the strongest foundations of the rule of mortgage indivisibility is recourse to this common intention: the parties, at the time of establishing the mortgage, intend that the entire mortgaged property shall secure the entire debt and that no portion of the collateral shall be released upon partial payment of the debt (1, 5, 24).

Al-Sanhuri expresses this idea with particular clarity, stating that the rule of mortgage indivisibility is founded upon the intention of the contracting parties, for they intended the mortgage to remain in force until the debt is fully satisfied (1, 5, 24). This view derives directly from the principle of autonomy of will, which treats the binding force of contracts as obligatory and equates the parties' common intention with law. The mortgage contract constitutes an indivisible whole and cannot be fragmented or partially disregarded (6).

The logical consequence of this foundation is that indivisibility is the general rule governing mortgage; however, because its basis is the will of the parties, they may depart from it through their express or implied agreement. Thus, the mortgagor and the mortgagee may stipulate divisibility at the time of contract formation or agree upon it subsequently.

The Iraqi Civil Code confirms this approach by giving priority to intention over wording in the interpretation of contracts. Article 155(1) provides that in contracts, intention and meaning prevail over expressions and forms. If the mortgagor claims that he is entitled, by partial payment of the debt, to recover a corresponding part of the mortgaged property, the court must refer to the parties' true common intention at the time of concluding the mortgage. Ordinarily, that common intention is the persistence of the entire collateral until full satisfaction of the debt.

Moreover, Article 150(1) of the Iraqi Civil Code requires that contracts be performed in accordance with the requirements of good faith. Good faith demands that the contract be executed precisely as the parties intended. This requirement is fully realized in the mortgage contract: the mortgagor, by providing collateral, intends to secure the performance of the entire debt owed; the mortgagee, in turn, intends that the mortgaged property shall secure the entire debt and that the mortgagor shall not, by partial payment, acquire the right to recover part of the collateral. Rather, the collateral is to remain wholly subject to the mortgage until the last unit of the debt is paid. This arrangement encourages the mortgagor to hasten full performance in order to recover the property.

Although the available judicial decisions do not explicitly identify the parties' common intention as the foundation of the rule of mortgage indivisibility, it may be inferred implicitly from general contract rulings that both Iraqi and French judicial practice have accepted this basis. The Iraqi Federal Court of Cassation has repeatedly emphasized that the contracting party is obliged to perform the contract in accordance with its contents and in a manner consistent with good faith (22). Accordingly, good faith also requires that the contract be executed in exact conformity with what the parties intended.

On this basis, the strongest and most proximate foundation of the rule of mortgage indivisibility is the common intention of the mortgagor and the mortgagee: they intended that the entire mortgaged property secure the entire debt and that the mortgage remain in force until the last part of the debt is paid. This intention is fully consistent with the principle of autonomy of will, the rules governing contractual interpretation, and the requirement of good faith, and it is implicitly endorsed by judicial practice.

2. The Right of the Mortgagee Creditor (Right of Retention)

In a mortgage—whether a collateral mortgage or a possessory mortgage—the creditor has a dual position: that of a creditor holding a principal personal right and that of a mortgagee holding an accessory real right. The real right of mortgage confers upon the creditor three important privileges: the right of priority, the right of pursuit, and the right to retain the mortgaged property until full satisfaction of the debt.

Many leading civil law scholars consider this right of retention to be the most important foundation of the rule of mortgage indivisibility, especially in the case of possessory mortgage. By virtue of this real right, the mortgagee may retain the mortgaged property, whether movable or immovable, until full recovery of the claim, including the principal debt, interest, and costs of preservation. Even if only a small portion of the debt remains unpaid, the right of retention persists, because the mortgage is indivisible (1, 2).

The *Majallat al-Aḥkām al-ʿAdliyya* also refers to the mortgagee's right of retention. Article 729 provides that the mortgagee has the right to retain the collateral until its release, that is, until full payment of the debt. In his commentary, Ali Haydar explains that the mortgagee may retain the mortgaged property until the debtor pays the debt for which the mortgage was established, or until the mortgagee waives the mortgage or releases the debtor from it (9).

Similarly, the Iraqi Civil Code defines the possessory mortgage in Article 1321 as a contract by which the mortgagor places property in the possession of the mortgagee or a trusted third party. This definition clearly reflects the right of retention granted to the mortgagee, such that the mortgagor has no right to recover the mortgaged property except after full payment of the debt. This is stated explicitly in Article 1332(1) and (2) of the Iraqi Civil Code: every part of the mortgaged property secures the entire debt, and if the mortgagor pays part of the debt, the mortgagee is not obliged to deliver part of the collateral but may retain all of it until the remainder of the debt—however small—is fully satisfied (1, 2).

The Iraqi Court of Cassation has likewise held that in a possessory mortgage, the mortgagee may retain possession of the mortgaged property until the mortgage is extinguished, and if the property returns to the mortgagor for any reason, the mortgagee is entitled to recover it so long as the mortgage subsists (22).

Accordingly, the strongest and clearest foundation of the rule of mortgage indivisibility is the real right of retention conferred upon the mortgagee, particularly in the context of possessory mortgage. This right requires that the mortgagee be able to retain the entire mortgaged property until the last part of the principal debt and its accessories is satisfied, without being compelled to return any portion of the collateral upon partial payment. This real right of retention also illustrates the essential difference between mortgage, as a strong real security, and the mere personal right of retention, which constitutes a comparatively weaker defense.

3. The Relationship of Dependency and the Connection Between the Debt and the Security

Legal scholars identify the foundation of the rule of the indivisibility of mortgage in the relationship of connection and dependency between the mortgage and the secured debt (1, 7, 8, 25, 26). Al-Sanhuri writes in this regard that the indivisibility of the mortgage arises from the accessory nature of the mortgage in relation to the debt: since the debt constitutes a single obligation that is secured, the mortgage, as its collateral, is likewise a single and indivisible entity created to secure the whole debt and each of its parts (1).

More specifically, the relationship between the mortgage and the secured debt is one of accessory to principal; accordingly, when the debt is extinguished, the mortgage is extinguished as well by way of dependency. This understanding is confirmed in other legal texts. Dependency denotes the legal relationship between principal rights and obligations and accessory rights and obligations, such that the fate of the accessory—regarding existence, validity, transfer, attributes, and extinction—depends upon the fate of the principal (7, 25, 26).

The most salient manifestation of dependency in the context of the rule of mortgage indivisibility is dependency in existence and extinction. This means that the mortgage, in terms of its existence and extinction, follows the secured debt: no part of the mortgaged property may be released upon partial payment of the debt, because the extinction of the mortgage is conditioned upon the complete extinction of the debt, not merely part of it. Dependency in existence signifies that the mortgage has no independent existence and always requires a debt whose satisfaction it secures, whether the debt already exists in the debtor's liability, or whether the mortgage secures a future debt, a conditional debt, or a contingent debt.

This view is reflected in Iraqi statutory law. Article 1294 of the Iraqi Civil Code provides that every part of the mortgaged property secures the entire debt and that every part of the debt is secured by the whole of the mortgaged property (1, 7). This provision clearly demonstrates how the legislator recognizes the reciprocal and indivisible relationship between all parts of the collateral and all parts of the debt.

Accordingly, it may be argued that the rule of mortgage indivisibility directly derives from the accessory nature of the right of mortgage. Since the mortgage is created to secure the performance of the principal obligation (the debt) and its existence depends upon it, it is logically consistent that the mortgage follows the unity and totality of the debt and is therefore indivisible. This approach ensures that the collateral remains fully effective as security so long as even the smallest part of the principal obligation remains outstanding, thereby preventing the dissolution or weakening of the security due to a partial reduction of the debt.

The Iraqi Civil Code further provides in Article 1315 that the right of collateral mortgage is extinguished by the extinction of the secured debt, and Article 1346 establishes the same rule for the possessory mortgage. The use of the phrase "by the extinction of the debt" in these provisions indicates that the mortgage is extinguished only upon the complete extinction of the debt. However, the dependency of the mortgage upon the debt is not absolute. In some cases, a mortgage may be arranged prior to the existence of the debt (such as where it secures a future debt), and in other cases the mortgage may be extinguished while the debt remains (such as where the mortgagee waives the mortgage or where the mortgage is extinguished by prescription).

Another noteworthy point confirming the role of connection and dependency in the rule of indivisibility is that if the debt, after being extinguished, is revived for any reason (such as the invalidity of performance or the invalidity of release), the mortgage is likewise revived by virtue of dependency. Article 1315(1) of the Iraqi Civil Code explicitly provides that the right of collateral mortgage is extinguished by the extinction of the secured debt and is revived with it if the cause of extinction of the debt ceases. Such revival, however, must not prejudice the acquired rights of good-faith third parties obtained in the interval between the extinction and revival of the debt.

The Indivisibility of Real Security in Iraqi Law: An Accessory, Default Rule Based on the Mortgagee's Real Right

In Iraqi law, real security—particularly in the form of the registered mortgage and the possessory mortgage—as an accessory real right, is in principle governed by the rule of indivisibility. Pursuant to Article 1294 of the Iraqi Civil

Code, every part of the mortgaged property secures the entire debt, and every part of the debt is secured by the whole of the mortgaged property (1, 7). This provision, which constitutes a direct reception of Article 1041 of the Egyptian Civil Code and Article 2114 of the French Civil Code, reflects the Iraqi legislator's intent to strengthen the position of the mortgagee and to preserve the integrity of the real security until full satisfaction of the debt (8).

Nevertheless, an analysis of the relevant statutory framework—particularly Articles 150, 155, 1294, 1315, 1332, and 1346 of the Iraqi Civil Code—together with the jurisprudence of the Iraqi Court of Cassation, demonstrates that although the indivisibility of real security constitutes the governing rule for mortgage, it does not possess a mandatory character tied to public order. Rather, it is a default rule grounded in the common intention of the contracting parties, the real right of retention of the mortgagee, and the accessory relationship between the debt and the security (1, 3, 7). Consequently, under Iraqi law, the possibility of agreement to the contrary, the waiver of the right of indivisibility by the mortgagee, or the recognition of exceptional circumstances by the judiciary is not excluded.

Thus, by adopting the legislative policy of "stating the rule without defining the concept," the Iraqi Civil Code, while affirming the principle of the indivisibility of real security as the general rule governing mortgage, leaves room for legislative flexibility, doctrinal development, and judicial adjustment in exceptional cases. This approach reflects a deliberate balance between the protection of the creditor's security interest and the autonomy of will within the framework of Iraqi private law.

Examining the Effects of the (Non-)Divisibility of Real Security in Iraqi Law

In light of the foregoing, it becomes clear that the Iraqi legislator has adopted the principle that real security is, as a rule, not divisible. Accordingly, the effects of the indivisibility of real security in Iraqi law, with reference to the relevant statutory provisions, may be set out within the Iraqi legal system as follows (1, 6, 7).

1. Invalidity of a Clause Providing for Progressive (Installment-Based) Release of the Mortgage

By the invalidity of a clause providing for progressive divisibility (or progressive release) of the mortgage in Iraqi law is meant that the parties to a mortgage contract cannot validly agree that, upon payment of each installment of the debt, a portion of the mortgaged property shall be released and removed from the scope of the mortgage.

Pursuant to Article 1315(1) of the Iraqi Civil Code, the mortgage is fully dependent upon the debt, and the mortgagee's real right over the mortgaged property does not extinguish unless the debt is extinguished in full (1, 7). The necessary implication of this rule is that, so long as any part of the debt remains outstanding, the mortgage subsists over the entire mortgaged asset; therefore, partial or progressive payments of the debt, in themselves, do not reduce or extinguish the mortgage.

More plainly, if the mortgagor undertakes to pay the debt by installments and the contract stipulates that, upon payment of each installment, a portion of the immovable or other mortgaged asset will be released, such a clause is not effective or valid under the Iraqi Civil Code. The reason is that the clause contradicts the rule of the indivisibility of real security, which constitutes the legal nature of the mortgage and is regarded as an intrinsic requirement of the mortgagee's real right (1, 6).

The rationale of this rule is the protection of the security and effectiveness of real collateral. If progressive release were accepted, the collateral value of the mortgaged property would gradually diminish and, in the end, the remaining portion of the asset might be insufficient security for the unpaid balance of the debt. By prohibiting this clause, the Iraqi legislator prevents the mortgagee creditor from inadvertently losing security as a consequence of partial payments or being placed in a weaker position (3, 7).

Accordingly, under Iraqi law, the mortgage remains "unitary" in the following sense: either the debt is fully paid and the mortgage is entirely extinguished, or the debt remains outstanding and the mortgage continues to encumber the whole mortgaged asset. No intermediate legal position based on progressive divisibility of the mortgage is recognized (6).

2. Stability of the Mortgagee's Right of Pursuit Against the Mortgaged Asset

The stability of the mortgagee's right of pursuit against the mortgaged asset means that, in Iraqi law, the real right arising from the mortgage is not directed merely against the person of the mortgagor; rather, it attaches to the mortgaged asset itself. For that reason, to recover the full amount of the secured claim, the mortgagee may pursue the mortgaged property even if, after the mortgage is created, the property is transferred to a third party (4, 5).

In other words, the transfer of ownership of the mortgaged property—whether in whole or in part—does not affect the continuation of the mortgagee's right. If the mortgagor sells, gifts, or bequeaths the mortgaged property, the mortgagee remains entitled, for the satisfaction of the entire secured debt, to proceed against the asset itself and, upon non-performance, to request enforcement and sale. This effect derives from the right of pursuit, which is a core characteristic of accessory real rights in the Iraqi legal system (2, 3).

Moreover, the rule of the indivisibility of real security, expressly stated in Article 1294 of the Iraqi Civil Code, ensures that neither the division of the mortgaged property nor partial payment of the debt limits the mortgagee's right of pursuit. Thus, each part of the mortgaged property continues to secure the whole debt, and the mortgagee may proceed against any such part for the full amount of the claim. Consequently, the purchaser or transferee of mortgaged property must accept and bear the mortgagee's right even if only a portion of the mortgaged property is transferred to him (1, 6).

This approach ultimately safeguards the stability and efficiency of mortgage credit in Iraqi law, because it prevents the mortgagor from weakening the mortgagee's legal position or obstructing debt recovery through transfer or fragmentation of the collateral (7).

3. No Requirement of Delivery for the Establishment of Real Security in a Registered Mortgage

The absence of a delivery requirement for the establishment of real security in the Iraqi registered mortgage means that the creation and effectiveness of real security do not depend on the physical delivery (possession) of the mortgaged asset to the mortgagee; rather, the formal registration of the mortgage is sufficient to establish the mortgagee's real right.

In the Iraqi legal system, the registered mortgage (*al-rahn al-rasmī*) departs from the traditional possession-based mortgage model in classical jurisprudence and is plainly shaped by French and Egyptian law. Accordingly, the Iraqi legislator connects the effectiveness of the registered mortgage to formal registration requirements, not to delivery. Once the mortgage contract is formally registered, real security is created and the mortgagee acquires an accessory real right over the mortgaged property even if the asset remains in the mortgagor's possession and no delivery occurs (1, 8).

A key consequence of this rule is that the indivisibility of real security is also established from the moment of registration: from that point, each part of the mortgaged property secures the entire debt and each part of the secured debt is secured by the whole mortgaged property. Therefore, neither the absence of delivery nor subsequent installment payments affects the unity and integrity of the real security. From the outset, the mortgagee holds a complete, stable, and indivisible right in rem over the mortgaged asset (6).

The rationale for this rule is strengthening transactional security and credit confidence. If delivery were treated as a condition for the effectiveness of the registered mortgage, third parties could not ascertain the existence of the mortgagee's real right by consulting registration records, and the security of transfers involving immovables (and certain movables) would be impaired. Registration, as a substitute for delivery, serves both an informative and a constitutive function: it creates the mortgagee's right and makes it opposable to third parties (3, 8).

Accordingly, in Iraqi law, real security arises prior to delivery, and the registered mortgage, from the moment of registration, produces all of its effects, including indivisibility, the right of pursuit, and priority. This feature demonstrates that real security in Iraqi law is not grounded in the mortgagee's material control, but rather in the legal structure of registration and accessory real rights (7).

4. Creation of an Absolute Priority Right for the Registered Mortgagee

By the creation of an absolute priority right for the registered mortgagee in Iraqi law is meant that, upon formal registration of the mortgage, the mortgagee acquires a privileged accessory real right that places the mortgagee, in the recovery hierarchy, above all other creditors of the mortgagor—whether unsecured creditors or even other secured creditors whose rights were created or registered later (4, 5).

In the Iraqi legal system, the criterion for priority among holders of real rights is the date of registration. Because the registered mortgage has a constitutive effect, the mortgagee who registers earlier has priority, with respect to the entire mortgaged property, over all creditors whose rights arise later. This priority does not stem from the mortgagee's identity or from the nature of the debt, but is the direct consequence of the establishment of a real right over the property and its public notice through registration (1, 8).

A crucial point is that this priority is itself not divisible. The mortgagee's priority attaches to the whole mortgaged asset, not to isolated parts. Even if the mortgaged property is divided, partitioned, or partly transferred to third parties, the mortgagee retains the same degree of priority over each part for the entire remaining debt. This is a practical manifestation of the rule of indivisibility of real security, which prevents the scope and strength of priority from being weakened through fragmentation of the collateral or partial payment of the debt (6, 7).

This priority is also absolute in temporal terms: it persists until the debt is fully satisfied, and partial repayment or reduction in the amount of the claim does not diminish the ranking or extinguish it. Only the complete extinction of the debt or the legal extinguishment of the mortgage (such as formal release) ends the mortgagee's priority (1).

The rationale of this rule is to secure credit transactions and to provide confidence for financial institutions and persons who extend loans or credit on the basis of a registered mortgage. If the mortgagee's priority were limited, unstable, or divisible, the economic function of mortgage would be undermined and the system of real securities in Iraqi law would lose effectiveness. Therefore, by granting an absolute, unitary, and continuous priority right to the registered mortgagee, the Iraqi legislator stabilizes the mortgagee's superior position until full payment of the debt (3, 7).

5. Strengthening Credit Security and the Position of the Creditor

By strengthening credit security and the position of the creditor in light of the rule of the indivisibility of real security in Iraqi law is meant that, by maintaining the real security in a "unitary" form, the legislator consolidates the legal position of the mortgagee at the highest level of certainty and stability and prevents the gradual weakening of the security (1, 6, 7).

Under the rule of indivisibility, the mortgagee retains his real right over the entire mortgaged asset until the whole debt is fully discharged. This means that neither partial payments of the debt, nor division of the mortgaged property, nor its transfer to third parties can diminish the scope or strength of the mortgagee's security. The practical result is that the creditor always holds a complete, unified, and sufficient backing for the recovery of the claim and is not exposed to the risk of the gradual erosion of the value of the collateral (3, 4).

This rule directly enhances the security of credit transactions, because individuals and financial institutions, before extending loans or credit, rely on the assurance that the real security provided will remain as strong at the end of the debt relationship as it was at its inception. If real security were divisible, each partial payment or partial transfer of the asset could weaken the security and increase credit risk, ultimately leading to a reduction in the willingness to grant credit or to higher credit costs (7, 8).

From an economic and banking perspective, the indivisibility of real security enables financial institutions to conduct accurate risk assessments and, relying on the stability of the mortgage, to provide long-term financing. This legal certainty facilitates the flow of credit and strengthens confidence in formal instruments and securities within the transactional system (1, 3).

Ultimately, the rule of the indivisibility of real security in Iraqi law is not merely a technical legal doctrine, but a fundamental instrument for preserving the balance between the interests of creditors and the functioning of the credit market. By maximally securing the mortgagee's right, it ensures the full recovery of the claim from the mortgaged asset and provides the legal security necessary for the vitality of credit transactions (6, 7).

6. Restriction of the Mortgagor's Contractual Autonomy

By the restriction of the mortgagor's contractual autonomy within the framework of the rule of the indivisibility of real security in Iraqi law is meant that, although the mortgagor is the owner of the mortgaged property and a principal party to the mortgage contract, he does not enjoy unrestricted freedom to exercise contractual will over the mortgaged asset and cannot validly conclude any agreement that leads to the reduction or weakening of the real security (1, 6).

The rule of the indivisibility of real security requires that the mortgage remain unitary and indivisible over the whole mortgaged asset until full payment of the debt. Consequently, agreements formulated in favor of the mortgagor—such as a clause providing for the progressive release of part of the mortgaged property upon installment payments, or a clause providing for the extinction of the mortgage in respect of specific portions of the property—generally conflict with this rule and are regarded in the Iraqi legal system as ineffective or unenforceable, particularly in the context of the registered mortgage (7, 8).

On the other hand, in the Iraqi registered mortgage, registration plays a foundational and largely mandatory role. The rules governing registration do not merely regulate the private relationship of the parties, but are enacted to preserve transactional security, protect third parties, and ensure transparency in the legal status of property. For this reason, the will of the parties—even if expressly stated in the contract—cannot alter the effects of a registered real right as against third parties or partially extinguish it (1, 8).

Thus, although the principle of autonomy of will is recognized in contract law, in the domain of real securities this principle yields to the structural rules of mortgage and formal registration. The mortgagor cannot, by private agreement and without compliance with legal formalities and without the mortgagee's lawful consent and the effects of registration, reduce the scope of the mortgage or divide it. This limitation demonstrates that the registered mortgage is not merely a simple debt relationship between two wills, but a legal institution with public effects and consequences vis-à-vis third parties (3, 7).

In conclusion, the restriction of the mortgagor's contractual autonomy is the natural outcome of prioritizing credit stability and transactional security over absolute contractual freedom in Iraqi law. By imposing this limitation, the legislator prevents the mortgagor from weakening the securing function of the mortgage through private agreements and thereby jeopardizing the confidence of the credit system and the rights of third parties (1, 6).

Conclusion

An examination of the structure of real and collateral security in Iraqi civil law demonstrates that the rule of the "indivisibility of real security," despite the seemingly simple wording of Article 1294, does not constitute a uniform and one-dimensional institution. Rather, it possesses a complex, multi-layered, and differentiated character, whose legal basis and degree of binding force vary according to the type of real security involved.

The Iraqi legislator has expressly established the rule of indivisibility only with respect to the registered mortgage, declaring that every part of the mortgaged property secures the entire debt, without clarifying its scope or its exceptions. This legislative silence has, in judicial practice, led to an interpretation that has effectively transformed the registered mortgage into an institution approaching a mandatory rule, such that even an explicit agreement between the parties has not been accepted by the Court of Cassation as sufficient to justify divisibility.

By contrast, although the possessory mortgage is, in practice, also applied as indivisible, the foundation of its indivisibility is not the dependency of the mortgage on the debt, but rather the real right of retention of the mortgagee—a right that is inherently indivisible and is not extinguished by partial performance of the debt. Accordingly, the indivisibility of the possessory mortgage has a supplementary character, albeit a very strong one.

On the other hand, the retention of title clause does not, in principle, constitute real security in the strict technical sense, but rather a contractual condition with a suspensive effect on the transfer of ownership. In this institution, the rule of indivisibility has no inherent application, and the possibility of agreement to the contrary is fully conceivable in accordance with the principle of contractual autonomy.

On this basis, the present study concludes that the possibility of dividing real security in Iraqi law is a relative matter, dependent on the type of security and its legal foundation, and that it is not possible to impose a single uniform rule upon all forms of real security merely by reference to Article 1294. The failure to make precise distinctions among these different levels constitutes one of the fundamental shortcomings of the Iraqi Civil Code, giving rise to inconsistencies in judicial practice and to erroneous expansive interpretations. Recognizing this tripartite structure is therefore an essential step toward a scientific re-examination of the rule of indivisibility and toward the reform of legislative and judicial practice in Iraqi law.

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All authors equally contributed to this study.

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Transparency of Data

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