

## Legal Surgery: the Need to Review Jordanian Civil Law

Dr. Abdelnaser Zeyad Hayajneh  
Law School - University of Jordan  
Hashemite Kingdom of Jordan  
[a.havajneh@ju.edu.jo](mailto:a.havajneh@ju.edu.jo)  
00962779092800

### Abstract

Sick but stable is the best term by which the Jordanian Civil Law can be described. After around three decades and a half from coming into force, the Jordanian Civil Law shows many strengths and weaknesses. The strengths needs to be affirmed while the weaknesses needs full and due revision so as to overcome the shortcomings resulted from its' interpretation and application.

The study provides brief descriptive overview of the Jordanian Civil Code, and is dedicated to bring together some comments and remarks on many controversial or ambiguous rules contained in the Jordanian Civil Law, with the hope that, the competent authorities will take them into account while revisiting the law. The article is divided into five parts, the first part is a historical background about the origin of Jordanian Civil Code, the second part is intended to give the reader brief and intensive information about the content of Jordanian Civil Code, while the third part will highlight the main principles and trends adopted by the Jordanian Civil Law. In the fourth part, functions of civil law will be highlighted, and finally, some comments and remarks about aspects of revision needed to modernize and strengthen Jordanian Civil Law are provided.

**Keywords:** Jordanian Civil Law, Legal Surgery, Comments and Remarks

### 1. Historical Background

The current Jordanian Civil Law has been enacted in 1976; to replace the Ottoman Majallah of 1876 (Majallah al-Ahkām al-adliyyah)<sup>1</sup>, which is highly influenced by Islamic Law. The Majallah (the Civil Code of the Ottoman Empire) is regarded to be the first and the most important attempt to codify Islamic Jurisprudence<sup>2</sup>.

Most Arab countries which ruled by the Ottomans applied the Majallah as the code of civil law in respect of civil - and to certain extant commercial- transactions, until these countries have their own civil and/ or commercial codes. Jordan was not an exception, the Majallah applied in trans-Jordan emirate (1921-1946)<sup>3</sup>, and it continues to be applicable in the Hashemite Kingdom of Jordan (1946- to present).

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<sup>1</sup>Majallah al-Ahkām al-adliyyah, Available online in Arabic at: <http://www.moj.ps/images/majallatalhkam.pdf>

<sup>2</sup>Islamic Finance Intelligence, Issue 3, 30 AUG 2009, Available online at: <http://www.daralistithmar.com/files/OIFI31AUG2009.pdf>

<sup>3</sup>K. Kareem, Najm Aldeen (2010) Sanhuri's civil code for Arab countries and its relevance to modern and islamic laws / Najm Aldeen K. Kareem. PhD thesis, University of Malaya. Available online at: <http://digitaleprints.um.edu.my/3291/>

However, Jordan introduced its' national Civil Code in 1976, and this law entered into force in 1/1/1977, without any major amendments or review.

It is worth mentioning in this regard that, Jordanian Courts shall apply the Majallah as long as its' rules did not contradict the rules prescribed in the Jordanian Civil Code<sup>4</sup>.

The Jordanian Civil Law comprises rules derived from the Egyptian civil code of 1948 which in turn was modeled on the Napoleon code. Despite this fact, it can be generally said that the civil law of Jordan remains an Islamic-oriented one. Section two of the Civil code makes this clear when it provides that Islamic jurisdiction is the second source of the civil law and Shariah the third. In this sense<sup>5</sup>, wherever a judge does not find a specific rule within the provisions of the Civil law code, he shall try to find the solution by referring to Islamic jurisdiction, and Sharia'a principles, respectively<sup>6</sup>.

## **2. General Framework**

The Hashemite Kingdom of Jordan enacted its' first civil law in 1976 under the name Provisional Jordanian Civil Code No 43 of the year 1976. This law comes into force since 1/1/1977<sup>7</sup>. Although 35 years elapsed since the application of the Jordanian Civil Code, no major amendments or changes have been introduced to the law<sup>8</sup>.

The Jordanian Civil Code Consists of Introductory Chapter and four books with 1449 Articles, the introductory Chapter (Articles 1-86) includes general provisions organizing the application of the law, its' sources, and certain provision related to legal personality (natural and juristic), provisions related to things and the theory of rights, its' classifications, sources, rules, usage and proof, and most importantly provisions related to Private International Law i.e. rules of attribution<sup>9</sup>, and general rules of evidence.

The first book of the Jordanian Civil Code (Articles 87- 464) deals with patrimonial obligations, its' sources i.e. Contract, unilateral disposition, tort, beneficial acts, law, as well as rules organizing obligations' effects.

In the same orbit of patrimonial transactions, the second book of the Jordanian Civil Code (Articles 465-1017) includes particular rules organizing numerous contracts, such as sale, lease, labour, insurance, surety, etc.

Property rules and other rules related to many rights in Rem have been contained in the third book of the Jordanian Civil Code (Articles 1018-1321), whereas the fourth book deals (Articles 1322-1447) with securities i.e. mortgage, and privileges. And the last two Articles (1448-1449) are related to enforcement

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<sup>4</sup>Article 1448 of the Jordanian Civil Code reads as follows: "the rules of Majallah al-Ahkām al-adliyyah shall be repealed to the extent that it contradicts the rules of this code"

<sup>5</sup> Historically, Jordan is subjected to the British mandate from 1917- 1946. However, this mandate was not long or heavy to affect Jordanian legal system by the Anglo-American jurisdiction regarding the role of judicial authority in making the rule of law

<sup>6</sup> For more information see Olwan, Mohamed "The Three Most Important Features of Jordan's Legal System", A paper presented at IALS Conference "Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World", available online at: <http://www.ialsnet.org/meetings/enriching/olwan.pdf>

<sup>7</sup> Published in the Official Gazette on page 2, issue no 2645 dated 1/8/1976

<sup>8</sup> The Jordanian Parliament endorsed the Provisional Civil Code to be an ordinary and permanent Law in 1996 by a declaration published in the Official Gazette on page 829, issue no 4106 dated 16/3/1996.

<sup>9</sup> Article 11-29 of the Jordanian Civil Code are the Jordanian Rules of Private International Law related mainly to conflict of laws.

of the law and the application of the Ottoman Majallah of 1876 (Majallah al-Ahkām al-adliyyah as long as the Majallah rules do not contradict with the rules of the Jordanian Civil Code.

### **3. Main Trends and Principles of Jordanian Civil Law**

The main trends and objectives of civil law are

- To support principle of good faith as an overwhelming principle in civil transactions,
- To ensure stability and cohesion of civil transactions and patrimonial affairs through prescribing rules which organize all aspects of these transactions,
- To achieve fairness by protecting the legitimate proprietary rights and interest,
- To maintain public order and principle of legality,
- To deter the uncivilized conducts by rules of civil liability under tort<sup>10</sup>.

In so doing, Civil Law sets up the general rules in form of imperative rules to ensure the observance of public order and legality. Then Civil Law leaves for individuals the freedom to agree on terms and details of their transactions to achieve their best interests in conformity of its general and imperative rules.

Civil Law is considered to be one of the most important laws in the State; since it is the origin of all branches of private law. Civil Law traditionally consists of variety of rules and legal doctrines which mainly related to legal personality and patrimonial transactions<sup>11</sup>.

### **4. Functions of Civil Law**

The main functions for civil law rules are organizing civil transactions and compensating damages resulting from wrongful conducts. However, these traditional functions are developed according to the new norms of human life, therefore, e-contracting has become a novel type of transactions that enter the orbit of the law of contract.

As for the second function, civil litigation is overwhelmed by the compensatory dogma; the only purpose of compensation from a civil law perspective is remedial by compensating the damaged party, and absolutely not to punish the person liable for that damage. It is not in the nature of civil law to prevent or punish offenses, unlike Criminal Law which ensures the protection of the public interest.

Similarly the compensatory function for civil liability rules is developed so as to allow courts to award punitive damages with the aim of punishing the wrongdoers and deterring others from committing acts or omissions that cause harms to others in their bodies' integrity, properties, or morals. However, this development is relatively gradual or even slow, because it is generally believed that civil liability normally has no punitive function and that this function is performed better by criminal law<sup>12</sup>.

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<sup>10</sup> Al Sarhan, Adnan "Jordan Civil Code: Sources of Obligations", DarAlthaqafah, Amman- Jordan, 2005

<sup>11</sup> Hayajneh, Abdelnaser, 2011, "Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law", European Journal of Social Sciences – Volume 23, Number 2, pp 277-287, available online at: [http://www.eurojournals.com/EJSS\\_23\\_2\\_11.pdf](http://www.eurojournals.com/EJSS_23_2_11.pdf)

<sup>12</sup> Hayajneh, Abdelnaser, 2010, "The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?", European Journal of Social Sciences – Volume 14, Number 4, pp 606 -612, available online at: [http://www.eurojournals.com/ejss\\_14\\_4\\_11.pdf](http://www.eurojournals.com/ejss_14_4_11.pdf)

## 5. Aspects of revision needed to modernize and strengthen Jordanian Civil Code

Although the Jordanian Civil Law was a progressive attempt toward codifying Islamic jurisprudence rules in a modern legislation, this attempt needs to be revisited by the legislator after about three decades and a half of application so as to avoid loopholes and correct any legal irregularities or paradoxes appears through this application. The revision required has many details which can be summarized as follows:

1. Some scholars rightly argue that there is a need to review the Ottoman Majallah and endorse some articles and rules upon the legislator discretion, and then repeal the whole Majallah<sup>13</sup>.
2. The need to review Article 2/1 of the Jordanian Civil Code so as to allow “*Ijtihad*” elicitation for judges even where the law provision is clear<sup>14</sup>, because judges are approximate to the facts and circumstances of each case and by virtue of this; they are capable of eliciting the best rule to settle the dispute<sup>15</sup>.
3. The need to separate rules related to private international law, namely articles 11-29 in a special law deals with all aspects of conflict of laws and all matters related to judicial jurisdiction of Jordanian Courts.
4. The need to relocate some articles in the suitable legislation, such the rules related to evidence (Articles 72-85), since these rules are better located in the Jordanian Evidence Law<sup>16</sup>.
5. The need to restructure some articles so as to avoid repetition and redundancy. In this track the Jordanian legislator needs to review certain articles in deferent parts in the Civil Code, for example, Articles 220, 224/1, 225 and 226 of the Jordanian Civil Code tackle almost the same rule that is the legal authority of customs while interpreting the ambiguous phrases, terms or wording of the contract.
6. The need to update some terms by using familiar terms in civil law context, for example the Jordanian Civil Code in Article 289 used the term “*Ajma*” (العجماء) to mean animal, and the term “*Jubaar*” (جُبَار) which approximately means without compensation. And also the term “*Jua’l*” (الجُعل) to mean Wage<sup>17</sup>.

<sup>13</sup> Eid Jouwid , “in the Court of Civil Law and the National Assembly”, An Article published in Alrai Newspaper, Available at [http://www.alrai.com/pages.php?news\\_id=279418](http://www.alrai.com/pages.php?news_id=279418)

<sup>14</sup> Albana, Khalil, “It time to elicit even where the provision is clear for the sake of modernization and human interest” An article published in Alrai newspaper. 2009, available online at <http://www.jorljo.com/showthread.php?t=19086>

<sup>15</sup> Article 2/1 of Jordanian Civil Code prevent elicitation if there any clear provision regardless of its’ proportionality in the case reviewed by the court

<sup>16</sup> Haddad, Hamza, “Sources of Obligations in the Arab Laws: Jordan, United Arab Emirates and Qatar”, A paper presented at University of St. Joseph, Lebanon, 2006, Available online at: [http://www.lac.com.jo/\\_private/pdf/41.pdf](http://www.lac.com.jo/_private/pdf/41.pdf)

<sup>17</sup> Article 1000 of the Jordanian Civil Code

7. The need to define or redefine some terms frequently used the Jordanian legislator throughout the Jordanian Civil Code without specifying a certain meaning for them, such as “*Al A'nat*” (العنت) approximately means procrastination<sup>18</sup>, “*Al Dharar Gayer Al Ma'louf*” (الضرر غير المألوف) approximately means uncommon damage<sup>19</sup>, “*Al Tadlees*” (التدليس) approximately means fraud<sup>20</sup>, “*Alaqelah*” (العاقلة) which approximately means male family member and male relatives to certain degree<sup>21</sup>, “*Marad Al Mout*” (مرض الموت) which has uncontrolled meaning, and many other ambiguous terms and phrases. In so doing, the legislator may choose to provide for an introductory article in the beginning of the Code to specify the meaning allocated to certain terms and phrases used throughout the Code, or to define each and every term and phrase once it appears in the Codes' articles.
8. Some articles of the Jordanian Civil Code need to be gathered so as to fit them better within the suitable and correct position, i.e. rules related to contractual liability. These rules are now disarranged in deferent places<sup>22</sup> making the application of these rules hard and problematic.
9. Unification of consent defects which affect the contract validity, enforceability, and the binding power of the contract<sup>23</sup>. The Jordanian Civil Code addresses three consent defects, duress, mistake and deception resulting in gross loss, in duress the law provides for the validity of contract but suspends contracts' effects until the party subjected to duress agrees to ratify the contract after the removal of duress<sup>24</sup>.
10. The need to regulate exploitation “*Al estghlal*” (الاستغلال) as a consent defect when one party exploit the other party's need or mental or physical circumstances to conclude unfair contract with him for the sole benefit of the exploiting party.
11. The needs to provide a general rule to deal with the immaterial influence as a consent defect similar to what most Arab and non Arab civil codes do. For the time being, Jordanian Civil Code provides for a rule regulate the effect of immaterial influence only between spouses in Article 141, which was criticized by scholars because it used backward wording, and confined the rule to the case where the husband threaten his wife by material conduct such as physically hitting her or preventing her form visiting her family.
12. The need to readdress the issue of *Al Fased Contract* (العقد الفاسد), so as to clarify the reasons and rules of such contract, or to revoke this kind of contract by altering the sanction *Al Fasad* (الفساد)

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<sup>18</sup> Article 360 of the Jordanian Civil Code

<sup>19</sup> Article 1072 of the Jordanian Civil Code

<sup>20</sup> Article 467 of the Jordanian Civil Code

<sup>21</sup> Article 273 of the Jordanian Civil Code

<sup>22</sup> These rules are to be in the general theory of the contract, the effects of obligation, the special part related to certain contracts i.e. Sale of goods, Lease, insurance, Loan, etc

<sup>23</sup> Owaidi, Ahmad Ali & Mahafzah, Qais Ali, “Different Legal Implications of Consent Defects under Jordan Civil Code: An Attempt of Unification”, *European Journal of Social Sciences* – Volume 19, Number 2 (2011), Available online at: [http://www.eurojournals.com/EJSS\\_19\\_2\\_06.pdf](http://www.eurojournals.com/EJSS_19_2_06.pdf)

<sup>24</sup> Article 141 of the Jordanian Civil Code provides that

to another one such nullity, suspension of the contract effects, or non-binding contract as deemed appropriate to the legislator<sup>25</sup>.

13. The need to update and modernize some topics especially in the contracts' book i.e. articles organizing some old fashion contracts such as "Al Muzarah" (المزارعة) approximately means "Sharecropping", "Al Mugarasah" (المغارسة), "Al musaqah" approximately means Sharecropping (المساقاة) approximately means watering, and also in fourth book related to some rights in Rem i.e. Al Ejarateen (الإجارتين), "Kholo Al Entefa" (خلو الانتفاع) approximately means lease for Waqfs land. These contracts were of significant importance when the Jordanian Civil Code issued. However, currently these contract were of less importance, and were common because of the developments which took place in the society' lifestyle.
14. The need to rewrite some articles so as to correct the legislative mistakes contained in the current provision. Such as article 141 which provide that the contract conducted under duress will become valid after ratification; and this is not correct; because such contract is correct from the beginning but its' effect were suspended until the concerned party ratify it or reject its' ratification. Some other articles used terms that allow a contract to be nullified by a courts' decision<sup>26</sup>, and the Jordanian Civil Code does not apply this doctrine since it apply nullification as a sole degree.
15. The need to clearly address the issue of punitive damage as a part of the recoverable damage in the field of civil liability in torts<sup>27</sup>. Currently, Jordanian Civil Code has no express article to allow or prohibit the awarding of punitive damages neither in civil liability for breaching contract nor in civil liability under torts. This can be done by amending Article 360 of the Jordanian Civil Code so as to clarify the legislator position regarding this issue<sup>28</sup>.
16. The need to clarify the legal paradox resulted form the wording of Article 273 and 274, which allow the victim or his heirs to receive "civil" compensation as well as "Diya" (الدية) or "Irsh" (الإرش) which approximately mean certain amount of money paid to the victim heirs or to the victim himself when the harmful act or omission resulted in the death of the victim or a serious bodily injury
17. The need to regulate electronic contracting within the civil code, in the regard, the Jordanian legislator may choose to set up the general rules of e-contracting within the general theory of contract namely articles 87-249<sup>29</sup>.
18. The need to relocate all provisions related to inheritance (1086 - 1124) in a special law or adds them to the Jordanian Personal Statues law; because these provisions are not related to civil transactions since the property transfer is a result of death and not a civil transaction. However,

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<sup>25</sup>Sarhan, Adnan, (2005), "Critical Remarks related to Emirates Act on Civil Transactions- Contracts, and personal rights", Law & Sharia' Journal, UAE, 23.

<sup>26</sup> Articles 134, 1031/2 of the Jordanian Civil Code

<sup>27</sup> Al Sarhan, Adnan "Punitive Damage: Comparative Study" Al Yarmouk University, Vol 13, issue 4, 1997.

<sup>28</sup> Hayajneh, Abdelnaser, 2010, "The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?", European Journal of Social Sciences – Volume 14, Number 4, pp 606 -612, available online at: [http://www.eurojournals.com/ejss\\_14\\_4\\_11.pdf](http://www.eurojournals.com/ejss_14_4_11.pdf)

<sup>29</sup> For the time being, Jordan legislator set up some rules of e-contracting in the Jordanian Provisional Law for E-Transactions no 85/2001. However, this law does not cover all aspects of e-contracting.

the rules related to will and its' conditions and effects can be a part of civil law because will fulfills the requirements of civil transaction.

19. Some articles of the Jordanian Civil Code have been repealed by special laws, such as some provisions related to the right to preemption which was overruled by the Amended Jordanian Act concerning Real Estates no 51/1958<sup>30</sup>.
20. The need to clarify the unfair position when a minor commit harmful act or omission that causes damage to a victim without fault or malicious intention in the minors' part; because Article 256 of the Jordanian Civil Code provides for a non-fault liability of any one who commit harmful act or omission.
21. The need to clarify the legal position when there is an unregistered pelage to transfer real estate property, because Article 1149 of the Jordanian Civil Code is ambiguous, and does not specify certain formality for such pelage, it only provides for compensation when committed party reject to transfer the property. As a result of this ambiguity Jordanian Court of cassation has deferent understandings for this Article.
22. The need to review many articles in deferent parts of civil law to correct the unjustifiable ruling according to equity and transactions stability requirements, for example, Articles 141, 192 which - in the case of the contracting party death - transfer the right to ratify or rescind the contract concluded under duress or with designate option to the deceased heirs. In the contrary, articles 150, 183, 187/2, 477 decide to eliminate the deceased contracting party right to ratify or rescind the contract by making the contract final and obligatory for his heirs.
23. The need to review and amend some articles governing joint ownership<sup>31</sup>, and family ownership<sup>32</sup>, due to the legal and practical challenges arose from the application of such provisions. Especially Article 1031 which allow the partner in the joint ownership to dispose his portion to a third party without prior consent of other partners. And article 1063/2 which authorizes the acquisition of a portion in the family ownership by a third party who is not a family member in contradiction with the purposes of family ownership.
24. Finally, there is a need to continuous and detailed review for each and every part of Jordanian Civil Code to avoid any loopholes or contradictions. In the regard, the legislator can utilize from huge legal literature that can be easily found in numerous academic, judicial and jurists' writings.

## **Conclusion**

The main aim of this study was basically to draw the attention of the Jordanian Legislator to give priority to the civil code in its' legislative agenda. From the above mentioned remarks and comments, one can notice the urgent need to revisit Jordanian Civil Code so as to overcome many loopholes, correct many unfair rules, clarify the legal situation in certain provisions, and accordingly restructure the entire Civil Code. This due revisit will certainly maintain the progressive approach that the Jordanian Civil Code represents as civil transactions legislation based on Islamic rules and traditions.

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<sup>30</sup> These overruled articles are (1151/1/2, 1152, 1153/2, 1162, 1168/2/3)

<sup>31</sup> Articles 1030- 1059 of the Jordanian Civil Code

<sup>32</sup> Articles 1061-1065 of the Jordanian Civil Code

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**Bio Profile**

Dr Abdelnaser Zeyad Hayajneh is currently working as associate professor at Law School in the University of Jordan. He graduated from Newcastle University with a PhD in Civil and Environmental Law. He is the author of two books, “Environmental Law: General Theory with explanation of Environmental Legislations” and “Legal Terminology: Learn, Proceed and have Fun”. He also published many articles in the field of Civil Law, Environmental law, Islamic Legal Literature, and Human Rights, there titles are respectively: (Evaluating the efficiency of the Jordanian legal Rules related to Joint Ownership), (Statutory Legislation in the Holy Qur’an: Sorat Yusuf as a Model), (The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible?), (New Rules in the Jordanian Amending Landlords and Tenants Act No 17 / 2009), (Special Judicature, Again and Again: Does Jordan need to establish special Environmental Court?), (Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law), (Just Compensation as a condition for the legality of Expropriation under the Jordanian Expropriation Law).