ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

THE LEGISLATIVE POLICY IN THE CONTEXT OF IRAQI COMMERCIAL LAWS

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Key words	Received:20/04/2024	ID No. 2109
Legislative- Policy- Commercial laws- Iraq	Accepted:23/11/2024	(PP 455 - 483)
	Published:30/11/2024	https://doi.org/10.21271/zjlp.22.sp.21

ABSTRACT

Generally speaking, laws and regulations are more than just rules and principles printed on papers. Every law is made for a specific purpose or a set of purposes determined by the legislator (It would be preferable to use legislature rather than legislator; in English, legislature is frequently used instead of legislator). Indisputably, this holds true for all the laws, regulations, and legislations likewise, but this research has opted to take the commercial laws in Iraq as the most striking example of that. Tracing back to the time of the enactment of the 1984 law of commerce no. (30) and the other collateral laws that had been subjected to a specific legislative policy which was in core a state-oriented policy, we can get into the mainstays and pillars of those laws and dissect the legislative idea, philosophy and imprint of those who laid down the rules of those laws. Sticking to the legislative policy would reveal that the research explores the ideas, intellect and philosophy that override the whole law. Moreover, the research would scrutinize the nature of the legislative policy under the current reality of Iraqi economy.

The research problem is to weigh and guess how far the legislative policy behind the Iraqi commercial laws is compatible, sufficient and suitable with the current reality of Iraqi economy, taking into account the new legal trends and advancements in the room of commercial law.

In performing the current research paper, the researcher has conducted an analytical method as he opts to stick to the Iraqi legal system and just to analyze and explain the legal situation of Iraqi laws and regulations, going far beyond the formality of the relevant provisions and articles, so as to extract the features of the legislative policy latent behind them.

The main findings of this research paper can be summarized in some basic points. First of all is the centrality and importance of the legislative policy and its role as an essential part of the commercial laws. Second, the legislative policy varies between the general law of commerce no. (30) of 1984 and other private commercial laws; in the former it is rater a state-oriented policy,whereas in the second it is a market-oriented policy. Third, the positivism, beside the centrality, is the main

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

driving force of the legislative policy for the General law of commerce of 1984. Finally, Iraqi law of commerce of 1984 is marked by shortcoming and insufficiencies, and some other private laws need amendments and change. Finally we have recommended to amend the commercial acts,the sources of commercial law, and some aspects of Iraqi trademark law. In addition to that ae recommended legal revitalization of the private sector.

The research has focused on how to set forth the general nature of the laws at issue and how far they could be labeled as a well-developed or underdeveloped law. In addition to that, the research has explored the adaptability of those laws under the rapid and widescale economic and legal developments throughout the world which deeply influenced Iraqi legal system.

INTRODUCTION

Legislative policy can be thought of as an essential part of any law, so the legislation can by no means denuded of the its driving force that plays an important role in its ultimate shape. No legislation can be deeply and thoroughly understood away from the philosophy or the idea that had motivated the legislator to crystalize the law. This can be generalized to all the laws enacted by the legislature, irrespective of what they are, but the commercial laws in Iraq can be especially peculiar and uniquely important as far as the legislative policy is concerned. Although there are two opposing schools of law, the first is the liberal school that is pertinent to the natural rights and liberalism, and the second one is the positivism which is a state-centric schools of law as it glorifies the state role in generating the laws and the rules of law, but the reality is that the more dominant and pervasive school was and is still the positivism which had played an important role in the formation of the Iraqi commercial legal system and particularly the 1984 law of commerce no. (30) of 1984, which is dissected within the current research paper. So, the axis of this research paper is the legislative policy, but it will not be limited to the 1984 law, rather it will deal with many other laws in Iraq, taking into account the fundamental changes and amendments made to the at the aftermath of the collapse of the previous Iraqi regime issued by the Coalitional Provisional Authority.

Research Goals

The current research aim at manifesting the effect of the legislative policy ,being a term calculated to embrace the thoughts, philosophy and ideas that stand behind the laws, specifically legislations, on the soul, application and the adaptability of the laws in question with the new advancements and developments. Contextually, it is as well an important matter for the purposes of this research to show whether the legislative policy has acted as a curbing factor impeding the flourishing of those laws and their development or as a positive factor that serves their development.

Research Problem

The problem that this research paper rests on is the fact that the legislative policy that had driven the commercial laws in Iraq, mainly the 1984 law of commerce is by far flawed and insufficient and goes in contrast with the new developments and

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

advancement in the room of economy and law. So, the change must not be confined to the rules and principles of the law, instead the whole legislative policy, the philosophy of the laws at issue and the legal ideas must all be changed and modified as well.

Research Methodology

The present research paper rests mainly on the analytical methodology, so it analyzes the relevant provisions of the laws concerned so that under the rules of those laws we can assess the essence of the legislative policy that was latent behind those rules specifically.

Significance of The Research

The significance of this research lies in the fact that it unveils the background and the philosophy that stand behind the laws in questions and explains the factors which were the driving force for the formation of the law.

The Research Plan

The current research had been distributed on the following chapters and sections:

1- The General Framework of the Legislative Policy Regarding the Commercial Laws in Iraq
1.1 The General Concept of Legislative Policy
1.2 The Tools of Legislative Policy
1.3 The Objectives and Aims of Legislative Policy
2-The Determinants of Legislative Policy and Their Blueprint in The Context of Iraqi Commercial Laws
2.1 The Legal Situation in The "GENERAL" Act of Commerce
2.2The Assessment of "PRIVATE" Commercial Laws
2.3The Overall Assessment of The "REALITY" of The Commercial Legislative Policy

1- THE GENERAL FRAMEWORK OF THE LEGISLATIVE POLICY REGARDING THE COMMERCIAL LAWS IN IRAQ

In this chapter we will be confined to the rudimentary, basic points and thoughts necessary to give a clear portray on the notion on the legislative policy, therefor we have opted to divide this chapter into three subsequent sections, the first one is the devoted to the general concept of the legislative policy, the second one deals with the tools of the legislative policy, whereas the third and the last on is dedicated for the objectives and aims of the legislative policy.

1.1 THE GENERAL CONCEPT OF LEGISLATIVE POLICY

In our perspective, considering and analyzing any legislation through the provisions and rules contained in it will never serve anything but a general, shallow, non-pierced and imperfect view or look that cannot intrude deep into the soul of that legislation at all. This statement will never be confined just to understanding those legislations; rather it will produce practical consequences on the level of their interpretation and unpacking their foundational trends and philosophical background. The best way for this superficiality to be overcome is to explore the contours and features of "The Legislative Policy" which propels the whole legislation and well-

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

clarifies its background, far-reaching the benchmarks that had precisely guided the legislator in portraying the ultimate shapes of that legislation. Knowingly, this statement could be said to hold true as a general rule for all the legislations whatsoever.

Setting off from the above prescription, we have to embark this process having the notion of the "legislative Policy" delineated sufficiently so as to know the functioning mechanism through which it performs. Moreover, as long as we academically navigate through the wide space of "commercial laws", the starting point of such "policy" may be directed towards generally conceptualizing the "commerce" and "law of commerce" to strictly demarcate the limits of this discipline and explore its independence versus the other disciplines which could overlap with it, especially in Iraq where "civil law" shares many commonalities with commercial law, owing to its general applicability which extends far beyond the "civil transactions" per se. Inasmuch as the nutshell of "Commerce" is sought, the primary meaning the word 'commerce' implies in the Oxford English Dictionary is(*Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, especially as conducted on a large scale between different countries or districts; including the whole of the transactions; arrangements, etc., therein involved.*[1]) This straightforward, unequivocal definition may be yielding in many legal outcomes which cut off the debate on the scope of "commercial law" and the essence of "commerce" separately or jointly with some other non-technical factors, political, ideological, intellectual, philosophical, religious and social in their very nature. The thorough examination, critical scrutiny and analysis of any legislation can be obtained through diagnosing those factors, or at least through the nature of the interaction that melts down those factors into the legislation. This speech could be projected on the legal policy the Iraqi legislator conducted regarding the "interest" for both commercial and civil debts and the rates affixed for each of them. Article (171) of Iraqi civil law no. (40) of 1951 sets the limits of the interest rate for the civil debts to be "exactly" (4%) and for the commercial debts to be "exactly" (5%). The mutual agreement of the parties to the principal debt contract can raise that rate up to the peak (7%) of the *par value* of the contract[2]. In addition to that, receiving the compound interest, at least in civil transactions, is disallowed and strictly forbidden under the sanction of abolishment (of the illegal interest proviso), and the same can be said for receiving, just in the civil transactions, a sum of interest more than the par value of the principal debt amount.

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1 -Michael Furmston, What is Commercial Law? In the book :Michael Furmston and Jason Chuah, Commercial and Consumer Law, Pearson Publications, London, UK, 2010,p.1.

2 -Article (171) of Iraqi Civil Code sets forth that (If the subject matter of the obligation is a sum of money, and it was clearly nominated at the time of the evolution of the obligation and the indebted fell late in its repayment ,he would be bound to give to the creditor ,as a redress for delay, legal interests that amount to (4%) in the civil matters and (5%) in commercial matters. These interests run from the date of judicial claiming of them ,unless the agreement or the commercial custom determine another date for their effectiveness ,and all that only if the law does not provide otherwise.)

2-The article (172) of the civil code sets out that (the parties to the contract can agree on another rate of interest provided that it does not exceed (7%), if they agreed on a rate higher than this it must be reduced to (7%) and what was paid in exceeding to that limit must be restored)

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ISSN-Online: 3005-396X

Casting an overall surveying glance over the legal attitude of the Iraqi civil legislator shows that he was so reluctant and irresolute how to tackle the "interest" matter. Ultimately, he has made up his mind by adopting the theory of "interest" but within a (narrow scope)[1] as he was afraid not to exceed the Islamic jurisprudence attitude towards usury as something strictly forbidden by the holy Quran. The relevant Quran Verses are clearly outlawing the taking of usury (Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein).2

The preliminary explanation for the legislative policy rests on some basic ideas, on top of them comes the teleological reasoning of the law, that is, law is a goal-oriented creature. Legislators should not reason from their private perspectives, instead they must act in the name and for the benefit of the organ or the polity they normally represent under the title of the public good, and their choices and visions in policymaking, via their laws and decisions, must be integral to the will of that organ or polity. In another clearer wording, they must act on behalf of the polity and express its volition via their legislative deed in general[3].This can be confidently said to be the case in the democratic systems, whereas the case in the undemocratic systems could be totally different and reversed , as the legislators will be, perforce, required to represent the will of the political leadership of the state or they may be assigned to represent the ideologies and credos of the ruling sovereign or political faction and the will of either of them, and thus they could be dictated to give in, in advance, to a prior idea or envision with regard to the subject matter of the legislation. And all these can be realized or thought of within the context of a state-supervised process of legislation that can thoroughly regulate a specific topic.

The state with its pervasive presence, at least within the ambit of the current research paper, had played an excessively important and influential part ,and accordingly it will never be possible to pinpoint and locate the propelling legislative policy that stood and still stands behind the commercial laws in Iraq ,thus contouring the whole dynamism and orientation of the currently in force legislations and regulations governing the whole economic life. It may be controversial to claim that the states' right to impose their will on their citizens recognizes no limitations and restraints as this looks sound and fit only for the highly civilized democracies, and for the states in transition to a preliminary democracy ,such as Iraq, the case is undoubtedly different by far, as it is only the democracies which observe and stick to the system of check and balance which prevents the states and federal authorities from infringing certain basic legal rights such as the freedom of speech ,mostly constitutionally prescribed. Within such a political systems there would be a check-

[1]- د. عبد المجيد الحكيم ،الموجز في شرح القانون المدني/ الجزء الثُاني/ أحكام الإلتزام.ط6،العاتك لصناعة الكتاب, القاهرة، مصر, 2009,ص55.

2 -Al-Baqara Surah,Verses (275-279) of Holly Quran.

3 -Giovanni Sartor, A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review, in the book: *Giorgio Bongiovanni et.al, Reasonableness and Law, Springer, London, UK, 2009, p.45.*

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

and -balance mechanism, and therefore whenever such a mechanism is lacked the situation would be reversed and quit opposite: the state will feel free and exercise an unlimited power. Undoubtedly the exertion of such a power would paralyze the constitutional system of rights and liberties, raising high the scale for the power holders in the state.

The philosophy that is latent behind the attitude of the legislator must be extracted according to a conductive method that dissects the reality of the law, and mainly through the situation of the positive law which looks very important for the purpose of our research in which the close relationship between the state part and the operable law in the society can be clearly manifested1.This statement assumes a special ,even a unique importance as the prevalent theme within the [previous] Iraqi state was a tough centralism. Contextually, it is well perceivable from the literature of legal positivism that two features are always being focused on, the first one is the centrality of codification ,which unveils a central role for the legislation in law making process, and the second is the subordinate, lower-ranking place,or even the marginalized and abominable role, of the non-legislative methods for discovering the law, especially the laws that were emanated from the role of the Judicial system and the judges and their speculative views to "what the real law is in their perspective"2. The simplest analyzing for such a concrete envisioning of the law is that it lacks the due flexibility as the law must exist relying on a pre-fabricated set of principles that are adhered to by its engineer, i.e. the legislator, or in another wording the law must conform to some strategies and principles that have been well-built into the structure of the law (in the narrowest sense; the enacted laws).The omnipresence of the state at the overall legislative scene or process can be accounted for by two reasons. The first one, affirmative, is to vigorously pinpoint the role of the state and show the centrality of that role, whereas the second one can be labelled as an exclusionary role which aims at eliminating or at least delimiting the ideas and thoughts that oppose the "positivism Policy". On top of them comes the "Deliberative Reciprocity" which would be restricted at the state behest, by restricting the bargaining power of them and their ability to create mutually fair conditions or privileges pursuant to their individual autonomy.

In this context the people share their commitments on the basis of some fair terms of social cooperation which rests on agreement on some substantive moral reasons justifiable on the premise of reciprocity3.This could be undoubtedly leading to another idea which is the individual autonomy and their capability of creating legal rules and regulate their relationships on the ground of individual will. Complimentary to this we can add that the notion of "rule of law" or "sovereignty of law" becomes marred by a strong flavor of "CENTRALITY", and this may extend to the institutions entrusted with law enforcement in behavior and transactions among citizens, which is another function of the rule of law4.

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[1]- د. منذر الشاوى، مذاهب القانون، منشورات مركزالبحوث القانونية بوزارة العدل ، جمهورية العراق،1986،ص5.

2 -Michael Singer, The Legacy of Positivism, Palgrave Macmillan, Hampshire, UK,2005, p.128.

3 -Ibid, the same page.

4 -Brian Z. Tamanaha, A Concise Guide to the Rule of Law, in the book: Gianluigi Palombella and Neil Walker (ed.), Relocating The Rule of Law, HART Publishing, Oxford, UK,2009, p.6.

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

Here, a framework of legal rules governs social conduct. People must generally behave in a fashion that does not breach rules of law. Transgressions of legal rules or social disruptions will provoke a reaction by legal institutions entrusted with enforcing legal requirements. Even at the Iraqi legal system multiple normative orders exist including customary norms, moral norms, religious norms of social etiquette, workplace norms, norms of business interaction, and so on. Sometimes the norms from these various orders overlap, with relative or slight differences in scope, origin, efficacy penetration and the sanction put for it. But the state –oriented centrality will vigorously imprint its blueprint over the whole system and grants a priority and a momentum to some norms on the account of others ,hereby, the state-formulated rules are always ,within the central system such as the case of Iraqi state under which the law of commerce had been enacted and issued, being given priority over other individual respective and social norms, so as for the will or volition of sate to be well-substantiated with their central gravity. Thus, law will play both roles likewise, affirming the state volition and superseding or replacing the individual freedom and structuring the legal system based on some non-technical and rather ideological grounds that highly reflect the views and the insight of the ruler who at the backstage tailored the whole legal system.

Flatly, any profaning or transgression of the enforced legal rules will be encountered by the sanctions and penalties, and it may be axiomatic even without speech or alerting citizens, but it is for this purpose that the article (3) of Iraq law of commerce currently effective provides that (Commerce is an economic activity that must stand on the basis of both trust and fidelity and strictly sticking to the rules of law, and anyone who acts otherwise will be prone to the civil and criminal liability). This article has not been motivated by the unavailing repetition of the general principle of liability, rather it aims at focusing on the mandatory nature of the rules of law of commerce (a compelling law or a legal rule from which no derogation is allowed through the private contrary agreements), which enables the corpus of mandatory rules to prevail and override the whole legislations and even steer it by far. In the statement of positive law, or the positivistic interpretation of law it is quite clear that "state" has a pioneering role in the lawmaking, as in the opinion of the positivists the legislator has a monopoly on the production of legal norms, and in the same scope, they depend on a specific theory of law in which the sources of law in which the law is the expression of a human will, not made by a higher system of values, and the validity of law,as they believe, does not depend on its conformity with a moral or natural order1.Such a conceptualization to law entails "the state centrality" on the one side and completely discarding the theory of natural rights, on the other. However, it is specifically important to hold that the "legislation" ranks first, and the second to none, in the mind of the "positivists".

1.2 THE TOOLS OF LEGISLATIVE POLICY

1 -Veronique Champeil Desplats ,Michel Troper , in the book :*Enrico Pattaro (ed.)A Treatise on Legal Philosophy and General Jurisprudence,vol12(Legal Philosophy in The Twentieth Century: The Civil Law World),Springer, Netherlands, 2016 ,p.451.*

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

When the legislator tends to formulate a specific law or "legislation" it seems both palatable and logical for him to be having some tools to realize the points or the objectives he has been determined to attain. Therefore, one can rightly wonder "what are the tools deployed by the legislator to gain the distant aims of the legislation"? This question looks as a central, essential matter in the scheme of the legislative policy.

Before we can present a suitable answer for that question it is worth mentioning that the legislation is highly affected by the political credos of the state and the political doctrine the state believes in, which acts like a driving force or the intellectual incentive which propels the whole legislative process and helps ultimately crystalizing its rules, principles and orientations. In this respect it is excessively significant to note that all the political doctrines irrespective of their respective nomination, especially the democracy and communism, despite all the disparities and divergences that set a separating line between them they agree and concur on one issue: the mere question of "the relationship between individuals and state", knowingly their attitude towards this question is by far different and intellectually distinctive, but this question plays a central, axial and vital role to them all alike1. Particularly when it comes to the economic rights, the wrangle between those two doctrines becomes more contentious and harsh and seems in form of an intense conflict, as we see.

It is more than impossible to conduct a holistic survey for all the legal activities and interactions within a specific state, in view of the tremendousness of their quantity, therefore we are bound to the limits of the private laws in general, setting aside all other disciplines of law, keeping in mind their weigh on the scale of the state. We have opted to say the "private Law in general", not just the commercial law as there are intimate relationships between the civil law and the commercial law at least according to the Iraqi legal system.The most striking proof on this relationship is the fact th article (3lsecond of Iraqi law of commerce no.(30) of 1984 sets forth that (Civil law applies on all the matters not regulated by a specific rule in the current law or in any other private law)

The main technique through which the legal system can perform efficiently is the attempt to contour the "legal idea" which only apparently looks as a simple and straightforward idea but intrinsically represents so a complex notion as it is the outcome of the interaction of all the law creative forces, keeping in mind the triumph and the outweighing of the most influential one of those forces and its capability of monopolizing the creation of the law2.

It appeals to us to say that it, necessarily, amounts to the level of an abstract, general rule that every law is remarked, influenced and natured by the source from which it sprung into being and it holds the eyesight, imaginative perception and mindset of the "source" from which it was first produced and flew out. This can go without any

[1]-على أدهم ،المذاهب السياسية المعاصرة،مطبعة المعارف بمصر،بدون سنة الطبع، ص.10 .

[2]- د. زانا رؤوف حمه‌كريم ،السياسة التشريعية فى العراق(دراسة تطبيقية فى التشريعات الدستورية)،دار سردم للطباعة والنشر،السليمانية، إقليم كوردستان العراق،2012،ص24.

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

exception for all the laws whatsoever. Consequently, it goes right to infer a meaningful conclusion purporting that the "product" or the "outputs" are by far flavored and colored by the party which makes them up, as normally the law is the expression of its maker who first invented it. Revolving around the same axis, one can tend to say that it is quite right that many doctrines opt to concentrate on the constituent elements of law and think of the "command characteristic of law" as an integral component of it, but the positivist thinkers tend to adhere to the ongoing component, namely the "command" more obsessively than the other doctrines do, even they tend to say that the discretionary authority granted to the judges to face up the lacunar cases (where a shortcoming or a deficiency or a gap in the legal provisions pops up) is derived from the high command of the rules or the sovereign. Hereby, a kind of centrality becomes inevitable to the Positivism and all the derivative trends and interpretation to the rules of law must revolve around the will of the legislator when he first enacted the law. It goes in line with the above account to say that the legislator will perceive in advance that ,to keep his legislative idea, minimally he is required to restrict the law and dictate his will upon the whole law, so as to keep the ideas or the requirement of his policy over the whole law so as to keep the scope of the law within a narrow and restricted ambit and stay the law within the shape, form and the content that he made up his choice about. Being such the case, we can nonchalantly say that the laws in general are the reflection of their legislator's mindset and the faculty. The essential, ideological and political theorization before the technical and market-oriented trend or philosophy had led to the crystallization of the relationship between the market (commerce) and state on the basis of the idea of state hegemony on the whole economy and a persisting endeavor by the state to localize the Iraqi Economy and the business sector so as for it to stay under the framework strictly portrayed by the state itself. This outcome was not founded on economic or commercial considerations ,such as the assumption that Iraqi economy lacks the capability to interact with the international markets and businesses on the long run , rather it was produced by a political and ideological justification and framing.

Therefore, the way the commercial laws and regulations are functioning and performing are all reverting to the political framework which strictly contoured the limit within which those laws and regulations have been dictated to work. For achieving that purpose, the legislator has conclusively and clear-cut determined some legal tools that are compatible with his political and ideological trends. The most prominent mechanism he opted to adopt is the deployment of the mandatory rules and rendering them outweigh or surpass the contractual rules and the individual contractual freedom or autonomy. Knowingly all those matters had been done within a restrictive legislative policy that puts so many restraints and limitations on the mercantile persons and commercial dealers in general. The whole law is constituted upon those restraints and limitations, as the preliminary provisions that sets forth the purview and the objectives of the Iraqi law of commerce no.(30) of 1984 disclose that the current law is resting on the regulatory trait surpassing the contractual trait of the commercial relations. The pervasive denotation on that is the broad use and

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

deployment of the mandatory rules which are intended to shape the regulatory trait or function of the law of commerce1.

Casting a quick glance over the above regulatory nature of Iraqi Law of commerce unpacks the fact that it was the "positivism" theory which was overwhelming the ideas and mind of the Iraqi legislator, which is seemingly nourished by the perspective of another philosophy called "voluntarism", with its focus on the will. It says that the law or the legal phenomenon is a ruler-will invented creature, i.e. the will of the rulers gives rise to the law or the legal phenomenon.2Whereas we encounter some thoughts on the "Legislation" as a repeatedly and frequently used mechanism of law-making as "having no root" and labeled as something "hastily and inconsiderably adopted" ,and this purports that it is an immature or ineffective method for the coining of the legal rules3. Also, it could be perceived that the immensely frequent use of such a channel may disregard and decrease the role of other source of law and leads to an unwanted imbalance between the sources of law in general.

1.3 THE OBJECTIVES AND AIMS OF THE LEGISLATIVE POLICY

Given the fact that the law, including the enacted laws and statutes are all a form of the legislator's will-oriented mechanism, and indisputably there, perforce, must be a specific aim or target sought to be attained or realized as the ultimate goal or destination for which the "suitable" tools had been deployed, as the will is by no means possible to move or be steered apart from a set of aims and incentives that had prompted and motivated the legislator. The practical effect of this form of teleology can be viewed from two vantage points, the first one is related to the functionality of the legislation itself and how to give effect to its content, whereas the second one is pertaining the contraction or depreciating the role of the sources other than the legislation. This is the reality at least with respect to the topic at issue in this research. What we enthusiastically believe in is the fertile ground of "plurality" or "multitude" or a "kind of disagreement" in prescribing the best redress or solution for a specific problem, let it be supposedly the limit of individual autonomy and its contractual discretion, ranging from expansionists to those who disparage or disregard it, here with his determinacy and unequivocally specification the legislator dictates his political option and codifies it. The ground on which many philosophical thoughts and views can evolve and pop out is the "disagreement" or "clashing views "even on the simplest notions like "justice"4 Honestly, the options of the legislator can be only partially true and palatable, and it by no means can imply that the only suitable solution is that of the legislator and that other views are worth to be discarded and set aside completely.

The relative, but wide-scale, freedom the legislator is normally having, will lead him to choose some intellectually designed patterns that cannot be separated

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[1] -Article (4) of Iraqi Law of commerce no. (30) of 1984,

2- د. منذر الشاوى، فلسفة القانون،ط2، دار الثقافة للنشر والتوزيع، عمان، الأردن،2011،ص43.

3 -Jeremy Waldron, The Dignity of Legislation, Cambridge University Press, Cambridge, UK,1999, p.9.

4 -Jeremy Waldron, Law and Disagreement, Oxford University Press, Oxford, UK, 1999, p.p. 4-5.

ISSN-Print: 2079-3901
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from the background from which it sprung out to being. In this respect and for the purpose of our research paper we can stand for some basic facts regarding the role of state. There are two parallel levels of law and its content, on the one level there are some brute facts on the ground .This reflects the reality or the practical side merely as it is apart from the human endeavors that theoretically or ideologically or intellectually accommodate it .On the other level there is the institutional aspect of the first aspect "the brute side", and this second aspect depends on the interpretation of things, pieces of behavior based on some normative framework. The most striking example of this is seeing a piece of colorful plastic card or looking at it as a visa card or master-card, his view presupposes a set of legal and other relevant rules and framework that collectively determine its legal value as either of those said cards1.Hereby, the given interpretation to the things and phenomena on the ground are what confers upon the meaning or implication they really have. Inarguably this could have never been possible but under some rules and uses which must serve a specific end2.Dissolving this, we can say that there must be three basic points, first there must be a set of reliable rules, second there must be a specific end or purpose that are sought and third it is important to know who determines those rules and ends as either of the rules and the ends are flowing from his or her will or mindset. In the context of the modern polity it is the politics and the politicians who undertake that role effectively. In doing so they are supported by the power they have, consequently the law must be viewed as containing, perforce the trait of "command" as the distinguishing content of law at least according to the positiv thought. Thus a collateral outcome can emerge: the law is nothing but the positive law and its very nature is that it is no more than the volition of a ruler ,an individual or a staff, which is dictated and imposed upon those who follow the ruler ,namely the ruled who are required to obey and get complied with the will of the ruler. Thematically, it is sound to afford an important finding regarding the legislative policy. Setting off from that we can say there are two conflicting views on the notion of the "right", naturally evolved rights and positively determined rights3, and the positivism is tending to almost always inclusively manipulate the prescription and production of what is the right, that is to say that only the state can have conclusively the right to determine the right in the various disciplines of law and it is as well up to it to contour the limits and the boundaries of that right as embodied in the laws enacted.

Under the Iraqi legal system of commercial laws generally, it is still right to assert that the state has so long been omnipresent and the state hegemony had led for the commercial law to tend to be sharing common traits with the public law rater the private law, so some jurists tended to use the term "economic law" instead of the "commercial law" owing to the pervasive presence of the state in the national economy4. This can be explained by the fact that the law of commerce no. (30) of 1984 has granted the pioneering, leading role to the public sector firstly ad the hybrid

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1 -Maksymilian Del Mar, Law as Institutional Normative Order: An Introduction , in the book: *Maksymilian Del Mar and Zenon Bankowski ,Law as Institutional Normative Order, Ashgate Publishing Company, Cornwall, UK, 2009, p.2.*

2 -Ibid, p.3.

[3]- روسكو باوند ،مدخل إلى فلسفة القانون، ترجمة د.صلاح الدباغ ومراجعة د.أحمد مسلم ،المؤسسة الوطنبة للطباعة والنشر،بيروت،لبنان،1967، ص22.

[4]- د. نورى طالبانى، القانون التجارى العراقى،ج1، النظرية العامة ،ط1،دار الطبع والنشر الأهلية، بغداد،العراق، بدون سنة الطبع، ص.54-55.

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sector secondly and that the private sector was only ranking third to them, and the case is still the same ,unchanged and identical to the epoch when the law of commerce has initially emerged.

A concluding remark thus can be drawn: The final destination of the legislative policy as explored within our research paper has led to a gross of outcomes as below:

1- **The legislator has specifically determined and pinpointed how the commercial law must be.**
2- **The legislator has determined the scope of the commercial law restrictedly and narrowly.**
3- **The legislator has calculated the priority of the legislation over the other sources of commercial law, with the widely adopted mandatory set of rules in commercial law.**

2-The Determinants of Legislative Policy and Their Blueprint in the Context of Iraqi Commercial Laws

Strictly speaking the current chapter will be devoted to surveying the legal policy in the General Law of Commerce no. (30) 0f 1984 and the private commercial laws and a thorough assessment to the reality of the legislative policy within the Iraqi commercial laws. Therefore, at the first section we will explore the legal situation in the" General" Act of Commerce, and in the second section on the assessment of commercial private laws, and the third section will be for the overall assessment of the reality of the commercial legislative policy.

2.1 The Legal Situation in The " General " Act of Commerce

The exemplary model for the positivism in Iraq can be said to be the Iraqi law of commerce no.(30) of 1984, as it came into being with a specific legislative policy that outstandingly laid the foundations and conventions adhered to and thought of by the positivism, and the nature of commercial law is still distinguished by a kind of stagnation imposed by that policy despite of the numerous changes and amendments made by the subsequent rulers of the Iraqi state ,especially the US-led Coalitional Provisional Authority (CPA),to the commercial legal system of Iraq.

Before we get into the key question of our speech, it really is worth mentioning that the Iraqi legislator in the law of commerce no.(30) had built all his theoretical and ideological construction on a specific attitude regarding whether to choose the monism or the duality of commercial law .The answer to this question decisively determines what position the commercial law holds within the family of the private law in general. In spite of some spheres where the commercial law sounds distinctive and different to the civil law but some juristic trends had called for the unity (monism) of the private law and incorporating the commercial law into the larger corpus of the civil law. Some justifications had been presented for that trend. The really intermingling or overlapping of the rooms of civil law and commercial law ,and the possibility of performing the commercial acts by both the merchants and non-merchants dealers who may just once do commercial transactions in their lives, and the fact that he civil law is considered to be an essential source for the commercial

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law(s) ,all these are the striking reasons that can "allegedly" justify the incorporation of the commercial law into the civil law so as for the former to dissolve in the latter1.

Whereas the (Duality Doctrine) goes in contrast to that, claiming that the civil law and commercial law are only partially reconcilable or harmonious with one another ,and the divergences, disparity and specificity of each of them can by no means be disputed or contested. So, it really is necessary to adopt the duality doctrine which purports that the civil law and the commercial law must be treated and thought of as two separate and distinct law irrespective of their overlap and intimate relationship that links the commercial law to the civil law. We, as well vigorously think of the duality doctrine, and the reasons that make this tendency justifiable are numerous. First, on account of the speediness of the commercial acts which are continually developing and shifting towards new fashions, models, the commercial laws must take into account the requirements of speediness. For instance, the principle of (freedom of proof) which is adopted in commercial laws, is quite suitable for commercial transactions but it does not suit the civil law and the civil transactions which need the formalism so as the protect the dealer and the abandonment of that formalism in civil transactions can denude him of the legal protection and affect adversely on his or her legal position or legal interest.2Moreover, the inserting of those two law in a single unification does not necessarily imply that they had been merged and melted in a legislative unity, as some topics such merchants, their duties including registering the due information in the chamber of commerce, and commercial obligations, are all a set of topics which pertain only to the commercial act and are quite away and inapplicable to the civil dealers. In addition to the requirements of credit which are different in commercial setting as compared to the civil milieu3.

Opposite to the common trend وIraqi legislator had opted to choose the Monism of the private law. This was a purposive policy which aimed at the achieving a final result: making the commercial law inferior, subsidiary and supplementary to the civil law no.(40) of 1951islative and its legislative policy. This has ultimately led to the commercial law being an exceptional law that must be narrowly read and interpreted. This point is a great disadvantage of the legislative policy in the Iraqi law of commerce which needs to be amended through diverting from the Monism Doctrine to the duality doctrine and contouring separate line between the civil law and the commercial law.

At the same framework we see that the civil law is the second to the commercial legislation and it was given the precedence and priority over the commercial custom which is subsequent, ranking third, to the civil law, within the sources of commercial law4.A deep analysis of that leads to two notable observations:

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[1]- د.عزيز العكيلى، شرح القانون التجارى،الجزءالأول،(الأعمال التجارية-التجار- المتجر- العقودالتجارية)، دار الثقافة للنشر والتوزيع، عمان، الأردن،2005،ص22.

[2]- د.مصطفى كمال طه و وائل أنور بندق، أصول القانون التجارى (الأعمال التجارية – التجار-الشركات التجارية- المحل التجارى-الملكية الصناعية)، دار الفكر الجامعى،الأسكندرية،مصر،2008،ص19.

[3]- المصدر السابق، ص ص 19-21.

[4] -for more on the hierarchical ordering of the sources of commercial law, see:

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1- **The commercial law had been made an exceptional law so that it stays within the orbit of the preferred legislative policy embodied in the civil law, in other wording the commercial law had been rendered an auxiliary or supplementary law for the civil law.**
2- **The jurists of commercial jurisprudence has tightly slammed the malformed ordering of the sources of commercial law, especially the late ranking of the customs which come after the civil law ,and the civil law having been given priority over the customs. The critique is grounded on the fact that the commercial custom is just a commercial legal rule and it is unpalatable for the civil law to precede that private commercial rule.1 However, and away from the extent to which this critique is true, the attitude of the Iraqi legislator in this respect is governed mainly by his obsession to prioritize the mandatory legal rule and give them precedence over the commercial custom and private agreement of the contract, as the customs are disallowed to contravene the mandatory legal rules.**

Generally speaking on that point, we can claim that the whole arrangement of the sources of current commercial law is more than questionable and objectionable.

Another intrinsic question which normally draws the attention of any researcher is the attitude of the current Iraqi law of commerce regarding the individual autonomy in the realm of commercial transactions. As a concrete axiom, it is observed that the modern societies have opted to develop contractual relations as these relations reflect the legitimate interests of the individuals at the society, while the traditional societies tend to give the regulatory legal frameworks the priority, and this can be said to prevail at the social communities than other ones. So, within the modern communities the priority goes to the individual, contractual relations, and the soul of this proposition mirrors the respect and grace granted to the "individual autonomy" and its discretion in creating legal obligations and rights independently2.Of this principle there stems two fundamental tenets ,the first one is the "contract is the law of the contracting parties" and the second is "Privy of Contract', namely the relative consequences of the contract which means that the contract is only effective to its parties"3.The legal security (surety) here is linked to showing full respect to the content of the will of the parties to the contract and not resorting to the abolishment or modifying the contract by either party unilaterally4.

In drawing up the rules and principles of the current commercial law, Iraqi legislator did not even mention the word "contract" literally, instead in the article (1)

د. أكرم ياملكى، القانون التجارى (دراسة مقارنة فى الأعمال التجارية والعقود التجارية والعمليات المصرفية والبيوع الدولية)، منشورات جامعة جيهان الخاصة ،أربيل، العراق،2015،ص31.

[1]- د.مصطفى كمال طه، أساسيات القانون التجارى (الأعمال التجارية-التجار-المؤسسة التجارية-الشركات التجارية-الملكية الصناعية)، ط1، منشورات الحلبى الحقوقية،بيروت،لبنان،2006،ص ص 29-30.

[2]- جاك غستان، المطول فى القانون المدنى/ تكوين العقد ،ط2،ترجمة منصور القاضى،المؤسسة الجامعية للدراسات والنشر والتوزيع، بيروت، لبنان، 2008،ص17.

[3]- عاشور عثمان وعبد الفتاح فريدة، مبدا سلطان الإرادة بين التأصيل والحداثة،رسالة ماجستير مقدمة إلى كلية الحقوق العلوم السياسية بجامعة عبد الرحمن ميرة، بجاية،الجزائر،2014، ص،14.

[4]- المصدر السابق،ص15.

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he stipulated that (This law rests on the following bases :3- Delimitation of the individual autonomy doctrine and preferring the regulatory relations trait over the contractual relation trait.), accordingly the contract must come in line with the legislative policy embodied in the commercial law(s) and civil law(s),moreover the contract is dictated to come at the end of the order of the commercial law sources, and this situation degrades the contract and is pivotal importance in the commercial transactions in general.

Therefore, some tips are worth to be mentioned here, and the Iraqi legislator is prompted to strictly take account of them for the upcoming amendment to the Iraqi law of commerce:

1- **It is a pressing need for the sources of commercial law to be rearranged. The amendment must be completely different to the current arrangement of those sources.**
2- **The contract as the emblem for the doctrine of individual autonomy must come at the first place and ranking.**
3- **The Commercial law must rank second, and it is worth to be mentioned that the private laws precede the general law, mainly the law of commerce no.(30) of 1984.**
4- **The rules of practical usages or the commercial custom rules must come before the civil law in order,as the customary rule is no less than a commercial private legal rule and it is not suitable for this rule to be subsequent to the civil law, at all.**
5- **The role of the private sector must be requalified and its rehabilitation. According to article (25) of the Iraqi 2005 constitution the state secures the reformation of Iraqi economy pursuant to modern economic bases as to guarantee the full deployment of its resources and the diversification of its sources and encouraging the private sector and its development. This provision is quite sufficient to manifest the constitutional attitude towards the role of private sector, which is both a positive and flexible one and can revitalize the performing role of that sector. But what arouses the researcher's interest is the equivalent provision in the law of commerce is the article (1) which states that (this law rests on the following bases: 3-Rendering the role of the private and hybrid sectors complementary to the role of the Public sector).This provision goes contradictory to the above-mentioned constitutional provision, and therefore must be amended as to be compatible with the foregoing constitutional scheme.**

2.2 THE ASSESSMENT OF "PRIVATE" COMMECIAL LAWS

Due mainly to the fact that the majority of these laws had been enacted and given effect at a different legislative period, one can easily note that the legislative policy that stands behind them motivationally, is by far different and distinctive from the legislative policy of the general law of commerce no. (3o) of 1984.Not only different are they, but as well contradictory and contrastively desperate and variant. A simple comparison between these laws and the law no.(30) of 1984 which represents the general law of commercial acts and the merchant ,can reveal and divulge how far they different are. Owing to the numerousness of these laws and the impossibility to encompass them all, we will stick to some specific laws, through which the legislative policy of the Iraqi legislator could be inferred and analyzed.

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The laws will be, the laws of trademarks, the law of commercial agency and the law of companies. Within those laws the new trends will be explored.

At the currently operative amended law of Trademarks and commercial Data in Iraq no. (21) of 1957 numerous amendments had been made, grossly, all of them had conferred a new trend and advancement upon it. Given those amendments and taking the into account, one can claim that this law is currently more and more open and compatible with international economy and trade and the transition of Iraqi closed economy to the capitalist economy and the free market philosophy and the being seasoned to be a member of the world Trade Organization and the legal ,economic and technical requirements of the said membership. The adoption of the famous trademark and its incorporating into the Iraqi law is one of the most outstanding changed made to this law1. The most prominent feature of the legal protection ever granted to such a kind of trademark is that it is worth to be safeguarded and legally protected against any form of infringement or transgression even if it was not registered at the commercial registration log held and supervised by the Chambers of Commerce. Whereas, the case is different for other forms of trademarks, as this registration, unlike the famous trademark, is a pre-requisite condition for assuming the legal protection of them.2Strictly speaking, the owner of the famous trademark is entitled to the legal protection of the law even its trademark was not registered in Iraq , so practically the owner is quite exempted from the registration3.

In addition to that, the very notion of the trademark had been altered by a new concept that is more compatible with the modern idea of trademark. This is to be accounted for by the fact that the law before the amendments made by the Coalitional Provisional Authority was adopting a specific notion which reflects the "formal" or "subjective" notion of the trademarks, while the law after amendment had adopted the "functional" concept which overlooks the essence of the trademark and requires the trademark only to undertake the function of distinguishing the goods and services. Accordingly, the definition is now mentions that the trademark is any sign or set of signs that can be used for distinguishing the goods of one enterprise

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1 - For more on the "famous trademarks" see :

طالب برايم سليمان، العلامة التجارية المشهورة ط1، منشورات زين الحقوقية ،بيروت لبنان، 2013،ص.88 -92.

2- It is eligible to be mentioned that it matters to contour the notion of "famousness" of the trademarks that are normally labeled as "famous". Some researchers have indicated to some basic criteria through which to hold that the trademarks is " famous", the most important ones of them are :a-the extent of being famous or known by the concerned people sector b-the time or duration of the use of the trademark any way and its geographical ambit c-The market –Value of the trademark d- The number of the countries at which the trademark at issue has been registered .see:

د.أحمد الباز محمد متولى، حماية العلامة التجارية المشهورة ألكترونيا (دراسة مقارنة)، بحث منشور فى مجلة البحوث القانونية والإقتصادية ،العدد (68) ،نيسان 2019،ص.ص751-755، متاح على العناوان الألكترونى التالى:

<<https://mjle.journals.ekb.eg/article_155742_59a986111ac89efc33f46ad0d9f72834.pdf> > last accessed (Nov. 26,2023)

3 -this provision had been added through amendment of the Trademark Law by the order no.(80) on (24/ June /2004) issued by the Coalitional Provisional Authority at the aftermath of the occupation of Iraq.

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from other enterprise goods1 .It is sound that it mentions some emblems like letters, words and colors, but these emblems had been mentioned only as examples and they are neither inclusive nor exclusive after the amendment, and this impliedly widens the scope of the trademark by far. Not only that, but at present, for a specific material to be considered a trademark it is not necessary for it to be realized or seen visually, and pursuant to that statement some non-conventional trademarks ,such as the tastes, the scents that could be smelled and voices that could be heard per se. They are all new forms of trademarks and are qualified to be legally protected2.with respect to the origin from which these kinds of non-traditional trademarks sprung out, it is suitable to draw the attention to the fact that the jurists tend to pledge the use or validity of the color trademarks to meeting some requirements; the first one is that the color trademark must act as a symbol and secondly it must have a secondary meaning, and thirdly it must be nonfunctional as the bright fluorescent colors used in safety gear ,such as the engineer helmet colored white, or yellow for some sorts of worker3.However, Iraqi Law of Trademarks lacks such conditions for the color trademarks ,therefore we propose for the Iraqi legislator to adopt those three conditions and incorporate them into that law in the upcoming amendments.

Moreover, the trademarks are not only confined to that of goods in Iraqi law, as some other types had been added such as the "Service Trademark" and the "Warranty or Guarantee Marks". Guarantee marks are the ones that verifies some elements common among enterprises, such as level of quality, characteristics of the products or services, ways of manufacturing, geographical origin and the like, it is not subject to membership, i.e. it is not personal or specifically conclusive to someone and almost everyone can use it when having guaranteed the common features which form the subject matter of the mark in question. Regarding the collective mark, there exist some regulations that detail the parties that can use the mark, membership requirements and rules on use, constitute an internally adopted instrument for internal consumption, because they are decided jointly by the members for them to exploit in relation to their products or services. So, this one is pertinent to a guild or some other similar formations or unions and their members.4The Service Marks are as well another distinctive type of trademarks on which two requirements are to be met, first the marks must appear on the advertisements and shows, second the service which is in nutshell an economic performance must be actually provided to the public5.

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1 -For the theories of the "essence" of trademarks see:
د.عدنان غسان برانبو، التنظيم القانونى للعلامة التجارية،(دراسة مقارنة)،ط1،منشورات الحلبى الحقوقية،بيروت،لبنان،2012،ص 16-18.

2 -Article (1) of the Trademarks and Commercial Data no.(21) of 1957 amended by the order no.(80) on (24/ June /2004) including the meanings and interpretative terms within the law)

3 -Dana Shilling, Essentials of Trademarks and Unfair Competition, Wiley Publishing New York USA2002, p. 31.

4 -Kalliopi Dani, Community Collective Marks: Status, Scope and Rivals in the European Signs Landscape, Nomos Verlagsgesellschaft, Baden-Baden, Germany 2014. Printed and bound in Germany,2014,p.28.drawn from the following link :
<<https://web.archive.org/web/20201103035922id_/https://www.nomos-elibrary.de/10.5771/9783845256467.pdf >> last accessed on (28-Jan-2024)

5 -Op.cit, p.11.

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This legislative policy is oriented at unprecedented openness by the Iraqi legal system to get largely compatible with the new trends and developments in the room of trademarks, and such policy will undoubtedly attract the foreign capitals and enterprises for Iraq as long as they feel legally protected by the operative laws and regulation within Iraq.

Another good aspect of the commercial laws in Iraq is related to the amended "companies Law" in force, no(21)of 1997. As always has been the case, the companies' law was a "continual change-oriented" law owing to its closeness and relevance to the whole national economy, so it has been treated as an excessively important tool of political economy within the Iraqi state. Thus, one can tangibly perceive that the changes made, by the Coalition Provisional Authority (CPA) in the room of companies' law in form of amendments onto that law, aim at protecting the creditors from fraud (scams), and the shareholders from the conflict of interests, and achieving the due transparency necessary for the investors regarding their investing decisions in the companies1.

A clear cut feature of Iraqi law of companies is its incapacitating openness to the foreign investment, and the Iraqi legislator of law of companies is currently motivated by unlocking the doors for the foreign capitals to invest in Iraq.

The adoption of the "sole Trader" or "one-man company" is another qualitative change made to the Iraqi law of companies, and the reason for that is its peculiarity due mainly to the single owner of such a category of company as it is a single-membered company with a specific assets system locally known in Iraq as (al-thimma). The legal explanation of that is that the (assets theory), as formulated by the French jurists alleges that every single person has one financial asset (sole thimma), but the limited responsibility in such accompany goes against the idea of (solitary assets account) which entail two financial assets account ,one general and another specific for the responsibility in the company2.

Further pursuing the new trends and advancements in Iraqi private commercial laws we can turn to the Acts of Commercial Agency, this law has been most recently amended and its latest version is the Law of Commercial Agency no.(79) of 2017.3The most prominent changes could be unfolded through these two ones:

1- **The profound change of the meaning of "commercial agency" depicting it as " a contract according to which it is assigned to a person ,natural or legal, to vend, distribute goods or products, or affording services inside Iraq as an agent or a distributor or an owner of a concession of the principal from outside the Iraq in exchange for a profit or a commission and he performs the after-sale services and the maintenance acts and supplying the spare parts for the goods and the products**

[1]- د.حسين توفيق فيض الله، مستجدات قانون الشركات العراقى،ط2،مكتب التفسير للطبع والنشر،أربيل، العراق،2022، ص21.

2 -For more on the Theory of Financial Assets Account as Developed by the French Jurists, cf :

د.عبدالرزاق السنهورى، مصادر الحق فى الفقه الإسلامى،منشورات الحلبى الحقوقية، بيروت ،لبنان،1998،ص22.

3 -This law has been disseminated at the official Gazette of Iraq (Al-Waqaii Al- Iraqia) no.(4469) on (13-Nov.-2017)

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he undertakes to market.[1] But the previous Act of Commercial Agency no(51)of (2000) had tended to narrowly determine the meaning of the Commercial Agency as (Every commercial act a person embarks as an agent in Iraq for another person ,natural or legal from outside Iraq, whether it was a commercial agency, commissioned agency or any other agency provided for in the laws of commerce, companies and transportation[2] .Here it is obvious that the first definition is wider in scope than its counterpart at the previous law, as it encompasses the after-sale services and distribution, or being the owner of a concession and supplying spare-parts, and all these were missing at the previous law of 2000.

2- The complex formalities, routines and procedures that were existent at the previous Act of Regulating the Commercial Agency had been alleviated and cut off in the 2017 Act, so as to encourage the revitalization of this sector that is intimately linked to the outer world. For instance it is only up to the registrar to let the foreign or Arabic companies in on the names of the companies that can represent them inside Iraq[3].The commercial agent was as well disallowed, according to the Act of 2000 to representatively act for more than three principals *from outside Iraq*, and he or she will be discredited to confine to only three of them and nullify the other ones on his own accord. While the (2017) has dropped off those two above-mentioned rules.

2.3 THE OVERALL ASSESSMENT OF THE REALLITY OF THE COMMERCIAL LEGISLATIVE POLICY

At the previous sections, the researcher had deeply dissected the cornerstones and pillars of the legislative policy in two fields of commercial laws; the GENERAL law of Commerce no.(30) of 1984 alongside the sphere of PRIVATE commercial laws, and the outcome derived from them revealed a great disparity and difference.

One of the most outstanding divergences between those two laws (the General law and the Private Laws) ,as the researcher firmly thinks, is that the first law, i.e. the General law has been founded on a political, ideological, biased, and prim foundation which best substantiates the state policy of positivism and the centrality coupled with it. Hereby, the law came politically, rather than technically, motivated and oriented. The philosophical and intellectual resonance for that can be summarized in the constitutional-natured Law of the Reformation of the Legal System no. (35) of 1977,which smoothly reflected the vision of the state and the power grasping rulers to the "Legal System". It suffices to take a quick glance over the rules of the law no. (35) of 1977,so as to deduce some basic guidelines that will be helpful for our purpose. This law was the pure nectar of the thought of the ruling power and party at that time. An examining surveillance over the (Paper of The Worked Reformation of The Legal System) can satisfactorily unveil some essential fact on the GENERAL law, i.e. the still-in-effect Law of Commerce no.(30) of 1984. Hereunder are some of them.

1- The forgoing (Reformation Paper) vehemently Criticizes the role the 1970 law of commerce no.(149) gave to the individual autonomy and the contractual freedom, describing it to have been raised to the sanctity ranking and that it had been even equalized and tantamount to the level of mandatory rules or to the level of legal rules, in addition to the primacy and precedence being given to the interests of the

1 -Article (1) of the Act of Commercial Agency no.(79) of (2017).
2 -Article (10 of the Act of Regulating the Commercial Agency no.(51) of (2000).
3 -Article (13) of the Act of Regulating the Commercial Agency no.(51) of (2000.

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creditors over the interests of the debtors. This has emitted two corollaries. One, the contract or the parties' agreement had been put at the end of the hierarchical ordering of the sources of commercial law, being preceded by all other sources, commercial and civil legislations and commercial customs. Two, affected by the avoidance of primacy of the creditors' interest over the debtors Iraqi law had abstained from regulating the (hybrid acts)[1], and undoubtedly this had been a drawback and a shortcoming in the context of the commercial acts theory. While the repealed law of commerce of 1970 clearly admitted the hybrid act theory. So, we in our researching process propose these two points:

a-The Iraqi Legislator has to put the contract at the forefront or the source of commercial law rendering it the first source as it reflects the contractual will of the parties to the contract.

b-This proposed provision must be added to the currently operative law of commerce no.(30) of 1984 setting forth (If the act was considered commercial for one party to the contract and civil for the other party, the commercial law must be applied only to the obligations of the party to whom the contract is considered commercial ,and the other party continues governed by the civil laws unless the law provides otherwise),and this provision connote the distributive application of both laws, commercial and civil.

2- **The above (Reformation Paper) had affirmatively held the applicability and enforcement of the "Legal Rules" with regard to the economic activity in all the sectors including the private and the hybrid sectors in addition to the public sector[2].This reflect both the centrality of the system and the adhesion of the substantiation its political ideologies and philosophy through the "Legislation Mechanism".**

3- **Excluding the rules of commercial bankruptcy, and the unification of the rules applicable on the insolvent debtor whether he or she was a merchant or not and formulating those rules as to achieve the liquidation within the limits of the public interest[3].**

4- **Deeming the state as the reference for determining the aims and objectives of the private sector's companies in line with the centrally planned economy. In addition to making those companies subject to the supervision and oversight of the state and its centrally dictated plan.**

Taking a quick glance over the preceding rules can reveal an important fact; the commercial law under the reign of the previous regime was an ideological, state policy-driven legislation and this had obliterated and concealed the distinctive and independent characteristic of the commercial law and rendered it supplementary, subsidiary and ancillary to the civil law and the state policy trends and philosophy.

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1 -Hybrid acts are those acts that are both civil and commercial at the same time. They are civil for one party and commercial for the other, and it may be quite true to accommodate them as having the commercial trait confined onto the creditors and the civil trait inclusively pertinent to the debtor. For more on the hybrid acts see :

د.نورى طالبانى، القانون التجارى العراقى،الجزء الأول/ النظريه العامة،ط1، دار الطبع والنشر الأهلية ،بغداد،1972، ص48.

2 -See "The Paper of The Worked Reformation of The Legal System), First Chapter (The Economic and Commercial Legislations).

3 -Ibid ,the same chapter .

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

Unlike the said General Law of Commerce no.(30) ,the private commercial laws serve another trend and objective which completely different as compared to that law, and on the ground of such a difference we can opt which one to override the other and approximately give what is doable in this respect.

Initially, it is necessary for the law no.(30) to be thoroughly revised and examined for its overdue amendment so as to be updated and vigorously capable of keeping pace with the universal economic and commercial developments and advancements, and overlooking such a necessity can be both detrimental and unbearable on the long run. A deep-rooted insight can push us towards saying that the new reality of the Iraqi economy and the openness it has witnessed at the aftermath of the collapse of the previous totalitarian regime have rendered it inevitable for the Iraqi legal system to adopt two important conditions or benchmarks. First, this economy must perform differently by far as compared to the past where the state had an overwhelming hegemony over the trade and economy. Second, the new reality entails perforce a different and modern legal policy with respect to the legal phenomena in general as currently the new economic interactions and activities and the new environment within which they are occurring or evolving, and the most striking example in this respect is the bankruptcy law and the rule and principles which override it in general. The state policy towards the rules and principles of bankruptcy had been excluded and set aside, and even it was intended to unify the rules and principles of commercial bankruptcy with the rules and principles of civil insolvency, meanwhile the pervasive hegemony of the public sector and especially the declining atrophy and the faint role of the private sector ,all these factors had led to the inapplicability of the rules of Bankruptcy Law about which only a meager cases brought before the courts[1]. But After the collapse of the previous regime and the revitalization of the private sector, coupled with a package of legal amendments on Iraqi laws the rules and principles of bankruptcy law will be nominated to further application, reliability and being resorted to by various private sector enterprises, projects and merchants including the banks for which the legal system of banking Trusteeship had been opted in Iraq2.

As a concluding remark, the researcher had come to the finding that two intersected trends can be observed with respect to the legislative policy within the Iraqi Commercial Laws. One of them is a traditional trend or direction that is not compatible with the new developments and advancement the Iraqi economy witnessed. By the trend the Iraqi Law of Commerce no. (30) of 1984 is specifically meant, so its amendment is a pressing need within a short visible span. And the reason for that amendment is the out-of-date legislative policy that is state-contractility and philosophy oriented.

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[1] **-An interview with the Professor Dr. Hissein Tofiq Faizulla on the reality and the future of the Law of bankruptcy ,dated (Sept.9,2023)**

[2] **- د.حسين توفيق فيض الله، الشامل فى الإفلاس،الكتاب الأول(الإفلاس والصلح الواقى فى الشريعات العربية) (دراسة مقارنة) ، ط1، منشورات زين الحقوقية ،بيروت ،لبنان،2022،ص83.**

On Banking Trusteeship (conservatorship) see:

د. حسين توفيق فيض الله، الشامل فى الإفلاس،الكتاب الثالث،(إعادة تأهيل المصارف والإفلاس الدولى) ، منشورات زين الحقوقية، بيروت، لبنان، 2022،ص ص 129،128،121.

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In complementarity to the above note, and in contrast to the 1984 law of Commerce, the private commercial laws go by far in harmony with the new universal economic, commercial and legal developments, and the legislative policy that dominates them is too responsive to and compatible with those developments. Such policy is technical, market and private sector-oriented.

The existence of these two forms of legislative policy is something idiosyncratic and irritating in terms of a unified legal system which presupposes an overall unified legislative policy.

THE CONCLUSIONS

At the end of the current research, we have come to the following Conclusions stated below:

1- **The endeavor to understanding the law will be more than insufficient and short-fallen if we did not cast a deep view on the roots and philosophical background of the law, especially the enacted law that appears in form of legislation. Such a view will be just a shallow and highly superficial.**
2- **The intellectual and philosophical roots and background of any law, including the commercial laws in question, are substantiated in the legislative policy that shapes the law and overwhelms it and acts like the incentive and the propeller of the law and contours its scope and the technique it functions and works.**
3- **A specific legislative policy and engineering vigorously stand behind the commercial laws in Iraq and they are mainly dominated by the state hegemony and ideology, and this is mainly true for the 1984 law of commerce no.(30),so it is feasible to describe such an Act as an outdated one due mainly to the countless developments and advancements that emerged and the stagnation of the legal regulation to the commercial acts and merchant theory when the law was first issued .**
4- **Two basic twin ideas have dominated the Law of Commerce f 1984, the Positivism and the Centralism which had been intertwined and mixed so as for them to be the state tool for achieving the goals and strategic aim the state pursued. Those ideas had led to push the commercial laws in Iraq away from its natural scope and rendered it rather an economic law affected mainly by the public policy of the state instead of the technical considerations that spring from the commercial life and environment.**
5- **The Legislative policy, as described and portrayed above had led to an idiosyncratic Iraqi Commercial law of 1984 and the private laws likewise, as they were all the creature of the same constituent law: The Law of Reformation of the Legal System which was reflecting the idea of the power grasping rulers and came to materialize the political credos of the ruling elite more than the technical consideration of commerce.**
6- **A careful insight on the reality of Iraqi commercial laws individually reveals two distinct and different lines of legislative policy dominating them. The General Law of Commerce no.(30) of 1984 is more stagnant and outdated, so it is badly in need to be rectified and get modified to acquire more up-datedness and adaptability to the new commercial legal trends and development throughout the world. Whereas the private laws had been by far changed and updated and thus**

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

they can actively play the role of a receiving gate to the modern and advances theories and ideas that confer upon them a new modern guise represented by the openness of the Iraqi economy and its centripetal tendency to draw the foreign capital and investment into Iraq,

7- **The changes Iraq has witnessed after rebuilding of the state at the aftermath of its occupation in 2003 in the political, legal, economic, constitutional rooms, although far-reaching but they were not so permeable to go deep into all the legal architect of Iraqi legal system, and the law of commerce remained unaffected and not impinged by the new changes. In this respect, the new reality of Iraq is neither coincident nor harmonious with that outdated law.**
8- **The ever-increasing changes that are prospected to continually go on, partly owing to the transitional characteristic of the commercial laws that are changeable and transforming to new models and version based on the emergence of new fashions, models and items in the markets and partly to some great events such as the admission and accession of Iraq into the World Trade Organization, will inevitably bring the commercial laws to the forefront of the amendment necessity.**
9- **The chain of the developments will never become complete but by the consistency of the amendment process and extending it to all the parts of the commercial legal system alike in Iraq, not being only confined to some parts of it.**
10- **The disparate legislative policy in the private commercial laws as compared to the General Law of Commerce is on all accounts implantable and inharmonious ,and in view of the proposed solution they must be subjected to a uniform legislative policy suitable for them both.**

THE RECOMMENDATIONS

The current research paper has come to a set of recommendations which are all founded on analyzing the legislative policy of the Iraqi legislator regarding the legal topics and issues as the have been considered by the researcher. Hereunder, we list them subsequently:

1- **One of the top necessities is the fact that the law of commerce no. (30) of 1984 pressingly needs to be updated and amended relying on contemporary and modern ideas and legal theories that can overcome the past, obsolete ideas, philosophy and the vision towards the nature of the commercial law. First and foremost, we can highlight two basic point as pressingly needing to be revised and changed. The prospected amendment must take these two matters into account:**
a-The pervasive hegemony of the "legal positivism" doctrine that embraces both the ideological, intellectual and philosophical view of the state (specifically the state or polity of the former regime that had been toppled down in 2003), and the centralism that is inherent to that doctrine ,must be alleviated and greater attention and priority must be given to the "natural rights" and liberalism as the latter can widen the scope of the "private rights" and the ambit of the commercial transactions. The motivation must be basically the determinacy to break off and bring to an end the monopoly of the "legislations" marred by the Positive mindset to be the sole, insuperable and uncontended source of making the rights, even the private rights. State interventionism and hegemony must be subsided in favor of the private legal relations and individualism.
b- The Commercial law, mainly the 1984 law of commerce must be put in a different context of relationship with the civil law(s) away from the current form

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

which is unbalanced, malformed and unrealistic. This can be achieved through enabling that law to restore its independence, peculiarity and distinctiveness and stop being a subsidiary, ancillary and following the civil law. Having said that, we totally adhere to the mandatory rules and their unique importance in the legal system as they are the mirror that reflects the high social, economic and political interests of the state which cannot be discarded even in part. The benchmark at any amendment or change must be the exigency of keeping commercial law independent as far as possible. This portraying shall be driving force for any upcoming change posed for that law.

2- **The current hierarchical order of the source of the 1984 law of commerce is badly outdated and revising them thoroughly sounds to be a pressing need. Based on the note mentioned in (1/a) above, we suggest the "individual autonomy" to restore its consideration. This requires the contract or parties' agreement to rank first instead of being at the end of the order as is the case now.**
3- **As long as the rules of practical usages or the customary rules are in core a private commercial rule , it is illogical to put them after the "civil law" , instead they must ranks before it. So, the custom comes only third to the contract and commercial legislations, while civil law goes to the end of that order.**
4- **A uniquely important axis of any upcoming amendment must be the "position and the role of the private sector". Constitutionally, this sector is concentrated on by the state to be rehabilitated and accorded the potential of playing a leading role in the new Iraq. The current situation in Iraqi law of commerce of 1984 goes contrary to that as it gives the priority to the public sector and makes the role of private sector only supplementary or complementary to the public sector. This must be as well amended and changed at any upcoming amendment.**
5- **The Iraqi Law of Trademarks had adopted a set of nontraditional categories of trademarks, the fragrance taste and color. The Iraqi legislator was not aware to elaborate the prerequisite conditions for the "color" trademarks, and we propose these conditions to be annexed to the color trademarks:**
   a-the color must not be functional, such as the color of the helmet of engineers or other safety gear.
   b-the color must act as a symbol.
   c-the color must have a secondary meaning, the implication of this condition is overlapping with the previous condition clearly.
6- **The theory of commercial act as regulated by the law of commerce must be both reconceptualized and reregulated within a comprehensive changing process. and the proposed change must take these points into consideration:**
   a- The inclusive cataloguing method must be discarded and no longer conducted.
   b- Conferring the flexibility over the legislative policy which dominates the regulation of commercial acts. This could be reached through the "theory of the commercial acts by resemblance" which means to consider the newly evolving acts commercial, though they have not been regulated and nominated by a legal provision, if they prove to be resembled either in trait or in purpose to the commercial acts which have been already mentioned and regulated by the law.
   c- The theory of the "hybrid act" or "blended acts" as well must be added to the *law of commerce, and the best provision is the following (If the act was considered commercial for one party to the contract and civil for the other party, the commercial law must be applied only to the obligations of the party to whom the contract is considered commercial ,and the other party continues governed by the civil laws unless the law provides otherwise).*

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

d- The theory of "ancillary" or "supplementary" commercial acts must be added to the current regulation of commercial acts in Iraqi law of commerce. This leads two advantages, the first it widens the scope of the commercial acts and then the applicability of commercial law, and the second is that the adoption of this doctrine leads to the application of a uniform legal system on both the main act and its ancillary act.

7-Another urgent need is that the current law of commerce and other private laws must be made consistent and harmonious to one another and reconcile each of them to the other .In this respect it is not enough to say that the "private restricts the general" is ample as the legislative policy is bigger than that and smoothly functioning of the legal system can only be made a reality through the unification of the legislative policy that dominates the whole commercial legal system.

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سیاسەتی یاسادانان لە چوارچێوەی یاسا بازرگانییەکانی عێراقدا

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پوختە

بەشێوەیەکی گشتی یاسایەکان لەوە زیاترن کە تەنها هەندێك ڕێسا وپڕەنسیپ بن خرابێتنە سەر چەن پەڕەیەك. بەڵکو هەموو یاسایەك گوزارشتە لە چەن مەبەستێك کە بەلای یاسادانەرەوە جێگای بایەخ بووە وگرنگی پێ داون. ئەمە بۆ هەموو یاسایەکان ڕاستە ودروست بەڵام بۆ یاسا بازرگانییەکان کە تەوەری ئەم توێژینەوەیەن ڕاستتر و وردترە وبەزەقی ئەو ڕاستیەیان تێدا بەرجەستە دەبێت. بەلەبەرچاوگرتنی ئەو کات وسەردەمەی کە ئەو یاسایانەی تێدا دەرکراوە، چ یاسای ژمارە (30) ی ساڵی 1984 ی بەرکار لە ئێستادا چ یاسا بازرگانیە تایبەتەکانی تر.ئەم توێژینەوەیە هەوڵی ئەوەی داوە کە خوێندنەوەیەکی زانستی بکات بۆ بابەتی سیاسەتی یاسادانان ی تایبەت بەو یاسا بازرگانیانە وفەلسەفەی ئەو یاسایانەو بیرو هزری یاسادانەری عێراقی لەبارەیانەوە وچۆن ئەو هزر وفەلسەفەیە ئاراستەی ئەو یاسایانەیان کردووە. دەرخستنی ئەو هزر وفەلسەفەیە زیاتر یارمەتیمان دەدات بۆ ناسینی سروشتی ئەو یاسایانەو وتا چەن ئەو یاسایانە ڕەنگدانەوەی دۆخی بازاڕو ئابووری عیراقن وڕۆڵی دەوڵەت لەوبارەیەوە چیە.

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

کێشەی ئەم لێکۆڵینەوەیە خۆی لەهەڵسەنگاندنی ئەو سیاسەتی یاسادانانەدا دەبینێتەوە کە لەپشتی یاسا بازرگانیەکانەوەیە، بۆ ئەوەی بزانین تاچەن کاریگەرن لەسەر ئاراستەی یاسایەکان وتاچەن گونجاون لەگەڵا رەوشی ئابووری عیراقدا بەلەبەرچاوگرتنی ئەو پێشهات وپێشکەوتنانەی کە لەبواری یاسای بازرگانیدا رووبان داوە.
لە ئەنجامدانی ئەم لێکۆڵینەوەیەدا پشت بەستراوە بە میتۆدی شیکاری وتوێژەر تەنها لەچوارچێوەی سیستەمی یاسایی عیراقدا هەستاوە بە شیکردنەوەی دەق وحوکمەکانی یاسا بازرگانیە بەرکارەکان بەمەبەستی گەیشتن بە بەوردەکاری سیاسەتی یاسادانان کە لەپشت ئەو یاسایانەوەن وئاراستەی ئەو سیاسەتە.
ئەم توێژینەوەیە گەیشتۆتە چەن دەرەنجام وپێشنیارێکی تایبەت بە تەوەری توێژینەوەکە، لەوانە پێگە ورۆڵی سەرەکی وئاراستەکەری سیاسەتی یاسادانان لەهەموو یاسایەکاندا. وبەدیاریکراوی لە یاسا بازرگانییەکانی جێ مەبەستی ئەم توێژینەوەیە.هەروەها دەریخستووە کە ئەم سیاسەتی یاسادانانە جیاوازو گۆڕاوە لە نێوان یاسای بازرگانی ژمارە (30) ساڵی 1984 ویاسا تایبەتەکانی تردا کە لەسەردەمێکی یاسادانانی جیاوازدا دەرکراون.ویاسای ساڵی 1984 رەنگدانەوەی سیاسەت وهزر وفەلسەفەی دەوڵەت ودەسەڵاتی سیاسی بووە لە عیراقدا، بەڵام یاسا بازرگانیە تایبەتەکانی تر زیارتر رەنگدانەوەی بازاڕ وژینگەی بازرگانین. هەروەها ئەم توێژینەوەیە ئەوەی دەرخستووە کە زاڵبوون وهەژموونی فیکری پۆزەتیڤیزم (الفكر الوچعی) وئەو مەرکەزییەتەی هاوشانی بووە باڵیان کێشاوە بەسەر بەشێکی زۆری یاسا بازرگانییەکاندا. هەربۆیە چەندین کەموکورتی هەن لە یاساکەی ساڵی 1984 ولەیاسا بازرگانیە تایبەتەکاندا کەپێویستیان بە چارەسەرکردنە لەوانە هەموارکردنی سیستەمی یاسایی کارە بازرگانییەکان ,وهەموارکردنی سەرچاوەکانی یاسای بازرگانی وهەموارکردنی هەندێك یاسای بازرگانی وەك یاسای هێما بازرگانییەکان. هەروەها هەموارکردنی یاسای ساڵی 1984 بۆ بووژاندنەوەی کەرتی تایبەت وبەرجەستەکردنی رۆڵی پێشەنگانەی ئەو کەرتە.
ئەم توێژینەوەیە جەختی لەسەر ئەوەش کردۆتەوە کە سروشتی گشتی یاساکانی جێ مەبەستی ئەم توێژینەوەیە دەربخات ودیاری بکات تاچەن پێشکەوتوو یادواکەوتوون.هەروەها ئەوەی دیاریکردووە تاچەن گونجاو وهاوشانن لەگەڵ پێشکەوتنە خێرا وبەربڵاوە ئابووری ویاساییەکاندا کەکاریگەریی خۆیان هەبووە لەسەر سیستەمی یاسایی عیراق.
کلیلە وشە: سیاسەتی یاسادانان، یاسا بازرگانییەکان، عێراق.

السياسة التشريعية في سياق القوانين التجارية العراقية

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الملخص

ان محاولة فهم اي قانون والوقوف على مضمونه والتعرف على جوهره لاتتسنى باللجوء الى دراسة النصوص والاحكام التي يجسدها القانون فحسب، بل يجب ان نغوص عميقاً للتوصل الى الغايات والمرامي التشريعية التي حرص المشرع على تضمينها في قانونه لكي يكون القانون مجسداً لها ومعبراً عنها بصورة دقيقة ومن منطلق غائي بإعتبار ان القوانين ما هي إلاّ وسائل وأدوات لتحقيق غايات معينة ما شرع المشرع قانونه إلاّ لكي يكون محققاً لها ولاسيما في إطار الفلسفة القانونية الوضعية التي تولي أهمية إستثنائية وكبيرة لآلية التشريع ودورها المتميز في تجسيد غايات ومقاصد المشرع من قوانينه. والحقيقة هي أن هذا الأمر ليس مقتصرا على القوانين موضوعة البحث في إطار هذه الورقة العلمية بل إنه يصح تعميمها على جميع القوانين بدون إستثناء، ولكن القوانين التجارية التي تولت هذه الورقة البحثية دراستها تتميز بخصوصية وميزة معينة نجمتا عن ان المشرع العراقي قد أولت عناية خاصة لوظيفة القانون التجاري واراد له ان يأتي بصيغة معينة تتفق مع الفلسفة الوضعية التي هيمنت على النظام القانوني العراقي لفترة لم تكن بالقصيرة، فجاءت السياسة التشريعية بصورة معينة تتميز بخصوصية ذاتية معينة.

ISSN-Print: 2079-3901
ISSN-Online: 3005-396X

ان مشكلة البحث تتمثل في تقييم السياسة التشريعية التي تهيمن على القوانين التجارية العراقية موضوع البحث وذلك من أجل معرفة مدى تأثيرها على تلك القوانين وأحكامها ومدى موائمتها للإقتصاد العراقي والتطورات القانونية التجارية التي شهدها العراق.

وفي إعداد هذا البحث تم إعتماد المنهج التحليلي وذلك بالإقتصار على القوانين العراقية ذات الصلة بموضوع البحث ، بتمحيصها وتحليلها من أجل الوصول إلى ملامح السياسة التشريعية وتأثيرها على أحكام تلك القوانين ومبلغ تأثيرها عليها. توصل البحث الى عدة نتائج وتوصيات .تأتي في مقدمتها حقيقة الدور المحوري والجوهري للسياسة التشريعية والدور الرئيس الذي تلعبه هذه السياسة في إطار القوانين التجارية العراقية ،بما فيها قانون التجارة رقم (30) لسنة 1984 والقوانين التجارية الخاصة. في هذا السياق لابد من القول ان قانون عام 1984 تهيمن عليه فلسفة الدولة والنَظام السياسي وفلسفته، بينما نجد ان القوانين التجارية الخاصة هي أكثر إنفتاحا على إقتصاد السوق والبيئة التجارية. وفي هذا السياق لابد من القول ان الفكر الوضعي قد هيمن ،بما يحمله من ملامح المركزية على قسم كبير من القوانين التجارية.إضافة الى ذلك فإن هناك العديد من المثالب والنواقص تعتري القوانين التجارية العراقية منها مايتعلق بالنظام القانون للعمل التجاري، وترتيب مصادر قانون التجارة, ومنها ما يتعلق بقانون العلامات التجارية. وقد توصل البحث إلى ضرورة تعديل أحكام قانون التجارة ليجسد بصورة فعالة الدور الريادي للقطاع الخاص في النشاط التجاري.

وأخيرا فإن البحث قد ركز على الطبيعة العامة للقوانين التجارية موضوع البحث ومدى كونها متطورة ام متخلفة ومدى كونها قــادرة عــلى مواكبة المستجدات والتطورات التجارية التي أثرت بصورة فعالة على النظام القانوني والإقتصاد العراقيين .

الكلمات المفتاحية : السياسة التشريعية- القوانين التجارية – العراق