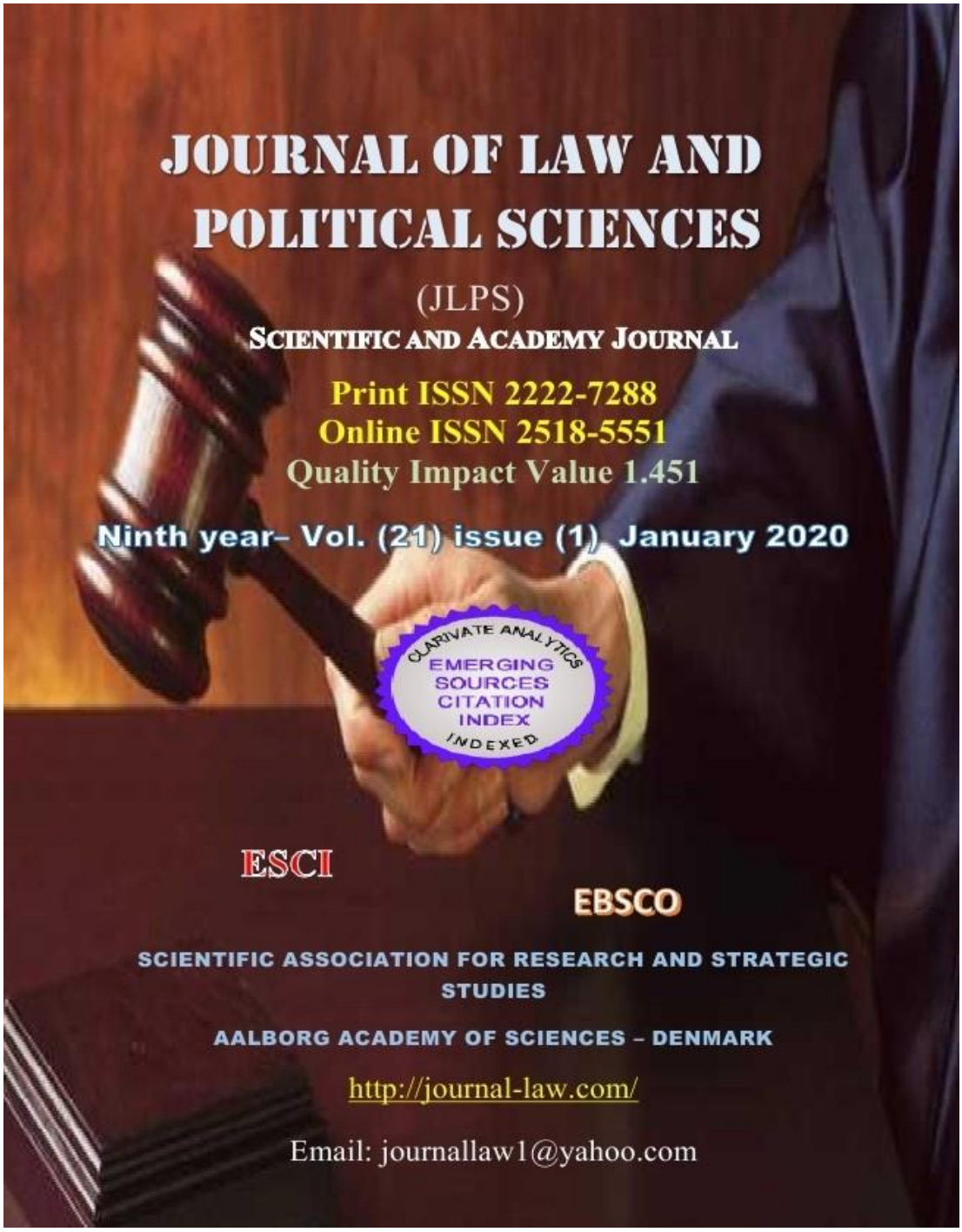
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(1)

DEFINITION OF SALE CONTRACT IN ISLAMIC SHARIA AND POSITIVE LAWS - ANALYTIC COMPARATIVE ORIGINATING STUDY

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Abstract

The definition of the sale contract, as the most important nominate contract ever, has received a great deal of attention in Islamic Sharia and its jurisprudence as well as in Arab and foreign civil laws. The importance of the definition manifests itself, as a general principle, in considering it as the key to the legal provisions subsequent thereto, since it by far reflects the philosophy of the legislator and the jurist dealing with the same through the

terms and expressions contained therein indicative of the meaning and the legal position with respect to certain matters.

The key point of this definition reveals itself in the difference it has raised and the extensive controversy it has caused, whether amongst the Muslim jurists or in laws with the various trends and philosophies thereof. We weren't to address this specific component by research if such differences were merely formal and of no value in the legal conclusion, yet the subtlety of these differences and their effects on the provisions of the sale contract as a whole have led us to tackle the same by rooting and analysis to reach a new definition consistent with the importance of the sale contract and its role in the day to day transaction, irrespective of our position whether or not it is necessary to principally have such a definition in place in the core of the legislative action.

Keywords: Sale contract – Islamic Sharia – Islamic Jurisprudence – Jordanian Civil Code

1- Introduction

The sale contract is one of the most important nominate contracts, and has priority over all other contracts. The jurisprudence and various laws sought to develop a definition thereto which usually takes the first article in the sequence of provisions thereof. In general, it is noted that the definitions involve evident difference between themselves, except for the Arab laws which are actually reproduced from each other.

The Islamic jurisprudence, which provided us with a variety of definitions of the sale contract does not deviate from the scope of this difference, the matter that as a result reflected on the legal definitions set out in this contract in both the Journal of Judicial Rulings and *Murshid Al Hairan* Book, in spite of drawing on the same Islamic jurisprudential source.

The stance of the Islamic jurisprudence further reflected on some of the modern Arab laws, some of which modeled after the Islamic jurisprudence without any substantial change, while others attempted to mix between the Islamic jurisprudence and some other modern laws, while there are some Arab laws that made a separate path at addressing the definition of the sale contract.

The same could be said with respect to the foreign laws with their various trends; as they also adopted different positions as to the definition of the sale contract, which we will actually reveal at exploring the details of this paper.

This particular part may prima facie appear to entail no such importance that require such a profound research, yet the one who delves into this subject would realize that the definition is not limited to the abstract boundaries thereof, but rather it goes beyond that in terms of effects to other legal articles, since the definition is considered as a miniature of the defined matter, and a preliminary step to reach the legal details and provisions thereof, which must be consistent with the nature and content of the definition that assumes the top position thereof.

Researchers, when studying this matter, attempt to the extent possible to explore the definitions of the sale contract, and to analyze the same to reach the strengths and weaknesses therein with a view to select the suitable definition for this contract away from blind imitation or transfer or even the unproductive mixing between more than a law, believing that the legislator was drawing up a more developed definition in harmony with the spirit of the age, yet they soon find out that such a development did only tackle the surface of this definition rather than the content or the effects resulting there from.

2- Stance of Islamic Sharia and its Jurisprudence on the Definition of Sale Contract

Islamic Sharia, through the Holy Book and Sunna, emphasized the legitimacy and importance of the sale contract as one of the best means for dealing between people, by which people avoid other means forbidden by Sharia such as usury.

The evidence on legitimacy of this contract, as well as the determination of the nature thereof in the Islamic Sharia is established by the Koran verses, as well as by Prophet's Hadith in terms of limits and scope of this contract. The Islamic jurisprudence elaborated on the definition of the sale contract and on drawing up the features thereof, in a juristic language different from that of the Holy Koran revealed by the Almighty God (Surely We have revealed the Koran and We shall surely safeguard it). [Al-Hijr: 9], and from the language of the Prophet's Hadith the source of which is the Almighty God (Nor does he speak from [his own] inclination; It is not but a revelation revealed; Taught to him by the One Powerful) [An-Najm: 3, 4, 5].

To shed the light on this topic, we have divided it into two themes, the first of which addresses the stance of the Islamic Sharia towards the definition of the sale contract and drawing up the features thereof, while the second theme is devoted for exploring the stance of the Islamic jurisprudence towards this subject.

2-1 Stance of the Islamic Sharia towards the definition of the sale contract

Sale in language is: handing over the subject of sale and receiving the price, or taking possession of the subject of sale and paying the price. Purchase, however, falls within the meaning of taking possession for a compensation, or acquisition of a property for property, yet in [Arabic] language both acts of sale and purchase are synonymous; thus the act of the seller can be called as: sale and purchase, and the same applies to the act of the buyer, an example

of which is the saying of the Almighty God (They had him bought) [Yousef: 20], where the meaning of (had him bought) in this noble verse is sold. Moreover, both terms of purchase and sale are given to the act of the seller and the buyer in [Arabic] language. However, it the customary practice designates the subject of sale by separating it from the seller, i.e. taking the subject out of the ownership, while it designates the purchase and buying by the act of the buyer, i.e. adding the subject to the ownership. [1]

The legitimacy, limits and foundations of sale are clear in the Holy Book, Sunna and Consensus, as Allah says in his Book: (But Allah has permitted trade and has forbidden usury) [Al-Baqara: 275], and says in An-Nisa Surah (O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent.) [An-Nisa: 29]. When the Prophet (God's blessing and peace be upon him) prohibited sales on which both parties to the transaction agreed, the jurist deduced that the Almighty God permitted sales except for those prohibited by the statement of his Prophet (God's blessing and peace be upon him) or having the meaning thereof; thus, in case of concluding a permitted sale contract after which they leave each other by mutual consent, neither party may return the same but for a defect or an option clause. 2 Furthermore, Allah says: (And let there be witnesses whenever you conclude a sale) [Al-Baqara: 282], and He says:

[1] Abdul Rahman Bin Mohammed Awadh Al-Jaziri, Al-Fiqh ala Al-Mazaheb Al-Arba'a (Jurisprudence in the Four Doctrines), V. 2, Ed. 2, Book of Rules of Sale and its related matters, Sale and its Definition, Scientific Book Publishers, Beirut, 2003.

[2] For more, see: Imam Abu Abdullah Mohammed Bin Idris Al-Shafi'e, Al-Um, V. 5, Al-Fiker Publishers and Press, Beirut, 1990, p. 172.

(By men who neither trading nor commerce distracts them from God's remembrance.) [An-Nour: 37] [1]

In Prophet's Sunna (tradition of the Prophet), the Prophet carried out sale, and saw the people deal in sale and purchase, which he confirmed and did not forbid them to do so. [2]

The foregoing falls within the meaning of Hadith (saying) of the Prophet (God's blessing and peace be upon him): (To have one of you to gather firewood and carry the same on his back is better than begging someone for charity, whether the latter gave or prevent it), his (God's blessing and peace be upon him) saying: (May Allah have mercy upon a man at selling, at buying and at completing the deal), and his saying in the matter of man's breadwinning and hand working: (No one would ever eat any food better than that earned by his own work, and even God's Prophet David was eating from what he earned by working.)

As for payment, God's Prophet (God's blessing and peace be upon him) said: (If it was a straight acceptance and delivery transaction, then it is accepted, but if it was deferred then it is invalid). [3]

In this respect, there is a narration from God's Prophet (God's blessing and peace be upon him) that he said: (gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt in equal proportions, and

[1] In Sahih Al-Bukhari: (They used to conclude sales and trade, but if they had one of the rights of the Almighy God, the trade or sale did not distract them from reminding themselves of Allah until they have performed the same to Allah), Sahih Al-Bukhari, V. One, P. 3, Al-Jalil Publishers, Beirut, no publication year, p. 72.

[2] Ali Haidar, Durar Al-Hukkam fi Sharh Majalet Al-Ahkam (Jewels of Rulers in Exposition the Journal of Rulings), V. 3, Al-Jeel Publishers, Beirut, 1991, p. 101.

[3] Recited by Al-Bukhari in his Sihah, ibid, pp. 72, 74, 75.

in similar amounts, on a straightforward basis, and this who adds or increases the amount commits usury, and if these sorts were different then sell as you want); thus, his saying (sell as you want) is an express statement permitting the sale. [1]

The Prophet (God's blessing and peace be upon him) preferred sale as means of transaction between people, as he said (best earning is an accepted sale and best work is that done by the man himself), recited by Ahmad, Al-Tabarani et el. The accepted sale here is soundly done where the seller does not cheat, deceive or disobey the Almighty God, and it is legitimate because of the exchange of benefits between the people and the cooperation achieved amongst them. [2]

To this end, At-Tirmidhi also related from Sakher Al-Ghamedi that the Prophet (God's blessing and peace be upon him) said: (O God! invoke a blessing on my nation in its early pursuit of subsistence), he said: if he dispatched a detachment or an army he did so in the early morning, and Sakher was a merchant who used to send its merchandise for sale in the early morning, and therefore he became wealthy. Furthermore, Ali the Companion related that the Prophet (God's blessing and peace be upon him) said: (The Almighty God likes to see the servant of God in pursuit of lawful livelihood), recited by Al-Tabarani. Rafe'a Bin Khadij related that some said: O Prophet of God, which earning is more blessed, he said: "Man's hand work and every

[1] Recited by Muslim in his Sihah, related by Abi Hurairah (may God be pleased with him), Dr. Muthanna Al-Nu'aimi, Definition of Sale, its Legitimacy and Elements, www.alukah.net, date of subject addition: 31/03/2015, accessed on 20/11/2018.

[2] ibid.

accepted sale," recited by Ahmed and Al-Bazzaz, and recited by Al-Tabarani from Ibn Omar. [1]

Within the contract sale in Islamic Sharia falls what is known as (Bai' Assalam) or (forward or future sale or sale for advance) as in Sahih Al-Bukhari [2] the following was reported: (The Prophet (God's blessing and peace be upon him) came to Madina and found the people give yield of tree in advance for a year or two, or said two years of three according to Ismail, so he said: let this who gave dates in advance do so using a fixed measure and a fixed weight), and in another narrative the Prophet said: (using a fixed measure and a fixed weight for a fixed term). Sahih Al-Bukhari also reports: [We were giving advance at the time of the Prophet (God's blessing and peace be upon him), Abu Bakr and Omar in wheat, barley, raisins, and dates]. [3] Furthermore, Sahih Al-Bukhari also reports: [… said I asked Ibn Abbas (may God be pleased with him) about advance sale of dates, and he said that the Prophet (God's blessing and peace be upon him) prohibited the sale of palm until the produce thereof could be eaten and until weighing the same; the man said: what is to weigh? A man who was standing next to him said: until gathering.][4]

The legitimacy of future sale (as a type of sale contracts) is consistent with the requirements of the Islamic Sharia and in accordance with the rules thereof, and is not in violation of the juristic reasoning (deduction), because

[1] Al-Sayyed Sabeq, Jurisprudence of Sunna (Prophet's Rubric), P. 3, Ed. 21, Al-Fateh Publishers for Arab Media, Cairo, 1999, p. 88.

[2] Al-Sayyed Sabeq, ibid, p. 11 and sb.

[3] Some add oil in certain narrations reported in Sahih Al-Bukhari.

[4] Sahih Al-Bukhari, ibid, p. 112

as it is permissible to defer the price in sale, it is also permissible to defer the subject of sale in future sale without differentiating between both, as Almighty God says: (O you who have believed, when you contract a debt for a specified term, write it down.)[1]

Debt is the deferred amount of guaranteed payable property; thus, when the subject of sale was described, known and guaranteed to be paid, and when the buyer is certain that the seller would deliver the subject of sale on time, the subject of sale shall be then deemed as debt that can be deferred within the meaning of the Quran verse. As Ibn Abbas (may God be pleased with him) said: Selling what one does not have does not fall within the prohibition by the Prophet (God's blessing and peace be upon him) about which he said to Hakim Bin Hizam: (Do not sell what you don't have) [2], since the purport of this prohibition is that a man should not sell what he cannot deliver, since what he cannot deliver actually implies that he does not have it, and thus such sale is nothing but a jeopardy and adventure. [3]

As for consensus as a source of Islamic Sharia, all Imams of the four doctrines agreed on the legitimacy of sale, and as means of acquisition. [4]

2-2 Disagreement of Islamic Jurisprudence in Defining the Sale Contract

Definition of the sale contract perhaps is one of the topics in which the disagreement of Islamic jurisprudence significantly appears, due to the importance and ancientness thereof on the one hand, and because it is

[1] Al-Baqara Sura: 282.

[2] Hadith documented by Ahmed, As'hab Al-Sunan, and revised by At-Termizi and Ibn Habban.

[3] Al-Sayyed Sabeq, ibid, pp. 120-121.

[4] Ali Haidar, Durar Al-Hukkam, ibid, p. 101.

considered as one of the best means for transacting and dealing between people on the other hand. Thus, *Bidayat al-Mujtahid wa-Nihayat al-Muqtasid* Book [1] stated: (Every transaction is made between two parties, thus it could be executed by an object for an object, an object for a liability, or a liability for a liability, and each of these three methods is either a sale on credit or an immediate sale, and each of these also is either immediate by both parties, or immediate by one party and on credit by the other; thus, there are nine types of sale. The sale on credit by both parties however is not permitted by consensus not in an object nor in a liability, because the debt for a debt is prohibited. The names of these sales are: Some of which before entering into contract and at contracting, and some relating to the subject of the sale; thus, if the same was by an object for an object, it would definitely be a price for a priced item or a price for a price, so if the same was a price for a price it shall be called a sale of exchange, and if the same was a price for a priced item it shall be called an absolute sale, and the same applies to a priced item for a priced item on the terms to be set out hereunder; yet if the sale was by an item for a liability, it shall be called as a forward sale, if it was on an option, it shall be called as an option sale, if it was on Murabaha, it shall be called as Murabaha sale, and if it was by auction, it shall be called as sale by auction.) The author of Al-Sara'er defined it as (the transfer of an owned object from a person to another for an estimated compensation by mutual consent). [2] The author of Subul Al-Salam defined it as (transfer of ownership of a property

[1] By Imam Abu Al-Walid Mohammed Bin Ahmed Bin Rush Al-Qurtubi, AKA Ibn Rushd the Grandson, p. 2, Al-Fiker Printing, Publishing and Distribution, Beirut, 1995, p. 102.

[2]Abu Jaafar Mohammed Bin Idris Mohammed Al-Ajali, Al-Sara'er, P. 14, Al-Yanabe'a Al-Thahabiah Series, no publication year, p. 289.

for a fund by consent). Furthermore, Al-Maqdisi, the author of Al-Iqnaa, defined it as (an exchange of a property, even if as a deferred liability, or permitted benefit, such as the right of way, for an equivalent amount of either of them in perpetuity without a usury or loan), while Al-Haskafi defined it as (the exchange of a desired item for an equivalent), while Al-Shalabi defined it as (the exchange of a property of a permitted benefit for a property of a permitted benefit by means of transfer of ownership and acquisition). Al-Nawawi defined it as (the exchange of a property for a property or the like by means of transfer of ownership), while Abu Qudamah concluded in his definition of the sale contract to that (it is the exchange of a property for a property by means of acquisition or transfer of ownership.)

It is noted that each of these definitions sheds the light on a certain point different from the others; as some of the scholars focused on the effects of the sale contract which lead to transfer of ownership from a person to another, while others introduced the definition thereof with the term (transfer of ownership) because this contract entails mutual transfer of ownership and acquisition of the subject of sale and the price. In addition, some of these definitions focused on describing the sale process as (exchange of property for a property), in addition to the focus on the element of mutual consent of the parties to the sale contract. It is also noted that part of the Islamic jurisprudence in this matter focused on the necessity of having such an exchange relating to a property of permitted benefit, i.e. which may be dealt with by Sharia, where anything to the contrary would not be included in the scope of this contract.

In conclusion, these definition do not differentiate between sale and bartering, because the sale in Islamic jurisprudence can take place by selling an object for cash, i.e. the absolute sale, an object for an object, i.e. the bartering, a cash

for a cash, i.e. the exchange sale, or a deferred object for an immediate price, i.e. the future sale. [1]

Some of the concerned in Islamic jurisprudence argues that the term sale is given to both, as they both are of the common words for antonyms. The sale by Sharia means (the exchange of a property for a property by mutual consent, or the transfer of a property for a compensation as permitted). God permitted the sale as a facility by Him to his servants, as every human being has necessities to meet such as food, clothing, etc, which are indispensable as long as the human is alive, and which a man cannot provide on his own because he is forced to obtain them from others. Thus, there is no way better than bartering, as he would give what he can dispense with for a compensation for which he stands in need to be taken from another person. [2]

The Journal of Judicial Rulings followed the tracks of the Islamic jurisprudence in defining the sale contract, where Article (105) thereof provided for that (Sale is the exchange of property for a property whether or not under a contract.

This means, according to the interpretation of the author of *Durar Al-Hukkam fi Sharh Majalet Al-Ahkam* that the sale is particularly the transfer of ownership for a property, which can be divided, as an absolute sale, into a sale under contract and a sale without a contract.

This definition is the same for purchase as well, and all that applies to the sale also applies to the purchase in all aspects. Thus, when we say exchange of a property for a property, this would exclude the lease, marriage, donation and

[1] Tareq Kazem Ajil, Al-Wasit in the Sale Contract, Comparative Study, Al-Hamed Printing Press, Amman, 2009, pp. 37- 39.

[2] Al-Sayyed Sabeq, ibid, p. 89.

lending. However, when we say (particularly), this would exclude the donation and gift on the condition of compensation. The particular aspect of sale is the use of the term (sell and buy) or dealing, for example: if a person donated a property to another and delivered the same thereto, and if the donee donated and delivered another property to another, this cannot be deemed as a sale and deviates from the definition of the sale contract although there is an exchange of a property for a property since both terms (sell and buy) relating to the sale were not used in the contract.

The concluded sale is divided into valid, defected, effective and conditional [1], yet the sale without a contract is the invalid sale. [2]

There is another argument in another elucidation of the Journal of Judicial Rulings [3], at addressing the provisions of Article (105) of the Journal, that the wording did not contain mutual consent to address the simulated sale since it is concluded even if not binding and not limited as of specific benefit so to address the sale of Dirham for a Dirham of equal weight and description which is deemed as concluded even if defected, and it further address the bartering by a partner of the share thereof in a house for the share of the other

[1] Article 106 of the Journal

[2] Article 107 of the Journal. The valid sale means the permitted sale which is legitimate in origin and description. The defected sale is the a legitimate sale by origin rather than description, i.e. it is valid per se yet defected considering some of the unlawful description therein. The invalid sale is that which is by origin invalid and is not originally permitted, while the conditional sale is a sale to which the right of a third party is attached, such as the *Negotiorum gestio* sale. Refer to Articles 108, 109, 110 of the Journal of Judicial Rulings.

[3] Salim Rustum Baz Al-Libnani, Exposition of the Journal, V. 1, Ed. 3, Scientific Book Publishers, Beirut, no publication year, p. 65.

partner in case of condominium and equal shares, since the same is considered concluded even if defective, where it is evident that generalization has precedence over limitation in all the foregoing because if we intend to have a definition for sale in general

Murshid Al Hairan Ila Maarefat Ahwal Al-Insan Book [1] was influenced by Hanafi Jurisprudential doctrine in the definition of the sale contract, which stated in Article (343) thereof that: (Sale contract is the transfer by the seller of ownership of a property to the buyer for a property that is the price for the subject of sale).

This definition does not deviate from the definitions in the Islamic jurisprudence in general, such as in using the term transfer of ownership and naming the parties to this contract, i.e. the seller and the buyer. This definition entails a broad meaning for the sale contract which covers the absolute, bartering, exchange and future sale. [2] The author of this book confirmed what some jurists stated that the subject of the contract must be a property of a permitted use capable of being delivered and duly known to the buyer which knowledge prevents invoking lack of knowledge. [3]

3- Legal Nature of the Definition of Sale Contract in Arab and Foreign Laws

The positive laws, whether Arab or foreign, differ in their definition of the contract sales. As for Arab laws, we can divide the definitions thereof the sale contract into three parts, some of which influenced by the Islamic

[1]Mohammed Qadri Pasha, Murshid Al Hairan Book, Ed. 1, Arab Publishers and Distributors, Amman, Jordan, 1987, p. 93.

[2] Note Article 352 of Murshid Al Hairan Book.

[3] Article 366, 382 of Murshid Al Hairan Book

jurisprudence and *verbatim* copied there from, some attempted to mix between the Islamic jurisprudence and the contemporary laws, while some sought to modernize this definition under the influence of western laws.

As for the foreign laws, they also vary in their trends and philosophies, whether Latin, Germanic, or Anglo-Saxonic (Anglo- American).

In order to better touch on this topic, we will divide it into two themes, in the first theme we will address the legal nature of the definition of the sale contract in Arab laws, and will devote the second for exploring the difference in defining the sale contract in some foreign laws.

3-1 Legal Nature of the Definition of the Sale Contract in Arab Laws

The Egyptian civil code was influenced by the French law, avoiding the criticism thereto as to the role of the sale contract in transfer of ownership from the seller to the buyer, as Article (418) of the Egyptian Civil Code defined the sale as (A contract under which the seller undertakes to transfer to the buyer the ownership of a thing or other financial right in return for a cash price). [1]

This definition is derived from the old civil Egyptian law as well as from the Polish law, yet it is distinguished from the old Egyptian law by that it does not limit the sale to the ownership of things, but rather goes beyond that to cover the other financial rights such as the easements and usufructs, where the personal rights, such as the transfer of rights, and the moral, technical and industrial property right, can be subject of the sale. This definition is also distinguished from the former one in designating money as the price in the

[1] **Arab Republic of Egypt, Ciivil Law, Ed. 6, General Organization of State Printing Press, Cairo, 1996.**

sale contract to distinguish the sale contract from the bartering contract. [1] However, some criticizes this definition for discarding the most important effect of the sale in the Islamic jurisprudence and modern laws, i.e. the transfer of ownership upon concluding the contract. It seems that the reason that made the Egyptian legislator adopt this trend is that the ownership of things identified by their type rather than by themselves cannot be transferred under the contract itself where they must be first partitioned. [2]

The Iraqi civil code followed the steps of the Journal of Judicial Rulings in definition thereof of the sale contract, where it made the sale inclusive of the general sale, exchange sale and bartering, and it did not deem it necessary to refer to (Bai' Assalam) future sale after permitting the sale of the future things in general, not only in the future sale, although the sale of future things is not exactly identical to Bai' Assalam and the terms thereof as established by the Islamic jurisprudence which avoid jeopardy and gross unawareness. This is exactly what Article (506) of the Iraqi Civil Code embodied, which defined

[1] Some of those who interpreted the Egyptian Civil Code consider that the Egyptian legislator was successful in defining the sale contract in Article (418) thereof; one of those who adopt this point of view is : Khamis Khudur, Sale Contract in Civil Law, Al-Fikr Al-Arabi Publishers, no publication year, p. 10.

[2] Our professor Saadoun Al-Ameri, Al-Wajiz in Exposition of Nominate Contract, P. 1, in Sale and Lease, Ed. 3, Al-Ani Printing Press, Baghdad, 1974m pp. 9-10. Some of the Arab texts which are identical to the Egyptian text, Articles (386) of the Syrian Civil Code, Syrian Civil Code enacted by Decree Law No. 84 dated May 18th, 1949, prepared by Mamdouh Utri, Al-Nouri Est. for Printing, Publishing and Distribution, Damascus, 2009; Article (407) of the Libyan Civil Code, Libyan Arab Jamahiriya, Administration of Law, Civil Code and its Complementary Laws, Ed. 1, 2003; Article (351) of the Algerian Civil Code, Civil Code in the Light of Judicial Practice, Birti Publications, Algiers, (2009- 2010).

the sale as (Sale is the exchange of one property for another property) [1]. Then Article (507) of the Iraqi Civil Code provided for that (Sale as regards the object of sale is the sale of a property for a currency which is known as the general sale, the sale of a currency for a currency which is known as the exchange, or the sale of a property for another property which is known as bartering.) Some of those who explained the civil code criticize this definition for not being deterring because it includes bartering and exchange, and is limited to describing the sale process itself without addressing by its provisions the persons or effects thereof. [2]

The Sudanese Civil Transaction Law of 1984 [3] was influenced by the Islamic jurisprudence which provided for that (Sale is the transfer of a property or a financial right in return for a compensation). The phrase (transfer of a property in return for a compensation) or as called in the Jordanian Civil Code (for a consideration) as will be indicated hereunder, was taken as we noted from the Islamic jurisprudence, which means that the Sudanese legislator adopted the sale contract in its broad meaning which includes the general sale, exchange and bartering. Moreover, the Sudanese legislator adopted the (Bai' Assalam) future sale in articles (217- 221), in which manner the Sudanese legislator permitted the sale of future things on the terms established by the Islamic jurisprudence, in spite that there is a general

[1] This article copied from Article (105) of the Journal of Judicial Rulings.

[2] Said Mubarak, Saheb Ubaid Al-Fatlawi, Taha Malahweish, Al-Wajiz in Exposition of the Iraqi Civil Code (Sale, Lease, Contracting), Al-Hikma Printing and Publication, Baghdad, 1993, p. 9.

[3] Issued by the Ministry of Justice of Sudan, no publication year.

provision permitting having the subject of contract a future thing if it was designated in a way not allowing for unawareness and jeopardy. [1]

The reliance of the Sudanese legislator on the Islamic jurisprudence at addressing the definition of the sale contract as to the compensation therein is confirmed by the provisions of Article (185/b) which states: (The nominated price must be known at the time of sale, where it is to be known by indicating the amount, type and description thereof if it was not present). This implies the permissibility of using currency as compensation by designating the type and amount thereof, or as similar items by designating the type, description and amount or as items of value provided that to designate the descriptions.

The Civil Transaction Law of the United Arab Emirates defined the sale contract in Article (489) thereof which provided for that: (Sale is the exchange of a non- monetary property for a monetary property). This definition seems to be clearly influenced by the Islamic jurisprudence and the Journal of Judicial Ruling, yet it stipulated for the compensation to be performed in cash. In this particular part, it followed the provisions of Article (418) of the Egyptian Civil Code and some other laws which stipulated for the price to be performed in cash, as in the English, as we will note. Thus, it has adopted one form of sale in the Islamic jurisprudence, i.e. the general sale without expanding to cover other forms of sale such as bartering and exchange. As for bartering, this law has regulated it in a separate contract,

[1] Article (79/2) of the Sudanese Civil Code. The influence of the provisions of Article (418) of the Egyptian Civil Code is evident in definition of the sale contract in Article (178) of the Sudanese Civil Code through the phrase (or a financial right) set forth in the Egyptian text.

although it appears that the UAE legislator sensed that it is not completely independent as he regulated the same along with the sale contract in one chapter under the title (Sale and Bartering) instead of regulating the same in a separate chapter is he did with respect to other nominate contract. [1]

The Kuwaiti Civil Code preferred the customary practice, i.e. the general sale, in defining the sale in Article (454), where the definition thereof included the most important characteristics of the sale contract; the transfer of ownership of the property, i.e. the transfer of ownership of the financial right for a monetary compensation, since it is an ownership transferring action distinguished from the lease, and further since it is a compensatory action distinguished from the gift contract, and since the compensation therein is an amount of money distinguished from the bartering contract. [2]

A distinguished example of the definition of the sale contract is that provided for in Article (372) of the Lebanese Law on Obligations and Contracts [3] which provided for that (Sale is a contract under which the seller undertakes to transfer the ownership of an object, and under which the buyer undertakes to pay the price thereof). This definition is close to the Egyptian codification,

[1] Law on Civil Transactions of the United Arab Emirates, Lawyer Society, 1980, Adnan Sarhan, Exposition of the Provisions on Nominate Contracts in the Law on Civil Transactions of the United Arab Emirates, P. 1, Sale Contract, Ed. 1, Wael Publishers, Amman, 2005, pp. 24- 25.

[2] Article (454) of the Kuwaiti Civil Code defined the sale contract as : "Transfer of the ownership of an object or transfer of another financial right in return for a monetary compensation." See : Kuwaiti Legislations No. (3), (5), Kuwaiti Civil Code, Decree Law No. 67 of 1980, Interpretative Memo, Ed. 2 Kuwaiti Bar Association, Edition of 2004 and Edition of 1987, p. 143.

[3] Enacted on 09/03/1932, Zein Law and Literature Library, Ed. 6, Beirut, 2012.

as it does not mention with respect to the subject of the sale but the ownership of the object, and does not state for a cash compensation as a price. [1]

3-2 Legal Nature of the Definition of the Sale Contract in Foreign Laws

Foreign laws also some way or another differ in their definition of the sale contract. The French Civil Code, which disposed of the forms and signs which were known in the Romans, and by which the legislator of the French law (Napoleon Law) in 1804 was influenced, yet it maintained the delivery and considered the same as the usual way for transfer of ownership. The development of this law however resulted in having it suffice with the formal delivery, as it is sufficient for completing the delivery to indicate the delivery has taken place in the contract, although if such a statement is inconsistent with the reality.

Jurists disagree in interpreting Article (1582) of the French Civil Code which defined the sale as: (A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it. It may be made by an authentic instrument or by an instrument under private signature) [2], as some of them consider that the sale contract does not transfer the ownership to the buyer because Article (1582) of the French Civil Code binds the seller to deliver the subject of sale, while the predominant opinion sees that other articles of the French Civil Code complement the provisions of Article (1582)

[1] Abdul Razzaq Ahmad Al-Sanhuri, Al-Wasit in Exposition of the Civil Law and Contracts on Ownership, Sale and Bartering, Al-Halabi Law Publications, Ed. 3, Beirut, 2009, p. 20.

[2] (A sale is an agreement by which one person binds himself to deliver a thing, and another to pay for it. It may be made by an authentic instrument or by an instrument under private signature). French Civil Law, Translated by Georges Rouhette, Professor of law, with the assistance of Dr. Anne Rouhette, Berton, Assistant Professor of English, 2009, p. 186

and assert that the sale contract is an act of transfer of ownership such as Article (1138) of the French Civil Code which states that the obligation of transferring the ownership takes place when the volitions of both parties meet [1], as well as Article (1583) which stipulate that the ownership is transferred to the buyer as of the time of agreement of both parties on the subject of sale and the price, even if the subject of sale has not yet been delivered or the price has not been yet paid to the seller. [2]

As for the position of the German Civil Code, Article (433) thereof provided for that: (Under the sale contract, the seller of a thing undertakes to deliver the same to the buyer, and to transfer the ownership of such thing thereto). The position of the German law is criticized for connecting the transfer of ownership since as the delivery to the buyer allows for taking possession of the subject of sale and gives rise to the right to ownership at the same time.

The Swiss Code of Obligation followed the example of the German law in describing g the nature of the sale contract as Article (184) thereof defined the sale as (a contract whereby the seller obligates himself to deliver to the buyer the object of the purchase and to transfer title thereto to the buyer, and the buyer obligates himself him to pay the purchase price to the seller).

[1]Art. 1138 : (An obligation of delivering a thing is complete by the sole consent of the contracting parties. It makes the creditor the owner and places the thing at his risks from the time when it should have been delivered, although the handing over has not been made, unless the debtor has been given notice to deliver; in which case, the thing remains at the risk of the latter), op. cit., p. 148.

[2] Art. 1583 : (It is complete between the parties, and ownership is acquired as of right by the buyer with respect to the seller, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered or the price paid). op. cit., p. 186.

Sale in the English law does not transfer the ownership but rather it results in obligation upon the seller to transfer the same to the buyer, as this law defines it as (a contract under which the seller transfers or undertakes to transfer the ownership of the commodity to the buyer for a monetary compensation known as the price).

The American jurisprudence take on the same approach by defining the sale as (transfer of the right to ownership from the seller to the buyer for a certain price), while the US Uniform Commercial Code defines the sale as (transfer of the ownership of the commodity from the seller to the buyer for a price paid by the latter.) [1]

The position of the English and the American laws represent what it known as the Anglo-Saxon Law or the (Common Law), and sometimes as the public law. The most notable countries that adopt this trend (the Common Law) are the United Kingdom, the United States of America, Canada, Australia and New Zealand. [2]

It is noteworthy to indicate that Article (418) of the Egyptian Civil Code was influenced by Article (294) of the Polish Law which provided for that the

[1] Tareq Kazem Ajil, ibid, pp. 41- 42.

[2] Common Law (Anglo - American) : Is a system of principles and rules grounded in universal custom or natural law and developed, articulated, and applied by courts in a process designed for the resolution of individual controversies. In this general sense, the common law is the historic basis of all Anglo - American legal system. It is also an important element in the origin and plan of the United States Constitution. www.encyclopedia.com

sale contract is "A contract under which the seller undertakes to transfer the ownership of a thing or another financial right to the buyer who undertakes to pay the set price." [1]

An example that we attempted to use in defining the sale contract is Article (1458) of the Philippines Civil Code which provided for that: (By the contract of sale, one of the contracting parties obligates himself to transfer the ownership and to deliver a determined thing, and the other to pay therefore a price certain in money or its equivalent). [2]

In such a definition, the sale contract does not transfer the ownership but rather incurs an obligations upon the seller to transfer the ownership, which transfer of ownership, according to this definition, must be coupled with the delivery of the thing to the buyer, while this definition did not refer to the financial rights as a subject matter of the sale contract. The most importance feature of he sale contract in this definition is the obligation of the buyer to pay the agreed upon price or the equivalent thereof, whether the same meant an equivalent in another currency or an equivalent by delivery of a property in the form of a commodity or right of a financial value in transaction. What leads us to this interpretation is the general nature of the text which should be taken as such unless there is an evidence of limitation either by provision or indication.

Due to the development of the technology and computer science, the sale contract has become more difficult. In a poll conducted in 2018 for sale

[1] Saadoun Al-Ameri, ibid, p. 11, Footnote No. (2).

[2] Art. 1458 : (By the contract of sale, one of the contracting parties obligates himself to transfer the ownership and to deliver a determinated thing, and the other to pay therefore a price certain in money or its equivalent). The civil code of the Philippines

representatives, the sale contract faced several difficulties in the recent years due to the changes in technology and reaching in general to potential clients.[1] In the light of the contemporary variables, the sale contract is defined as (the general system of work required for developing, managing, enabling and executing the exchange of benefits of goods or services with a view to realize an equitable value. [2]

Some defines the sale contract from the point of view of management and economics as (part of the marketing).

Nowadays, many consider that (sale is a kind of mastering the art, to the contrary of the common belief, the systematic work in sale refers to a systemic process of recurrent and measurable milestones, through which a seller connects with his offer, product or service to a compensation allowing the buyer to economically achieve his goal). [3]

4-Approach of the Jordanian Law and Jurisprudence to Definition of the Sale Contract

The Jordanian Civil Code defined the sale contract when it replaced the Journal of Judicial Rulings in 1976 [4], as Jordan was governed, in terms of regulating all transactions, to the provisions of the Journal of Judicial Rulings

[1] Sales statistics you need to know about right now! [INFOGRAPHIC]. Sales speaker Marce Wayshak. Retrieved 20-7-2018. https : www.marcewayshak.com/sales-statistics

[2] American Society for Training and Development (ASTD). Sales competency project. Archived from the original on 21-9-2008. Retrieved 7-3-2017. https ://web.archive.org/web/20080921095003/http

[3] Greening, Jack (1993). Selling without confrontation. The Haworth press, Inc. p. 23

[4] This law was enacted as a provisional law published in the Official Gazette Issue (2645) dated 01 /08 /1976 then it became a standing law under the Constitutional Declaration published on page (829) of the Official Gazette Issue (4106) dated 16 /03 /1996.

issued in 1286 AH, which implies that the former definition of the sale contract was based on the provisions of Article (105) of the Journal.

The current Jordanian Civil Code for the most part and as whole builds on the Islamic jurisprudence of all doctrines thereof, without failing to grasp what age requires as to dealing with and drawing up modern texts to keep up with the spirit, articles and concept of the law and be governed by the provisions thereof, and without having such texts give rise to any consequential effects deviating this law from the key source and Islamic jurisprudential nature thereof. [1]

The Definition of the sale contract in Article (465) was evidently influenced by the Islamic jurisprudence and the relevant Arab laws, such as the Egyptian and Iraqi civil codes. This definition however was subject to criticism and notes by those who assumed the task of explanation thereof and elaboration thereupon. We will address this topic in two themes, the first of which is devoted for clarifying the approach of the Jordanian Civil Code to defining the sale contract, while the second explores the opinions and notes of the interpreters of the Jordanian Civil Code relating to this definition.

4-1 Approach of the Jordanian Civil Code to Definition of the Sale Contract

The Jordanian Civil Code, in Article (465) defined the sale contract as : (transfer of the ownership of a property or a financial right in return for a consideration). The influence of the Islamic jurisprudence is noted in this definition and its historical sources, since the sale in the jurisprudence of the Islamic Sharia is based on transfer of ownership and taking possession; thus,

[1] **Jordan Bar Association, Expository Notes to the Jordanian Civil Code, P. 1, Ed. 2, Al-Tawfiq Printing Press, Amman, Jordan, 1985, pp. 15 - 20.**

the transfer of ownership of the subject of sale is what meant by the sale contract and taking possession of the price serves as the means thereto. Article (343) of *Murshid Al Hairan Ila Maarefat Ahwal Al -Insan* Book defined the sale contract as follows: (Sale contract is the transfer by a person of the ownership of a property to another for a compensation estimated by mutual consent). Furthermore, some of those concerned in Islamic jurisprudence and its jurisprudence defined it as : (The transfer of a property for a compensation as permitted therein). [1] This definition was clearly influenced by Article (105) of the Journal which defined the sale as (Sale is the exchange of property for a property whether or not under a contract), which is the same definition adopted by the Iraqi Civil Code in Article (506) thereof. [2]

The Jordanian text further followed some of the features of the Egyptian text in Article (418), where the latter has referred to (the financial right), which was taken by the Jordanian legislator without thorough examination, while other laws have considered the same and avoided mentioning it as in Article (489) of the Civil Transaction Law of the United Arab Emirates.

It is of importance for us in this occasion to indicate that this definition was overall and unrestricted as it covers the general sale, bartering, exchange and future sale, which emphasizes that the Jordanian legislator has followed the tracks of the Islamic jurisprudence which clearly manifested the same. [3]

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[1] See in this respect : Al Hassan Bin Al Mutahhar, AKA Scholar Al Helli, Tazkeratul Fuqahaa, Contract of Sale, p. 3, as referred thereto by out Professor Saadoun Al-Ameri, ibid, p. 12; Al-Sayyed Sabeq, ibid, p. 89.

[2] Jordan Bar Association, Expository Notes to the Jordanian Civil Code, P. 1, Ed. 2, Al-Tawfiq Printing Press, Amman, Jordan, 1985, p. 495.

[3] See : Ibn Rushd the Grandson, ibid, p. 102, to which was have already referred.

The provisions of the Journal of Judicial Rulings clarifies to the us the purport of this definition, as Article (120) of the Journal provides for that : (Sale, considering that the subject of sale is divided into four parts, the first of which is the sale of a property for a price, and since this is the most common part, it is called as sale; the second part is the exchange, the third part is the bartering and the fourth part is Bai' Assalam, i.e. future sale). Article (121) of the Journal defined the exchange as (sale of a cash for a cash), while Article (122) of the Journal defined the bartering sale as (sale of an object for an object, i.e. exchange of a property for a property without using the two moneys). [1] As for the future sale, it is (a sale of deferred commodity for an advance), since (the sale of a deferred commodity for an advance in future sale is valid under the conditions thereof). [2]

The Jordanian legislator continued to follow the steps of the Islamic jurisprudence and use the terms thereof not only in the sale contract, but also in other contracts, where these terms were clear in its definition of the bartering contract which the Jordanian legislator covered under the broad sense of the sale contract in Article (465), but then it later designated Articles (552 - 556) which were put under the title of sale and as a paragraph therein, rather than covering the same under a separate chapter as it did with respect to other nominate contract. Thus, Article (552) of the Jordanian Civil Code provides for that (Bartering is the exchange of a property or a financial right for a compensation other than moneys) [3], which was repeated by the

[1] Moneys is the plural for money, which means gold and silver, Article 130 of the Journal.

[2] Article 123 of the Journal; Article 352 of *Murshid Al Hairan*.

[3] The Egyptian legislator designated a separate chapter for bartering in Articles (482 - 485).

Jordanian legislator in Article (557) of the Jordanian Civil Code which the legislator drawn up using the same terms of the sale contract by providing for that (donation is the transfer of ownership of a property or another financial right while the owner is alive for no consideration.)

Moreover, the Jordanian Civil Code mentioned the term (general sale) in several places such as, for example, in Article (499) of the Jordanian Civil Code which provides for that : (General sale requires the delivery of the subject of sale at the place of existence thereof at the time of concluding the contract), as well as in Article (566) of the Jordanian Civil Code which states (The provisions of general sale shall apply to bartering as to matters not inconsistent with the nature thereof).

Although the Egyptian and Iraqi Civil Codes do not contain special provisions for the future sale for absence of the need thereto since they both permitted the sale of future objects if they were sufficiently designated which prevents gross unawareness and jeopardy, as manifested in Articles (131 / Clause 1 of the Egyptian Civil Code, 514 / Clause 2 of the Iraqi Civil Code), the Jordanian legislator has designated separate articles, (Articles 532 - 538) for this type of sale. We are in favor of the Jordanian legislator in its distinction between the sale of future objects and conditions thereof and the future sale (Bai' Assalam) in Islamic jurisprudence and conditions thereof; since the future sale (Bai' Assalam) is the sale of a non - existing thing for a price immediately collected, provided that such an object is to be created and delivered to the buyer within a set term, and this what is known as the sale by bankrupts as jurists call it. The subject of sale in this sale is called as the delivered item, the seller is called as the recipient, the price is called as the capital, and the buyer is called as the owner of the future item or the giving party. In future sale (Bai' Assalam), the kind, type and nature of the subject

of sale must be known, where a term must be designated for delivery thereof, and a similar object must be available in the markets at the time of contracting to the time of scheduled delivery, where the existence thereof in markets must not cease between both times. Moreover, in future sale (Bai' Assalam) no different countable items may be contracted on, such as animals and jewelries. [1]

4-2 Opinions and Notes of the Interpreters of the Jordanian Civil Code Relating to the Definition of the Sale Contract

The interpreters of the Jordanian Civil Code unanimously agree on that the definition of the sale contract set forth in Article (465) of the Jordanian Civil Code was transcribed from several sources, one of which is the Islamic jurisprudence which is the second source for this law, and the other was Article (418) of the Egyptian Civil Code, in addition to being influenced by the Iraqi Civil Code as both codes are related to the historical source thereof (Islamic jurisprudence).

This definition was subject to criticism and various evaluation, as it is distinguished from the Egyptian definition by absence of reference to the obligation of transfer of the ownership. In our opinion, this difference can be held in favor of this definition rather than against it, since the term (transfer of ownership) is deemed as sufficient and adequate for the purposes of the sale contract. [2]

Furthermore, the Jordanian law, and as part of its adoption of the Islamic jurisprudence, does not impose an obligation upon the seller to transfer the

[1] See : Al-Sanhuri, ibid, p. 223; Al-Ameri, ibid, p. 71; Al-Sayyed Sabeq, ibid, p. 120.

[2] Transfer (n.) is the nomen verbi of transfer (v.); promised to transfer the ownership :- conveying the ownership to (someone), www.almaany.com, accessed on 10 /12 /2018.

ownership, but rather it transfers the ownership at the time of the contract if the subject of sale was an item that can be designated by itself or if the sale was in a lump. The ownership of a thing identified by its type rather than by itself cannot be transferred under the contract itself where the same must be first designated in accordance with the law. [1] Additionally, lack of a reference in the definition to the parties to the contract (the seller and the buyer) is clarified by two things, one of which is the other legal texts that clarify the transfer of the ownership to the buyer as set forth in Articles (485, 486, 487), and that the ownership may be transferred to a person other than the buyer when the contract contains a stipulation in favor of a third party. [2]

The most controversial point with respect to the definition of the sale contract in the Jordanian Civil Code is the nature of the consideration, i.e. the price or compensation to be performed by the buyer to the seller to procure the agreed upon subject of sale, as the Jordanian legislator in Article (465) of the Jordanian Civil Code used the phrase (in return for a consideration). Some of the interpreters are in favor of this definition in its broad sense, and consider it as the most comprehensive definition adopted by laws of Latin origins, including some of the Arab laws which limit the sale contract to the transfer of ownership of the property for a monetary price. According to this opinion, leaving the (consideration) open in this way would include the monetary price (general sale), bartering, exchange and future sale. There is however another opinion that tends to see that the sale contract set out in Article (465) of the Jordanian Civil Code means the general sale, i.e. the

[1] Articles 485, 486, 1146 and 1146 of the Jordanian Civil Code.

[2] Ali Hadi Al-Ubaidi, Nominate Contracts, Sale and Lease, Ed. 5, Al-Thaqafa Publication and Distribution, Amman, 2011, p. 16.

case in which the seller assigns the subject of sale in return for a monetary price. The proponents of this approach justify their stance by holding that the Jordanian legislator has defined the bartering and future sale and drawn up necessary provisions thereon, and further has determined to apply the provisions of the general sale to bartering in a manner that is non inconsistent with the nature thereof in Article (556). [1] Some add to this trend, as they believe to be a proof on the validity thereof, that the reality and customary practice is that the compensation for sale is either money or an object valuated in money, which is the applicable practice in our today's world with respect to the compensation for the sold property, where the reality serves instead of words, i.e. statement, since if it was not the case then it cannot be called as a sale in the legal sense. [2]

The difference and multitude of these opinions are attributed to the nature of the legal text in Article (465) of the Jordanian Civil Code, as well as to the multiple sources, the matter that renders it subject to criticism, analysis and evaluation, that require reconsideration as we would propose.

If the foregoing applies to the consensual contracts, which are deemed as the origin of contracting, there are contracts in which the form prescribed by law must be fulfilled, one of the most important of which is the sale contract. Article (485) of the Jordanian Civil Code provides for that : (The ownership of the subject of sale shall be transferred to the buyer at concluding the sale

[1] Note these opinions in the work of : Abbas Al-Abboudi, Exposition of the Provisions of Nominate Contracts in the Civil Code (Sale and Lease), Ed. 2, Al-Thaqafa Publication and Distribution, Amman, 2011, p. 29.

[2] Adam Wahib Al-Naddawi, Exposition of the Civil Code, Nominate Contracts (Sale and Lease), Ed. 1, Al-Thaqafa Publication and Distribution, Amman, 1999, p. 19.

unless otherwise required by law or agreed upon). [1] Furthermore, Article (1146) of the Jordanian Civil Code provides for that : (The ownership and other moral rights to the subject of transfer and property shall be transferred by contract whenever it satisfied the elements and conditions thereof in accordance with the provisions of the law), while Article (1148) of the Jordanian Civil Code which stipulates that : (Neither the ownership nor other moral rights shall be transferred between the contracting parties and in relating to third parties but by registration in accordance with the provisions of the laws related thereto).

The provisions of Article (16 /3) of the Law on Land and Water Settlement [2] can be viewed as a good example on the foregoing in relation to the sale contract and definition thereof which article provides for that : (In places in which a settlement has been made, the sale, bartering, or sharing of the land or water shall not be deemed valid but if the transaction was made at the Department of Registration). [3]

[1] The law may stipulate for a certain form for the sale contract which must be satisfied since such a form is considered as a matter of public order. However, the same does not prevent the contract to remain consensual provided that to be made in writing whether such a condition was made to establish the contract or as a requirement for conclusion thereof. In case that the subject of sale is a future item not made yet, the ownership thereof shall not be transfer to the buyer at concluding the contract since it does not yet exist. For more: Saadoun Al-Ameri, ibid, pp. 16, 100.

[2] No. (40) of 1952, as amended, published in the Official Gazette Issue 1113 dated 16 /06 /1952.

[3] As opposed to the text of Article (508) of the Iraqi Civil Code which states : (The sale of a real property shall not be concluded but if it was registered at the competent department and fulfilled the form provided for by law),

We believe that what is meant by sale as provided for in Article (16 /3) is the general sale in which the consideration is a monetary price, because this type of sale is one of the most common sales in our time. As for the bartering set forth in the article, we believe it means (bartering a property for a property) [1], i.e. bartering a land for a land based on the phrase (sale, bartering and sharing of the land), not to mention the title of the law itself which indicates that it deals with the settlement of lands and waters. [2]

The Jordanian judiciary followed the same approach of the Jordanian legislator in terms of taking the term (general sale) to mean the term (sale) in laws which stipulated for a monetary price as a consideration in the sale contract, where a ruling of the Court of Cassation stated that (the price in the general sale is immediately payable unless settling the same was deferred or made in installment for a defined term by agreement or customary practice)[3]

[1] Article (105) of the Journal.

[2] Noting that the existence of a building erected on the land does not prevent the application of the provisions of Article (16 / 3). For more details, see : Mohammed Yousef Al-Zu'bi, Nominate Contracts, Exposition of the Sale Contract in the Jordanian Law, Ed. 1, Amman, 1993, p. 279.

[3] Court of Cassation, Ruling in equity No. 1986 /846 dated 13 /12 /1986, published in the Journal of the Jordan Bar Association, 1989, p. 1745. We could not find rulings by the Jordanian Court of Cassation related to the subject of our research other than this one.

4- Conclusion

Addressing a very specific point such as the sale contract is not an easy task due to the narrow space in which the researcher can move. Such limitedness however, in spite of the criticality that it entails, creates in the researcher the motive for further research, investigation and use of the slightest and smallest piece of information to accomplish the research and complete the shape and plan thereof. Jurists principally disagree on the existence of a definition to this or that matter in the law, since the definition cannot at best be overall and all inclusive, because it is necessarily incomplete and subject to criticism and assessment. The definition of the sale contract however became an accepted fact as it exists in all laws which we have reviewed and some of which we used in this paper. It also exists in all Muslim jurists of different doctrines, and even within the same doctrine.

The importance of the definition of the sale contracts is manifested by that the definition is considered as a smaller picture of this contract and a key to the subsequent legal terms which should be consistent therewith and not contradictory to the content thereof, whether in the same civil code or in other laws that may one way or another deal with the sale contract.

In the light of the foregoing, this paper reached to a set of findings and recommendations :

5-1 Findings :

(1) The Muslim jurists in all doctrines, and even in the same doctrine, disagreed on the definition of the sale contract, which disagreement was deep to reach the elements of the sale contract such as the mutual consent which some stipulated in their definition while others did not

as we clarified in the researcher; thus, Article (105) of the Journal was explained as follows : (the wording did not contain mutual consent to address the simulated sale since it is concluded even if not binding), and even some of the interpreters of the Journal did not limit the same as to (be of a specific benefit). [1]

(2) All laws differ in their definition of the sale contract except for some Arab laws originating from the same source such as the civil laws in Egypt, Syria, Libya and Algeria. As to other Arab laws, they differ in their definition even those laws influenced by each other or which are in neighboring geographic regions, such as the definition set out in the Kuwaiti Civil Code which differs from that set out in the Law on Civil Transactions of the United Arab Emirates.

(3) The difference in definition also reached the laws which adopted the same source, as in the civil codes of Iraq and Jordan whose came from the same source (Islamic jurisprudence), but varied in developing a definition to the sale contract.

(4) Reliance on a more than source to draw up a definition or to formulate a legal article would certainly lead to having the legislator fall in contradiction and error, especially if he fails to note the nature of the law from which he copied and the philosophy of the legislator that he attempted to rely on, which we have actually noticed in the details of this papers.

(5) It is especially necessary to harmonize between the definition that comes in top of the subject and the subsequent legal articles, because any difference between them would lead to more interpretation and

[1] **Saleem Rustum Baz, ibid, p. 5.**

construction that would overburden the jurist at interpretation and encumber the judge in application thereof.

5-2 Recommendations :

(1) We wish for the legislator to be attentive at copying the definition or another wording from another law, because every law has its own historical and material sources, in addition to the circumstances that surrounded the promulgation thereof. Otherwise, the legislator would fell in the trap of contradiction and criticism, which actually happened with the Egyptian Civil Code which transcribed the definition thereof from the old Egyptian law and the Polish Civil Code as it referred to the obligation of the seller to transfer the ownership to the contrary of the basic rule which transfers the ownership of the object to the buyer at concluding the sale contract. It also used the phrase (the ownership of an object or another financial right) although it entails the same meaning, the matter that led other laws to deal with this defect by using the word (property) only without referring to the financial right, as happened with Article (489) of the Law on Civil Transactions of the United Arab Emirates.

(2) If copying in such a form would inherit such a defect, copying from a copied is even more painful, as actually happened with Article (465) of the Jordanian Civil Code which combined the Islamic jurisprudence and the Egyptian Civil Code, and thus it contained the phrase (transfer the ownership of a property) which came from the Islamic jurisprudence, then copied the phrase (the financial right) from Article (418) of the Egyptian Civil Code, while there is no difference between the property and the financial right as established by Article (53) of the Jordanian Civil Code which provides for that (Property is any object or

right of a material value in transaction). Other laws, such in Article (454) of the Kuwaiti Civil Code, were similarly entrapped.

(3) Consistency and harmony between the definition and the following or related articles even if they appear in other places is a matter of great importance, as we have observed herein. The basic rule or origin in the sale contract is the transfer of ownership in the same contract which principle is derived from the Islamic jurisprudence with certain exceptions to the rules which do not exceed the rule, as confirmed in Article (485) of the Jordanian Civil Code and Article (531) of the Iraqi Civil Code. The legislator however turned this rule into an exception and turned the exception into a rule as a result of the unsuccessful mixing between various sources of law, as clearly manifested in Article (247) of the Iraqi Civil Code and Article (1148) of the Jordanian Civil Code, both of which are of western origins.

(4) As a result of our study of and comparison between several definitions given to the sale contract, along with observing the effects thereof, taking into consideration the requirements of the present time and what is consistent with the nature of dealing nowadays, in which the sale for a monetary price is mostly common at all levels, we propose the following definition : (Sale contract is the transfer by the seller of the ownership of a property permitted to be dealt in to the buyer for an agreed upon monetary price or an equivalent thereto).

Such a definition would remove all reasons of weakness and ambiguity in the definition of the sale contract, as it clearly refers to the parties to the contract and to transfer of ownership by using the eloquent term (transfer of ownership) in its true meaning as we noted in the research. It does clarify the consideration in the contract, i.e. the monetary price

with which people usually transact in our country and in other country. If the origin of such a monetary price is the national currency, the contracting parties may for whatever reason agree upon paying an equivalent to this monetary price in the national currency, if the consideration therein was written in a foreign currency and vice versa as permitted by the applicable laws of the country.

(5) By such a definition, a set of other sales and contracts, such as bartering, exchange and future sale, will be reconsidered by regulating the same under separate provisions consistent with the nature thereof, as in the case of bartering and exchange, or by discarding some others such as the future sale (Bai' Assalam) which became rare nowadays and can be governed by the provisions permitting the sale of future objects, as some laws actually did such as the Egyptian and Iraqi Civil Codes, in spite that the latter is highly influenced by Islamic jurisprudence, and despite our understanding of the difference of conditions on sale of future objects in the modern meaning from the future sale (Bai' Assalam) according to the Islamic concept, yet the rarity or nonexistence of transaction in the latter sale requires such a change.

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THE SPECIFICITY (PROBLEMS) OF THE MORAL ELEMENT IN CYBER CRIMES

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Abstract

This paper deals with one of the controversial topics in the Criminal Code, namely the moral element of the crime, known as the criminal intent or the "intention of committing the crime", for a range of crimes of great importance and widespread, namely cyber crimes. The study of the moral element of these crimes raises the importance of being related to the intent and will of the offender, which raises controversy, difficulties and problems, both in terms of forms of criminal intent on the one hand, and in terms of the process of proof in the electronic environment on the other.

Therefore, the researchers dealt with this topic to identify those problems related to the moral element in two topics: The first topic deals with the problems of the general model (general purpose) of the moral element in cybercrime. The second topic concerns the forms of moral element in cybercrime. The study concluded a number of conclusions and recommendations related to this subject.

Keywords: Criminal Law, Penal Code, Cybercrime, Elements of Crime, Moral element

INTRODUCTION

The moral element, or “criminal intent”, is the intention to commit the crime. The Jordanian legislator in Article 63 of the Penal Code stipulates: "Intent: is the will to commit the crime." The French legislator referred in the Penal Code in the first paragraph of Article 121-3 of the Penal Code by saying: Intent to commit. “This means that all criminal offenses or always need to have a moral element based on the availability of intent even if it is not directly referred to. There is, however, an exception in the second paragraph of the same article: “However, when the law provides, a misdemeanor can be committed through recklessness, negligence or intentionally putting another person at risk”.[1]

Jurisprudence: The moral element is defines as: "The relationship between the materials of crime and the character of the perpetrator", it is the guilt for which the perpetrator deserves the punishment imposed by law[2]. This is the

[1] Toutefois, lorsque la loi le prévoit, il y a délit en cas d’imprudence, de négligence ou de mise en danger délibérée de la personne d’autrui.’

[2] Khaled Mamdouh Ibrahim, Cybercrimes, Dar Al Fikr University, Alexandria, 2007, p. 243.

general intent, to which the jurist (Garson) gave it the classic definition: "the will to commit the crime as defined in the law; so that the accused knows that it is against the law[1]". It is clear from the definition that the general intent has two elements: will and knowledge.

Most jurisprudence relied on this definition and these elements, for example (Merle and Vito) believe that the general intent is criminal science and will[2]. The element of knowledge requires that the accused realize that he is against the law, that this is presumed, it is not permissible to apologize ignorance of the law. Article 122.3 of the Penal Code also added a new presumption, stating that: "A person who justifies his belief that he can legally do the job cannot be criminally liable, as a result of a mistake in the law which he could not avoid"[3]. Knowledge of facts , which lies in the perpetrator's knowledge that the facts committed by him/her are only facts lead to the commission of the crime in the form defined by law.[4]

The element of the will depends on two elements: the will of the act or the will of the offender to act, this element is absent in the case of any defect of

[1] L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfeindre les prohibitions légales….' Emile Garçon, Code pénal annoté, 1ère éd., art. 1, no. 77.

[2] la conscience et la volonté infractionnelles': R. Merle et A. Vitu, Traité de droit pénal, no. 542.

[3] N'est pas pénalement responsable la personne qui justifie avoir cru, par une erreur sur le droit qu'elle n'était pas en mesure d'éviter, pouvoir légitimement accomplir l'acte.'

[4] Ahmed Mahmoud Mostafa, Computer Crimes in Egyptian Legislation, Dar Al-Nahda Al-Arabiya, Cairo, 2010, 1st floor, p. 114.

the will[1]. The result means that the perpetrator intends to commit the crime completely. There is also a moral element or a special criminal intent, which consists of two elements (knowledge and will)[2], in addition to a special intent lies in the purpose of the perpetrator. Here, the legislator often works on the use of a specific wording in the criminal text when linking the criminal intent to the end. Therefore, the criminal intent is general, and is not specific except when provided by the legislator. The legislator requests its own intent.

The moral element, which represents the intent and will of the offender, and is linked to the mechanics of the soul, it raises several difficulties and problems. These problems are increasing for cybercrime. One of these problems in relation to images of criminal intent on the one hand, or in terms of the process of proof in the electronic environment. Hence the idea of research came in order to address the problems related to the moral element.

Therefore, the researcher addresses these problems using the descriptive analytical research method by describing the forms of the moral element in cybercrime and illustrating their problems as follows:

[1] One of the most important drawbacks of will is coercion.

Article 74/1 of the Jordanian Penal Code stipulates: "No one shall be sentenced to a penalty unless he has acted consciously and voluntarily." The researcher here indicates that these provisions for cyber crimes are subject to the same general provisions, but the most important characteristic in the context of cyber crimes is the difficulty of proving them.

[2] Baha Al-Marri, Explanation of the Law Against Information Technology Crimes, Arab Publishing and Distribution, 2019, p. 38.

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TOPIC(1): PROBLEMS OF THE GENERAL MODEL (GENERAL INTENT) OF THE MORAL ELEMENT IN CYBER CRIMES

The moral element on the one hand concerns psychological and moral aspects. Of course, there is difficulty in the availability of the element, as the judge often has difficulty in extracting its elements, especially in the field of cybercrime, which are committed in electronic ways or aimed at a technical or virtual world. Problems that relate to the general model of the moral element may be related to the elements of the moral element itself on the one hand, or to its extraction process on the other, addressed in the two sections as follows:

SECTION (1): PROBLEMS RELATED TO THE CONTENTS OF THE MORAL ELEMENT (GENERAL PURPOSE)

The moral element consists of the elements of knowledge and will. The will is somewhat more important than knowledge. It is the essence of the moral element. Knowledge is not a requirement for itself, but it is a stage in the formation of the will, and a condition for its conception.[1] Criminal intent also outweighs the inadvertent error, because the origin of the crimes is to be intentional, so willfulness is more numerous, more serious, and more dangerous.

Willfulness is the directing of the will to create an order punishable by law.

[1] Fathi Ezzat, Crimes of the Modern Age, Dar Al Fikr Wal-Qanoun, Cairo, 2010, p. 312.

Therefore, it is absolutely necessary for the perpetrator to be aware of the truth of what he commits, and aware that his act is a criminal by law.[1]

Therefore, there are problems related to the element of will and problems related to the element of science as follows:

PART I: PROBLEMS OF THE WILL ELEMENT.

The element of will is the link between crime as a material fact, and the person who commits it. The will relates to the human being who is the perpetrator of the crime ,so looking for it means looking at the actor's will and intention.[2]

Here, talk about the element of will for the moral element in cybercrime will not change from its provisions for conventional crimes, as long as it is focused on the offender or the perpetrator of the crime, the actor is a human being in both conventional and cybercrime.

Jurisprudence differed on the legally considered will to establish criminal responsibility among three doctrines: the doctrine of freedom of choice, the doctrine of coercion, and the mixed doctrine that reconciles between coercion and freedom [3]. On this matter, we find that the Jordanian legislator has adopted the doctrine of freedom of choice, excluding the cases where freedom of choice does not exist. Article 92/1 of the Jordanian Penal Code stipulates: "Anyone who commits an act shall be exempted from punishment if, when he commits it, is incapable of realizing his actions or is unable to know that

[1] Hatem Abdel Rahman Shahat, cybercrimes, Dar Al-Nahda Al-Arabiya, Cairo, 2002, i 1, p. 345

[2] Mohammed Subhi Najm, Penal Code: General Section, Dar Al Thaqafa for Publishing and Distribution, Amman, 2016, 7th floor, p. 269

[3] Mahmoud Naguib Hosni, General Theory of Criminal Intent, Dar Al-Nahda Al-Arabiya, Cairo, 1978, 37.

he is prohibited from committing such act or because of an imbalance in his mind."[1]

Article 93 also stipulates: "There shall be no punishment for those who have lost their feeling or choice in their work at the time the act was committed because of alcohol or narcotic drugs of any kind, if taken without their consent or without their knowledge."[2]

With reference to the Cybercrime Act No. 27 of 2015, the legislator has not made any specific provision regarding these aspects for the moral element of cybercrime, which means that the general provisions of the Penal Code apply to the will element of the moral element, including the provisions of legal person's liability (Article 74 of Penal Code).

PART(2): PROBLEMS OF KNOWLEDGE

"Knowledge" means the perpetrator's knowledge of the physical elements of an act , result or causal relationship, or the special elements of the crime if any, or aggravating circumstances if any. The opposite of knowledge is the mistake about these things or ignorance of them with some differences between them. For example, there may be a mistake in an aggravating circumstance or one of the elements, herein there is no criminal liability.

Article 86/2 of the Penal Code stipulates: "If an aggravating circumstance is mistaken, the offender shall not be liable for this circumstance". For

[1] In exchange for freedom of choice, the Jordanian legislator took measures - not punishment - for the madman.

Article 92/2 states that: "Anyone exempted from punishment under the preceding paragraph shall be detained in a mental hospital until it is established by a medical committee report that he is cured and is no longer a danger to public safety."

[2] There is also article 94, which concerns the responsibility of young people. Article 88, which relates to coercion and article 89, which concerns the state of necessity.

example, in the case of cybercrime, "the perpetrator does not know that his action is to infiltrate a money transfer site is an aggravating circumstance under Article (7) of the Jordanian Cybercrime Law. With reference to the law of cybercrime, we find that it did not provide specific provisions for the element of knowledge, and therefore the provisions of the General Penal Code were applied to the element of knowledge in the moral element.

The mistake is different from ignorance (not being aware of the act it constitutes a breach of law). A mistake is knowledge of the elements or circumstances in a manner that contradicts the truth, such as the case of a mentally ill person, who will not be aware that he is committing the wrongful act, while ignorance is the absence of knowledge of the facts related to the formation of the crime. In unintentional crimes, punishment is not affected by knowledge, because responsibility in it is not linked to being aware that the act it constitutes a breach of law.[1]

Therefore, when the wrongdoer wrongs the facts, such as believing that he is the owner of the website or the information system, and access to the site, he/she will not be guilty. In return, the mistake will have no effect in certain cases, as the error in the facts not related to the physical elemnt of the crime will not prevent the existence of public intent. For example, anyone who commits the crime of hacking into a university site, believing it to be a bank site, still has the general intent to hack.

Also, the mistake in the result will not affect the criminal responsibility when the result is more severe than the result that the perpetrator wants, and this leads us to other forms of the moral element, the form of the potential intent.

[1] Decision of Discrimination No. 61/1979 of 1979 Journal of the Bar Association, p. 920

On the other hand, those who claim the lack of knowledge must prove it. This is one of the substantive defenses that need to be proved, as the judiciary is strict in proving the denial of knowledge in some cases but not others, such as proving the absence of knowledge of the age of the victim in the crimes of rape and indecent assault, confining it to exceptional circumstances only.

One of the elements that may affect knowledge or lack of knowledge in the cybercrime law, aggravating circumstances, as exemplified in cybercrime law which is the circumstance that the infringed system in the crimes of penetration and destruction of regulations relating to the transfer of funds and offsets (Article (7) of cybercrime law), or being aware of the specific elements of some crimes such as crimes against children, here still the law of cybercrime subject to the general provisions of the Penal Code.

Here we should mention another circumstance, but it may not be affected by the subject of mistake, which is the status of the perpetrator in cybercrime (the circumstance of Article (8) of cybercrime law), where the perpetrator is one of the workers in institutions that are assaulted aggravating circumstance, mentioned in the Article (7) of the Cybercrime Law. The penalty was doubled as the perpetrator was an employee of the institutions involved in transferring funds and offsets. Here, we note that this circumstance is one of the most aggravating circumstances, which are exclusively linked to the moral element of the crime.[1]

Finally, it is worth noting that the existence of the elements of will and knowledge as a component of the moral element of cybercrime is consistent

[1] Mohammed Shibli Al-Shibli, The Rooting of the Theory of Aggravating Circumstances in Cybercrime According to the Approach of the Jordanian Legislator, The Jordanian Journal of Applied Sciences, University of Applied Sciences, Vol. 20, No. 2, 2018, p. 138 et seq.

with the general model of the moral element in accordance with the theories and development of criminal law, while we find some crimes, whether electronic or non-electronic, in which one of these elements may suffice without the other, that is, the availability of will without knowledge, or knowledge without will, this model is of the American legislator, where we find the American legislator has moved in determining the moral element between the principle of will, and the principle of knowledge, where sometimes he uses the element of will (as in trademark law in US federal law), and sometimes knowledge element is used (as in the law of reproduction).[1]

SECTION (2): THE PROBLEMS OF EXTRACTING THE MORAL ELEMENT (GENERAL INTENT) IN CYBER CRIMES

In principle, the burden of proving the moral element of the crime is shouldered by the prosecution. In practice, the general intent is often deduced from the nature of the material element of the crime.[2]

These difficulties may relate to certain crimes as a result of the nature of the crime, its elements, or circumstances, as well as sometimes the ease of concealing its effects, or the ability of the perpetrator to conceal material

[1] Ahmad Mahmoud Mustafa, ibid, p. 112

[2] Crim. 25 mai 1994, B. no. 203; J.C.P. 1994 éd. G, IV, 1962; D. 1994, inf. Rap. p. 217; le 12 juillet 1994, B. no. 280; Dr. pén. 1994 , comm. 237, obs. J-H Robert: 'la seule constatation de la violation en connaissance de cause d'une prescription légale ou règlementaire impliqu[ait] de la part de son auteur, l'intention coupable exigée par l'article 121-3 du Code pénal.

evidence, which makes it difficult for the judge, even under his discretion, to derive the moral element.[1]

Problems related to the extraction of the moral element in cybercrime can be summarized as follows:

- Difficult to draw the substantive aspects in the Internet or digital environment, where the judge seeks to search for the will of the perpetrator regarding the will of the act and the will of the result, and to know the facts without the need to prove knowledge of laws as a presumption. As for the will to act, it remains difficult to derive from cybercrime, which is more difficult than that found in conventional crimes, where the status of cybercrime or the means of committing the crime does not make any difference. Problems and difficulties lie with regard to the will to learn and to know the facts. As for the will of the result, the problem lies in the ease or difficulty of the judge's expectation and familiarity with all the consequences of cybercrime, especially when there is a possibility of multiplicity and aggravation of the results. If we take, for example, the crime of illegal access, here we can simply say that the result is illegal access. This is a simple result that can be drawn, but it may be difficult to predict that the will to lead to that result. Access may be by mistake, and the crime is achieved and the result is achieved when the aggressor does not exit or refuse to exit. Here he has a criminal intent, but there may be circumstances that cancel that intent. Here the judge does this task to derive the intent, which becomes extremely

[1] Mohammed Ananza, the criminal intent in cybercrime, Dar al-Ayam, Amman, 2017, i 1, 237

difficult when the judge tries to prove the intent in a hypothetical case in which all probabilities and assumptions are possible.[1]

If after access the perpetrator caused a "damage" , it is also easy to anticipate, as the judge concludes that access was done with the intention of destruction, but the difficulty lies in the case that the damage has not been done, because the purpose of destruction is an aggravating circumstance based on the purpose of destruction rather than the destruction itself.

One possible consequence that may be problematic in proving the moral element here is the possibility that the judge will resort to the presumption of will, which may make it easier to incriminate the perpetrator without distinguishing his will.

There is another difficulty with proving the will in cases where participation in the execution of the crime is made, where it becomes difficult to prove the will of all partners or to distinguish whose will has led to the result, because of distributed roles among the participants in the crime, or the possibility that the will of some participants has led to the result but not others. A criminal contribution must have a moral element. The moral element of the intervention lies as a form of contribution.[2]

It is also difficult to prove the elements of the moral element in the case of initiation, especially in the case of incomplete initiation in which the acts are incomplete; there is nothing to help to extract the moral element. This is

[1] Baha al-Marri, op.cit., P. 83

[2] Mohammed Shibli Al-Shibli, The Rooting of the Theory of Aggravating Circumstances in Cybercrime According to the Approach of the Jordanian Legislator, Ibid p. 138 et seq.

increased when we know that a large number of cybercrime are similar regarding the first acts and can have more than one description, for example, we find that the beginning of hacking may constitute the beginning of: penetration crime, crime of intent to destroy, spy crime, cybercrime crime, and possibly a number of other crimes.

- As for the proof of knowledge, it also shows the difficulty, where the proof of knowledge requires that the judge prove the offender's knowledge of all the details of the component of the material element, including the knowledge of special elements and aggravating circumstances. On the one hand, the judge himself must be aware of all the elements and circumstances of cybercrime.

Considering at cybercrime, we find it easy to draw elements that are somewhat similar to traditional crimes, such as cybercrime, which involves cursing or contempt, while in some respects there are many issues that the judge cannot be aware of, being technical. Purely, at the same time the judge can not resort to experience, because the experience involves proof but not to draw the moral element, which is the task of the judge.

When these crimes are felonies[1], it becomes more difficult to investigate, where knowledge is difficult to prove which may be easy when the result is achieved, but when it is not, it remains difficult, which may lead the judge to assume the perpetrator's knowledge of the result, thus not allowing

[1] The Jordanian legislator punishes for attempting to initiate felonies in general and for attempting misdemeanors when there is only a provision, in accordance with Article 69 of the Penal Code. In the cybercrime law, the legislator has not addressed initiation, leaving the matter to the general provisions of the Penal Code.

perpetrator to prove wrong when available, which is contrary to criminal policy.

There is a tendency to assume the moral element without the need to prove it, where the prosecution should not provide any evidence of the existence of this element , because it does not prevent the liability[1] unless the defendant proves the existence of force majeure, or proved madness, because the proof of good faith, or the absence of negligence.

Here, it should be noted that leniency in the assumption of moral element may lead to the criminalization of simple people who do not have sufficient knowledge of the elements of cybercrime, and at the same time, the Stringency in its assumption may help skillful users of the web to go unpunished, because of their professionalism and their ability to prove not knowing the facts or part of them. This requires a clearly formulated legislative intervention that facilitates the process of proving and extracting the moral element as much as possible, or linking it with material aspects, as opposed to crystallizing the issue of attempting to avoid impunity when the necessary material aspects are not available.

- Problems related to the moral element, at the time of the availability of criminal intent in cyber crimes. Criminal intent is often required before the crime is committed. In the case of conventional crimes, the judge derives the intent of material and factual circumstances, but in the Internet and computer environment it differs as a logical entity, because intent may sometimes be

[1] The last paragraph of art. 121–3 specifies that 'il n'y a point de contravention en case de force majeure'; see also Crim. 15 mai 1926, S.1928.I.33, note Roux.

subsequent to the act, such as wrong access and refusal to exit an information system.

Therefore, there is a possibility that there is a leniency in the extraction of the moral element, and thus deviate from the general rules or prejudice to legitimacy, in the case of cybercrime may be the possibility of mistake is possible, and therefore t becomes more difficult to prove the intent. For example, the crime of access may occur unintentionally. Where the majority of legislation, such as Arabic ones, is based on demanding the availability of the intent of knowledge and will [1], this intent must be available, therefore, if access was unintentional and then the individual became aware that he had to exit ,then he exited , here we are not in front of intentional crime, other than if he/she continues to access, where the intent will is available after access but not before it.[2]

Difficulty also arises when a person is allowed to access for a certain period, here it may be a crime to exceed the limits of the entry permit, so it is difficult to prove the duration of the excess or how to prove it.[3]

In sum, many crimes may be committed with a large part of its material component, whether intentionally - if they remain outside the framework of criminalization - or inadvertently, without the completion of the moral element, or the intent is available, but it is difficult to prove when it is available, to reach proof. The offense of overriding access is therefore a crime

[1] Hanan Al-Modhki, Cybercrimes, Al-Halabi Law Publications, Beirut, 2014, p. 112.

[2] Hamza Abu Issa, Information Technology Crimes, A Comparative Study of Arab Legislation, Dar Wael, Amman, 2017, p. 48.

[3] Baha al-Marri, op.cit., P. 92

that does not require the existence of a moral element, which is legally incorrect.[1]

TOPIC (2): PROBLEMS RELATED TO THE IMAGES OF THE MORAL ELEMENT IN CYBER CRIMES

In the electronic environment, there may be other problems related to the moral element, which are related to the different elements of the moral element: special intent, probabilistic intent, and infringing intent, both in terms of the difficulty of extracting or proving these forms of the criminal intent of cybercrime. The researcher addresses this as follows:

Section (1): problems related to special intent

The general intention is the will towards a criminal event, with knowledge of all its legal elements. In other words, the mere tendency of the will towards the realization of the crime, and the knowledge of its elements, without seeking a specific purpose or a specific motivator, is sufficient for the establishment of a general purpose, or a simple intent. The purpose, whether honest or malicious, also has no effect on the integration of the general intent.

It is noticeable that in most of the crimes that are intended, the legislator suffices only with a general criminal intent. In addition to the elements of knowledge and will, the legislator may require in some crimes an additional element, namely, the intention of the perpetrator to achieve a specific purpose, or that the perpetrator has a specific motivator based on the general origin.[2]

[1] Ahmad Khalifa Al-Malat, Information Crimes, Dar Al-Fikr Al-Jama'i, Alexandria, 2006, p. 613.

[2] Yousr Anwar Ali, Explanation of the Penal Code, University Press, Tanta, Egypt, 1994, p. 315.

The Jordanian legislator relied on private intent in more than one place, for example, ordinary crimes: the crime of torture with the intent of extracting a confession. Article 208/1 of the Penal Code states: "Whoever practices any form of torture in order to obtain confession is punishable by one to three years' imprisonment." Torture is an independent crime, but it has a special purpose of obtaining confession.

The French Penal Code also defines the two types of intent as public and private[1]. Examples of private intent are to have the money stolen in the crime of theft after being taken out of possession of its owner. This intent affects the construction of the crime. Acts without it may constitute another crime, such as the destruction or unlawful use of the property of others. Sometimes private intent has a role to play in tightening the penalty.[2]

Multiple intent leads to different problems. Determining whether a particular crime requires special intent can be problematic in practice, as sometimes the legislation explicitly defines the crime that special intent is necessary. For example, in France the crime of providing intelligence to a foreign power, where the law expressly states that the acts of the accused must have been carried out in order to incite hostilities or acts of aggression against France[3]. But in many cases the legislation makes no explicit reference to the matter, leaving the judges to clarify. In France, all crimes requiring a specific result require special intent.

[1] Catherine Elliott, French Penal Code, Translated by: Hamza Abu Issa and Mohammed Shibli Al Shibli, Dar Wael Publishing and Distribution, Amman, 2020, 1st Floor, p. 108.

[2] Aqel Yousef Maqableh, Al-Waseet in Explaining the Jordanian Penal Code, Yarmouk University - Irbid, Jordan, 2013, p. 245.

[3] Art. 411–10 new Criminal Code: ‘en vue de susciter des hostilités ou des actes d’agression contre la France’.

The researcher deals with the above in a number of parts as follows:

PART (1): SPECIAL INTENT IN CYBERCRIME

Cybercrime requires criminal intent, as opposed to some inferences. For example, the legislator does not rely on a particular situation for some cybercrimes, in terms of requiring public intent or special intent. However, this does not imply that it does not require intent in general or in origin.[1]

Concerning the special intent of cybercrime, the French legislator has requested in article (332/2) of the Penal Code a special intent for the crime of deliberate destruction.[2]

The Jordanian legislator stipulated special intent in the crime of hacking and cyber espionage. For example, causing damage in the crime of penetration leads to increase the punishment. Sometimes the intent may work to change the description of the offense, such as cyber espionage crimes, they are originally a misdemeanor of penetration, but when the penetration is related to state security, and then intended to harm the state, it becomes a felony of cyber espionage.

PART (2): DIFFICULTY IN EXTRACTING AND PROVING SPECIAL INTENT IN CYBERCRIME

This is a very difficult issue because it is related to psychological aspects, which are often related to the motive of the crime, although the legislator is not interested in the motive in many crimes, as it is sometimes an aggravating circumstance. Therefore, the crime is carried out by the general elements of

[1] Ahmad Mahmoud Mustafa, op.cit., 116.

[2] Ahmad Mahmoud Mustafa, ibid, pp. 120-121.

the moral element, for example illegal entry without paying attention to the motivation to enter.[1]

However, for conventional crimes, abstract access can sometimes amount to attempted theft. The same applies to the access to an information system, which is punished for mere entry, but it may be for the purpose of destruction, as is the case with the Jordanian legislator - without requiring verification of destruction - which means that the intent of destruction may be motivating, the legislator imposes a punishment as aggravating circumstance.

Even if traditional general rules apply to cybercrime, the difficulties of proving whether or not the special intent exists, which exists for ordinary crimes, persist for cybercrime. For example, the Egyptian legislator did not require a special intent for forgery, but the Egyptian judiciary required a special intent, namely the intention to use the forged document for the purpose for which it has been forged[2]. This applies to both counterfeiting and electronic counterfeiting.

It is noteworthy that requiring special intent in certain crimes may lead to distinguishing the interference that may occur between certain crimes, such as interference between the crime of damaging computer components and the crime of disabling it from performing its work, to agree the acts that lead to each of them, such as the use of viruses, modification,obstruction, delete or alter information as means of committing the two crimes. Here we go to the moral element to show the difference, where there must be the intent to cause

[1] Hamza Abu Issa, Information Technology Crimes, previous reference, p. 49

[2] Egyptian Court of Cassation Decree No. 322, p. 1431, May 16, 1971 The set of legal rules, referred to in: Abdel Halim Fouad al-Feki, the crime of counterfeiting electronic signature, Dar Al-Nahda Al-Arabiya, Cairo, 2016, p. 94

damage to the computer and its system in the crime of destruction, in return must be the intention to disrupt the system in the crime of computer obstruction[1]. Thus, the type of intent or existence of special intent distinguishes similar crimes from each other.

SECTION (2): THE PROBLEMS OF PROBABILISTIC INTENT AND INFRINGING INTENT

Sometimes the will of the perpetrator may aim at a certain clear and direct result .Here, we become in face of the intent in its natural form, or the direct intent, which is limited to cases where the offender expects the criminal outcome as an inevitable effect of his/her act, confirming his behavior, however, the offender commits this behavior.[2]

On the other hand, the will may not be directed towards achieving a certain clear result, but it may be expected, this is known as probabilistic intent. Or may not be expected, but it came as a result more severe than the expected result, or desired by the offender, within what is known as infringing intent.

On the other hand, the will may not be directed towards achieving a certain clear result, but it may be expected, and this is the probable intention. The result may not be expected, but it can be more severe than the expected result, or desired by the offender, and this is known as infringing intent.

The researcher deals with the above in parts as follows:

[1] Ahmad Mahmoud Mustafa, previous reference, p. 122.

[2] Mahmoud Najib Hosni, previous reference, p. 211.

SECTION 1(1): POTENTIAL INTENT IN CYBERCRIME

Sometimes intent and intent are not direct, intent may be probable, such as the case that the perpetrator does not seek to achieve the criminal outcome, but made his behavior in anticipation that it could occur as a possible or possible effect, and accepted this expectation.

The Jordanian legislator has imposed punishment for the result achieved in the crime, even if it exceeds what the offender intended, such as the intended result, as long as he expected it to happen. Article (64) stipulates: "A crime shall be considered intentional even it exceeds the criminal offense arising from the act, if the offender expected the result and accepted it. The error is caused if the harmful act results from negligence, lack of caution or non-compliance with laws and regulations. "

In France, there is one major limitation on the meaning of intent for the purposes of the application of the French Penal Code, which relates to indirect or probabilistic intent, such as the expectation that one can cause the result, but does not want it. However, this does not amount to the concept of special intent in French law[1]. The Penal Code may consider it a simple mistake to treat it as an aggravating circumstance, with regard to manslaughter and non-fatal crimes against persons[2]. It can also constitute a crime per se under article 223.1 of the Penal Code, when there is a direct risk of death or serious injury.

In both conventional and cybercrime, there is no difficulty in proving probabilistic intent, because what is required in the case of this type of intent

[1] Crim. 27 mars 1902, Bull. no. 128.

[2] Articles 221-3, 222-19, and 223-1 of the new French Penal Code of 1994.

is the expectation of the perpetrator of this outcome, which he accepts. The difficulty in proving this is the same in both types of crimes. One issue that can be conceived by us in the case of cybercrime is that the expected outcome of a physical act in conventional crimes may not tolerate as many possibilities as in cybercrime.

PART (2): INFRINGEMENT INTENT IN CYBERCRIME

There is a situation known as infringing intent, where the perpetrator commits a certain behavior with an expected result, but the result which is more serious than the expected result, is punishable by law in a manner other than the penalty directed at the intended result. For example, the crime of beating leading to death, the first result was beating, while the result achieved is death which was not intended, here the legislator punishes of intent, but his punishment is not a support for the probable intent contained in Article 64 of the Jordanian Penal Code.

An example of this is in France when a person commits acts of violence against his victim without intending to kill him, but later it leads to death. For example, the offense set forth in Article 222-7 of the French Penal Code relating to acts of involuntary abuse, which causes involuntary death, with a maximum of 15 years (higher than the penalty applicable to the person who caused serious but not fatal injuries, who is punished by imprisonment for ten years)[1], and will also be less than the penalty for murder under Article 221-1, which amounts to 30 years.

An example of this intent can be imagined in cybercrime, the crime of penetration is a misdemeanor punishable by law without requiring destroy.

[1] Article 222-9 of the new French Penal Code.

However, it may be inadvertently destroyed after a period of time as a result of the hacking by changing programming systems that will appear later, so that we will be faced with a new crime of destruction, not penetration. Here the intent was intentionally to destruct, yet the legislator imposed a punishment for the destruction even if it was not intended for infringing.

This raises the problem of research between a desired result and a result achieved, which is inherently internal intentions difficult to draw one, so, how to distinguish between them? It is more difficult if the crime is in an electronic environment, especially if such results are tangible or dangerous, especially if there is a time lag in achieving this result and the causal relationship between the new result and the perpetrator's action is weakened.

The infringing intent is not considered sufficient to form a special intent, but the legislator sometimes takes into account the intent and result, punishing the perpetrators more severely, if they were judged on the basis of their intent, but less than if they were judged on the basis of result only.

PART (3): PROBLEMS RELATED TO THE DIFFICULTY OF EXTRACTING THE INFRINGING INTENT AND PROBABILISTIC INTENT IN CYBER CRIMES

The issue of probabilistic intent is not as problematic as it is conceivable in cybercrime. Although the number of cybercrimes contained in the cybercrime law is small, it is easy to imagine the probable intent. An offender may try to access to a system, but the process of access can be achieved only through the destruction of the contents of a system, network or website, where the intent of the offender was to access only, but the result achieved is the destruction of the contents.

The perpetrator has been punished here with an independent crime. This is the physical plurality of crimes. We can also be in front of an offense of access with the intent of destruction, so we are in front of a moral multiplicity of crimes with respect to entry and entry with the intention of destruction, because the single act applies more than described.

This is when the will of the actor to commit a certain act that was expected to happen other than what he wants and accepted, in the same example, the intent may be infringing, such as the will of the actor to achieve a certain result (access), but what resulted (destruction) because of this entry, achieved a result other than what he wanted, because it is a more serious result.

There is a similarity between probabilistic intent and infringing intent, yet there is a clear and important difference between them. In the probabilistic intent, the result achieved is expected; in the infringer, the most serious result is not expected. In any case, the perpetrator is punished for these two purposes, but with a variation in the punishment, which will be affected by the legal adaptation of the perpetrator's act.

In the field of cybercrime the difficulty of determining the intent in general arises, even if it is clear. This difficulty increases when the intent is not clear, especially since the virtual Internet environment is a wide-ranging environment, which bears considerable interpretation, making it difficult for the judge to draw such elements. When a judge tries to derive these objective moral elements from the facts of the crime, it may not be possible to trace them or to inevitably link them to the material facts of the crime or the moral elements of the perpetrator. We are facing the crime of cyber espionage, is the offender held accountable according to the infringing intent? or he is only held accountable for mere access, and has the element of mistake in the nature of the website whether it is a government or non-governmental site.

In sum, these forms raise problems about the process of extraction, which makes the task of the judge difficult, risky, between not punishing the offender or unnecessary severe punishment, which may require legislative intervention trying to link the moral aspects of the criminal intent to material facts, to reduce the burden on the judge and to avoid linking intent and other forms of intent with moral aspects.

This will not be left open to two possibilities: either criminalization irrespective of criminal intent or failure to hold accountable for the inability to derive an intent that may exist. There is a middle area that is error or neglect crime.

PART (4): INTENT FOR NEGLIGENT CRIMES

Article (64) of the Jordanian Penal Code stipulates: "... the error happens when the harmful act results from negligence, lack of precaution or non-observance of laws and regulations." The assessment of these cases is subject to personal and objective criteria.

In France, Article 121.3 also provides for crimes of recklessness or negligence. Negligence or error is assessed by the judge according to a personal criterion relating to the psychological aspect or characteristics of the defendant1. Sometimes the objective criterion or the actual external circumstances of the defendant is used. The substantive criterion is clear under Articles 6-221 and 19-222of the Penal Code (on unintentional crimes against persons).In the latter it seems clear that the moral element of these crimes is a single violation of the rule of protection or care provided for by law.

[1] J. Dumont, Atteintes involontaires à la vie, Jur. Class. Pén. no. 49; Merle et Vitu, no. 577.

Concerning the suspicion that Article 121.3 did not consider the defendant's external circumstances, paragraph (3) was amended to read: “There shall also be a misdemeanor when there is recklessness, negligence or failure to fulfill the obligation of care or protection provided for by law or regulations, when the law so provides, however, unless the perpetrator has exercised due diligence, taking into account the nature of his or her functions, competencies, as well as the authority and means at his disposal, as appropriate. "

A fourth paragraph was added as follows: “There shall also be a misdemeanor when there is recklessness, negligence or failure to fulfill the obligation of care or protection provided for in law or order, when the law so provides, if it is established that the person who did such conduct did not due diligence taking into account the nature of his, functions, competence, as well as the authority and means at his disposal. In the case provided for in this paragraph, natural persons who have not directly caused harm, but who have created or contributed to the creation of a situation that has allowed the damage or they have not taken measures to avoid it, they are criminally liable if they are found to have clearly committed, either intentionally violating an obligation regarding due diligence , or they made a grave mistake exposing another person to a very serious risk which he could not have been aware of.

Therefore, when paragraph (4) is applied, there will be no justification for a conviction unless three conditions are met:

- The conduct of the accused constitutes a grave mistake (defined in paragraph (3) as recklessness, negligence or failure to fulfill an obligation of care or security).
- A person who is at risk of another should be aware of it.

- The risk is particularly serious. According to the Minister of Justice, this risk will often be either the risk of death or the risk of serious injury.[1]

RESULTS

1) It was found that there are problems related to the moral element in cyber crimes, including those related to the will element and some related to the knowledge. These problems mainly lie in the fact that the legislator depended in these crimes on the general provisions that apply to various crimes.
2) One of the problems related to proving the opposite of the element of wrong knowledge and ignorance in the scope of cyber crimes. When the perpetrator made a mistake in the facts not related to the material element of the crime, that would not preclude the existence of a general intent.
3) It is found that those who claim lack of knowledge must prove it, it is one of the substantive defenses that need to be proved. Even the judiciary is strict in proving the denial of knowledge in some cases and not others, such as proving the lack of knowledge of the age of the victim in some crimes.

4) It was found that one of the elements that may affect knowledge or lack of knowledge in the law of cybercrime, aggravating circumstances, here still the law of cybercrime subject to the general provisions of the Penal Code. Where knowledge must be focused on these pillars, regardless of the possibility or probability of proving the mistake or not, the offender

[1] Speech of Madame Guigou, Minister of Justice, to the National Assembly on 29 June 2000.

shall not be held accountable unless he knows about them, and must prove the lack of knowledge.

5) The existence of the elements of will and knowledge as a component of the moral element of cybercrime was found to be consistent with the general model of the moral pillar according to the theories of criminal law. While we find some crimes, whether electronic or non-electronic, in which one of these elements may suffice without the other, the availability of will without knowledge, or knowledge without will.
6) The study concluded that the burden of proving the moral element of the crime shall be shouldered by the prosecution , and in practice, the general intent often derives from the nature of the material element of the crime. Sometimes, the judge draws his expertise and skill. There are particular difficulties for the judge who is inexperienced in the electronic aspects, or in the absence of judges specializing in the electronic aspects, as opposed to the professionalism of the perpetrators of cybercrime, which indicates a difficulty in drawing elements of the moral element for these crimes.

7) It is also problematic that there is difficulty in deriving substantive aspects in the internet or digital environment, such as the will to act and the will of the result, to the knowledge of the perpetrator of the facts, and the possibility of the judge resorting to the presumption of the will, which may make it easy to criminalize the perpetrator, without distinguishing his will to achieve the result or not.

8) It is also difficult to prove the will in cases of criminal contribution, where it becomes difficult to prove the will of all partners or distinguish who has gone to achieve the result because of the distribution of roles sometimes between the participants, or the possibility that the will of some of the participants leads to the results , while the will of others was intended to achieve another result, which may lead the judge to assume that the will of all partners to achieve the same result was the same.

9) It is also difficult to prove the moral element in the case of initiation of committing an act , especially in the case of incomplete initiation in which the acts are incomplete, there is nothing to help to extract the moral element, this is increased when we know that a large number of cybercrime's first acts are similar to which more than one description apply .

10) The element of knowledge was difficult to prove, as this requires that the judge prove and draw the perpetrator's knowledge with all the details of the material element, including knowledge of special elements and aggravating circumstances. It is even more difficult when it is necessary to prove it in cases of attempt and criminal contribution.

11) One of the problems related to the moral element in cybercrime is when the criminal intent is available in cybercrime, it is often necessary to have a criminal intent before committing the crime. However, in the Internet and computer environment, it is different as a logical entity, because the intent may follow the act, such as error access, and refusal to exit the information system.

12) One of the issues that have difficulty in the field of moral element in cybercrime is the issue of special intent. In some crimes, the legislator

requires that the special intent is a specific intent, and that it is an objective and psychological issue that is difficult to prove and discover.

13) It appears difficult to draw probabilistic intent and infringing intent in cybercrime, especially in cybercrime one offender may be expected to commit several crimes, as is the crime of penetration that may include penetration, destruction and violation of privacy and espionage, which makes it difficult to prove the intent of the perpetrator.

RECOMMENDATIONS:

The study has concluded a number of recommendations as follows:

1. The legislator recommends adopting a clear approach to extract and prove the elements of the moral element for cybercrime, as this process of proofing and extraction in the context of cybercrime becomes difficult and surrounded by problems that require clear legislative intervention.
2. The researcher recommends the legislator the need for the availability of the elements of knowledge and will and not only the availability of one of them.
3. The legislator recommends that for cybercrime, the perpetrator should be informed of aggravating circumstances so that he can be held accountable.
4. The researcher recommends that cybercrime be considered by specialized judges competent in the field of cybercrimes.
5. The researcher recommends that the legislator criminalizes or tighten the punishment on the basis of material issues that are easy to prove.
6. The researcher wishes the legislative intervention to provide a clear formulation that facilitates the process of proving and extracting the moral element as much as possible, or linking it with physical aspects, in

return for crystallizing the question of criminal intent for the case of initiation and the case of criminal contribution.

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5) 'Toutefois, lorsque la loi le prévoit, il y a délit en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui.'

6) 'L'intention, dans son sens juridique, est la volonté de commettre le délit tel qu'il est déterminé par la loi; c'est la conscience, chez le coupable, d'enfeindre les prohibitions légales….' Emile Garçon, Code pénal annoté, 1ère éd., art. 1

7) 'la conscience et la volonté infractionnelles': R. Merle et A. Vitu, Traité de droit pénal, no. 542.

8) 'N'est pas pénalement responsable la personne qui justifie avoir cru, par une erreur sur le droit qu'elle n'était pas en mesure d'éviter, pouvoir légitimement accomplir l'acte.'

9) Crim. 25 mai 1994, B. no. 203; J.C.P. 1994 éd. G, IV, 1962; D. 1994, inf. Rap.

10) le 12 juillet 1994, B. no. 280; Dr. pén. 1994 , comm. 237, obs. J-H Robert: 'la seule constatation de la violation en connaissance de cause d'une prescription légale ou règlementaire impliqu[ait] de la part de son auteur, l'intention coupable exigée par l'article 121-3 du Code pénal.'

11) The last paragraph of art. 121–3 specifies that 'il n'y a point de contravention en case de force majeure';

12) Crim. 15 mai 1926, S.1928.I.33, note Roux.

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THE SELLER'S COMMITMENT FOR BUILDING EXECUTION, OWNERSHIP TRANSFER, AND RISK-TAKING OF REAL ESTATE UNDER CONSTRUCTION

(In Accordance with Jordanian Law of Real Estate)

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Abstract

The study tackled the commitment of the seller to execute under-construction building, transfer its ownership, and incur risks of the real estate in the light of Jordanian real estate ownership.

The researcher pointed out that there is a problem in implementing the contract with regard to building completion and ownership transfer after concluding the contract. The buyer is exposed to problems and risks, for the Jordanian legislator did not take into consideration such problems that the seller himself may encounter during building construction and ownership transfer. There might be risks and problems which make contract implementation impossible.

The study found out that the Jordanian legislator did not take into consideration, such issues of anticipated contract for selling a building, a floor, or an apartment under construction, though such clauses and sub-clauses are essential because they secure for the buyer contract execution and ownership transfer.

The study concluded that it is essential to give more attention to contracts of selling buildings under construction and to enact special rules because this economic activity is vital and sensitive to the country. Therefore, gaps should be bridged by enlightening purchasers of the core and related issues of the contract, securing liability, adding precautionary items to the estate registry and to have a joint warranty to secure the purchaser's rights in building completion and ownership transfer. Rights of the purchaser should be regarded real estate franchise rights according to which he should be informed of all contract terms, maps, and specifications to ensure such rights

Keywords: Real estate ownership; Promissory sale contract; Selling buildings; floors; or apartments under construction; Guarantees and risks

Introduction:

According to the contract of under-construction buildings, ownership can't be transferred to the purchaser except after completion and legally after the registry.

The seller stays the real owner of the estate till the building is completed and all that is needed is done. It is then that he starts the procedures of licensing, partition, and division of the estate into apartments in compliance with engineering plans which the seller had to accomplish before obtaining a work permit after which apartments ownership can be transferred to buyers.

Though the buyer was given a work permit, title, and a joint title for the piece of land, still, many problems prevent building completion and other

issues that prevent transferring ownership to the buyer. Such problems lead to stop construction and registry procedures, the topic of this research, how would the buyer who paid the seller the whole amount without having any legal guarantee, ensure execution and ownership transfer to him?

The researcher, in this study, will present the problems the buyer encounters at the stage of execution, ownership transfer, and the proper methods to which he might resort to get his right.

1.1 Problem of the Study:

In the absence of legal texts which regulate the problems the buyer encounters which forbid him from transferring ownerships of apartments under construction, thus losing his rights, the researcher sheds light on these problems in an attempt to secure legal rights for the buyer. The study answers the following questions:

1- What are the legal methods by which the buyer of an apartment under construction can compel the owner transfer ownership without resorting to law?
2- What are the legal methods by which the buyer retains his right in the apartment in case the building wasn't completed
3- To what extent can the general rules protect the buyer's right in building execution, termination of the contract, and compensation?
4- What is the legal status of the buyer's right in paying the entire price of the apartment in case the company went bankrupt or terminated the contract or the estate was mortgaged? Is the buyer's debt regarding the apartment or building a franchise one when execution was impossible to implement?

1.2 Significance of the Study:

The significance of this study lies in its attempt to unveil the liabilities of the seller toward implementing the construction of the apartment and transferring its ownership to the buyer based on the procedures followed in this respect. The extant law of real estate ownership doesn't include some legal regulations related to execution and transference such as a mortgage, garnishment, bankruptcy, contract termination, power Majeure, emergencies and maturity.

1.3 Objectives of the Study:

The objectives of the study include determining what is meant by executing building of the apartment and ownership transfer. The execution might not be over during the period expected. In addition, the seller might encounter problems during that period in transferring ownership to the buyer in addition to the absence of legal methods that secure the rights of the buyer in accordance with the contract.

Another objective is to investigate guarantees given to the buyer for contract implementation. Could mortgage, franchise rights, joint guarantee, construing major and minor terms of the contract, contract termination, or compensation be solutions to protect the buyer's right?

1.4 Limitations of the Study:

1- Topic limitation: the problems the buyer encounters in the implementation and ownership transference of an apartment under construction.

2- Space limitation: the Hashemite Kingdom of Jordan

3- Time limitation: articles 128 and 129 of real estate ownership no. (13), 2019.

1.0 Methodology:

The study adopted the descriptive-analytical method, in addition to opinions and regulations concerned with buyer's rights in a contract of selling an apartment under construction besides execution period and ownership transfer. In addition, it adopted the comparative method in discussing relevant legislation and decisions of Jordanian court of Cassation.

2.0 Study Plan:

The researcher in the first topic discusses commitments for executing the building and ownership transfer, in addition to problems and dangers the buyer might encounter.

As for the second topic: it discusses legal methods to protect the buyer. The third part handles liability and indemnity. Then finally conclusion and references

FIRST TOPIC:

2.1.1 THE OBLIGATION FOR BUILDING EXECUTION, OWNERSHIP TRANSFER, PROBLEMS, AND RISKS FACING THE SELLER:

One of the items of contracts pertaining apartments under construction is that the seller commits himself for the buyer to execute constructing the building and to transfer ownership to the him as the latter commits himself to pay the price agreed upon in the contract for registry being the first requisite As for the second requisite, the researcher will tackle problems and risks that face implementation and ownership transfer and commitments of the seller.

2.2 FIRST REQUISITE:

2.1.2 OBLIGATIONS FOR BUILDING EXECUTION AND OWNERSHIP TRANSFER:

In accordance with the contract of selling apartments under construction, the seller commits himself to execute the building and afterwards to transfer ownership to the buyer after waiver and registry at the competent manager of land department.

This requisite will be divided into two parts:

- First part: Building execution
- Second part: ownership transfer

3.2.2 BUILDING EXECUTION:

One of the obligations the seller committed himself toward the buyer was to prepare the apartment according to the design agreed upon for being responsible for apartment construction. Items (A) and (B) from article (128) of Jordanian law of estate ownership no. (3), 2019, stipulate that the seller

had to implement construction during the assigned period according to the specifications set in the contract and to attach explanatory maps with all details.[1]

In the law of estate ownership, the Jordanian legislator specified in the terms of the contract to determine the duration for execution, specifications attaching to that illustrative designs and maps to protect the rights of the two parties in case any dispute emerges.

Item (2) of article (35) (1966) for organizing cities, villages, and buildings stipulates that all departments and establishments, public and private, and companies authorized to provide buildings with water, electricity, telephone, and general drainage not to connect such services unless the owner obtains a permit from the competent organization committee to use the building only for the purposes to which it was erected.[2]

What distinguishes the contract of selling an under-construction building or apartment is the absence of the item sold the minute of signing the contract. The contract is concluded on maps and designs of a non-existent thing. Among terms of the contract agreed upon is the duration of execution time for the building under construction.

The Jordanian legislator made execution duration essential for the effectivity of selling a building, floor, or apartment under construction. Item (b) of article (128) of the new Jordanian law of real estate ownership stipulates that the contract should include the time needed for execution.[3]

Neither the owner nor the seller can escape the commitment to this item unless an extraneous factor attributed to force majeure prevents that. There

[1] Article (128), Jordanian real estate law, item 13, 2019.
[2] Law of organizing cities, villages, and buildings, No. (79), 1996.
[3] Article (128), Jordanian real estate law, 2019

are many excuses which the seller claim for not handling the building as scheduled; some of them are: being unable to obtain necessary licenses, cases filed against him, as of joint ownership removal, company bankruptcy, cases of contract abrogation, selling the land on which construction is built, nullifying the transaction, estate garnishment, or mortgage, all of which go back to the seller.

As for the extraneous factor, it could be due to appropriation, the collapse of the land on which the building is erected because of factors beyond the seller's capability such as floods and earthquakes (Shanab, Mohammed. 1976) in explaining rules of contracting says: "Building commitment means achieving a result which the owner of the project couldn't achieve. He is bound responsible for everything unless proven that power Majeure was the reason behind it.[1]

The owner of the project, the seller, will be questioned about why he didn't execute the building on the set time. Non-conformity to this entails legal liability which gives the buyer the right to abrogate the contract and ask for indemnity in accordance with article (246) of Jordanian Civil law.[2]

If a dispute arises between the two parties, then the court specifies the items of the contract, and through the experts it selects, they determine whether or not the building complies with maps and specifications stipulated on in the contract.

In origin, executing the building should comply with designs and good intentions. Paragraph (1) of article (202) of Jordanian civil law stipulates that contract should be executed in its entirety in a way that complies with good

[1] Shanab, Mohammed (1976). Explication of Contracting from. Cairo: Dar Al-Nahda Al-Arabiyeh, pp. 85-86.

[2] Jordanian Civil war no. (43), 1976

intention. It is important that the contract should include maps detailing all specifications with regard to areas, building needs, touchings, corridors, material to be used so as to avoid any dispute after the building is finally executed.[1] Most of the legal problems which both the seller and buyer encounter before ownership transfer stem from the disagreement on the specifications and maps and whether or not they comply with the terms of the contract.

3.3 SECOND REQUISITE: OBLIGATION FOR OWNERSHIP TRANSFER

The most important commitment on the part of the seller in the contract is to avoid any action that makes ownership transfer impossible. The contract of selling buildings, apartments, or floors can't be effected without an official registry. Article (88) of Jordanian Civil law stipulates that the seller is compelled to hand in the sold estate free of any problems and has to do whatever necessary for ownership transfer. Article (497) of the same law stipulates that the estate can be only received when ownership transfer has been done officially. Article (1148) of the same law stipulates that neither ownership nor real state rights can be registered except in compliance with the law to which it belongs.[2]

Paragraph (13) of the article (929) stipulates that the promised building, floor, or apartment ownership can be registered through a written request of the two parties after the terms of the contract being implemented and registration fees paid.[3]

[1] Ibid.
[2] Jordan Civil Law.
[3] Item (B), Article (129) of Jordanian real estate ownership.

As for waiver time of the estate, the two parties had already agreed on that in advance, and that is essential according to article (128) of the Jordanian law of real estate.

The buyer might face obstacles in estate registry and ownership transfer during the time agreed upon. These obstacles go back to the seller personally among those might be: inability to get work permit, failure to divide building, mortgaging the estate for loans taken to implement construction, estate garnishments before completion, inability to finance the project or death of the project owner, etc.

Compelling the seller to transfer ownership includes at the same delivering the estate thus meeting the obligations on the seller's part.

3.4 PROBLEMS AND RISKS FACING THE BUYER IN PROJECT EXECUTION AND OWNERSHIP TRANSFER

There are numerous problems that face the buyer in effecting terms of the contract between him and the seller regarding project execution and ownership transfer which prevents construction implementation. These problems might be caused by the seller himself or by extraneous reasons that prevent him from execution or transfer. The researcher will discuss two issues in this part:

3.4.1 First: Problems and Risks Caused by the Seller or by Others

3.4.2 Second: Problems Caused by Extraneous Reasons

3.4.3 FIRST: PROBLEMS CAUSED BY THE SELLER:

In compliance with to terms of the contract, the seller should secure not to harm the buyer with regard to the execution of the estate and ownership transfer. Article (497) of Jordanian Civil law stipulates that virtually, the

property is only received when it is officially registered by the name of the buyer.[1] Some of the problems that the seller faces prior to contract and post it. Problems prior to signing the contract can be represented in the seller buying the property before removal of joint ownership was taken, with the buyer losing the case, or the buyer might have bought the estate that had already been sold to somebody else, or the estate might have been mortgaged to others, etc. All such problems create troubles for both buyer and seller.

As for the problems that might emerge after signing the contract, they might be exemplified in: the seller might sell the apartment or floor twice, incomplete licensing, a case filed against him for the estate has another owner, because of a dispute among company partners, the company was declared bankrupt, or because the sold apartment was rented to somebody else, etc.

The seller is held responsible for such problems and should indemnify the buyer for the damage he suffered from.

Paragraphs (1,2) of articles (3,4) of Jordanian civil law stipulates that the seller saves the buyer from any obstacle in the way of the sold estate like a fall due prior to purchase contract.[2]

The seller commits himself to refrain from doing anything that might directly or indirectly affect the estate or ownership, which will be a violation on his part to all his commitments.

Exposure to problems might be exemplified in a dispute that emerges between the first and second buyer for the seller had sold the building or apartment twice. The owner, in this case, is held responsible. Another example of indirect exposure can be seen in the seller renting the sold apartment to another person which is legally considered law infringement.

[1] Jordanian civil law
[2] Ibid.

3.4.4 SECOND: PROBLEMS AND RISKS DONE BY OTHERS:

The seller guarantees that the buyer won't be exposed to any problems which are of two types: legal or material. Regarding the legal side, the seller is committed to the buyer not to sell the apartment or floor to another person that might have occurred prior to concluding the contract selling might also be nullified due to a false contract.

As for the material side, Al-Sanhury, Abdel Razzaq, (1960) pointed out that the material problem done by others has nothing to do with the seller who in this case is not held accountable for it. Thus, the claim of others having rights might be related to the estate or might be personal as might be manifested in a claim that the floor or apartment is rented. Legally, such a kind of act is guaranteed by the seller. It is clear from what preceded that there are reasons beyond the capacity of the seller which might prevent him from completing the construction or ownership transfer among which force majeure like war or military invasion, earthquakes, volcanoes or floods.[1]

There are some other reasons the seller has nothing to do with. Whenever, for example, the government appropriates something for the general interest, or considers the area a military zone on which building, is not allowable. Other forms of force majeure are administrative decisions and orders which must be executed. This is what Jordanian court of Cassation adopted "administrative decisions which must be executed constitute a force majeure as they include the two impossibilities: signature and payment.

[1] Al-Sanhury, Abdel Razzaq. (1966). Mediator in explaining civil law (selling contract). Cairo, Egypt: Egyptian University printing press, p.421.

3.4.5 SECOND SECTION: PROBLEMS AND RISKS ATTRIBUTED TO AN EXTRANEOUS REASON REGARDING BUILDING EXECUTION AND REAL ESTATE TRANSFER:

Article (247) of civil law stipulates that, in contracts binding for the two parties, if a force majeure occurs and makes execution impossible, then the obligation is no more functioning and the contract is automatically revoked. If the impossibility is partial, the equivalent partial part will be affected. Similarly, the impossibility in temporary contract functions the same. In both cases the debtor is allowed to revoke the contract.[1]

Article (205) of the same law stipulates that "if general exceptional, unexpected events happened and made it almost impossible to execute the binding contract and overburdened the indebted, the court has the right to revoke the burdening obligation to an acceptable extent and anything beyond that is considered null and void.[2]

3.0 SECOND TOPIC: CASE OF LIABILITY, INDEMNITY, AND GUARANTEES FOR THE BUYER

In the contract of selling a building, floor, or an apartment under construction, the seller is compelled to execute construction and to transfer ownership, and he should also refrain from doing anything that violates his obligation toward the buyer. He will be also held responsible for any infringement of the contract and be penalized for not executing its terms. There are other reasons for which the seller will be either responsible or not.

[1] Jordanian civil law, 2019
[2] Ibid.

Such reasons might be: force majeure, exceptional conditions, and impossibility of execution.

The researcher will divide this topic into two requisites: the first discusses liability and indemnity and the second buyer's guarantees.

3.1 FIRST REQUISITE

3.1.1 LIABILITY AND INDEMNITY CASE

The seller is held accountable for not executing the construction, and for not transferring ownership of the real estate for the buyer. The reasons behind that might be force majeure, exceptional conditions, and impossibility of execution.

3.1.2 LIABILITY AND INDEMNITY:

The seller is held responsible to the buyer in case the former didn't meet his obligations regarding building execution or ownership transfer.

In this case, the buyer has the right to have the contract implemented or abrogated and ask for indemnity according to article (206) of Jordanian civil law which states:

1- The contract is binding to both parties, and if any of them didn't meet his obligation, the other party has the right to execute the contract or abrogate it.

2- The court has the right to compel the violator for immediate implementation or wait for a specific time or to abrogate and indemnify according to the case.

The buyer is held responsible once he doesn't comply with the terms of the contract.

The seller will be held responsible pending the following conditions exist:

First, personal claims of the seller or the others

A- The seller will be held responsible in front of the buyer for personal or legal molestation whenever he doesn't meet his obligation regarding building execution or ownership transfer in several cases, among which are the following:

1- The seller mortgages the estate to get funding to finish up the construction but fails to refund it, so the estate is mortgaged.
2- The inability of the seller to transfer ownership because he couldn't get work permit to partition the building into floors and apartments
3- If the seller is a real estate corporation and a dispute between partners happened and led to liquidation
4- If the seller is announced bankrupt.
5- If a case of division is filed against the place on which the building is erected.
6- If the estate on which the building is erected has been based on an invalid contract.

B- Claims of others:

The seller is held responsible whenever he doesn't execute the construction and transfer ownership because of legal claims of others exemplified in the following:

1- Someone provides a contract proving his ownership of the estate for which he files a case to nullify or abrogate the contract relevant to that estate, garnish it, thus preventing ownership.
2- The apartment is sold to another buyer who argues for his right against being sold to a second buyer.
3- A case filed by someone claiming his right of ownership of the estate being given as a grant or inherited.
4- Presenting the estate for sale in auction as others have rights and demands on it.
5- A testimony which proves that the estate of concern belongs to another person and a case is filed to solve the dispute.

C- Some reasons can't be traced back to the seller or others, which might stop construction and ownership transfer such as:

1- Government appropriation for the public interest, thus preventing construction completion and ownership transfer
2- Confiscation of the estate for military purposes in certain emergency cases
3- Being close to the airport and railways, the real estate won't be licensed

C- Reasons attributed to the extraneous factor: there are cases beyond the seller's ability traced back to foreign factors such as:

1- Force majeure: based on article (247) of the civil law, earthquakes, volcanoes, and floods lead to contract abrogation.[1]
2- Exceptional circumstances: Article (205) of Jordanian Civil law stipulates that due to exceptional circumstances like outage of iron, cement, and wood from the market obliges the seller to stop construction. The seller, to refute his responsibility for not meeting his obligations had to testify that the reason was extraneous.

Second, damage: it is one of the pillars of contractual liability. Article (363) of Jordanian civil law stipulates that "if the estimate is not stated in the law or in the contract, then the judge estimates the damage at the occurrence. The buyer has to testify the damage affecting him for not having the estate registered. This kind of damage was indemnified as stated in articles (267), and (363) of civil law.[2]

D- Causality

[1] Article (47) of Jordanian civil law, No. (43), 1976

[2] Sultan, Anway. (n.d). sources of commitment in Jordanian Law. Amman, Jordan: Dar Al-Thaqafa for publishing and distribution, p.234.

Contractual liability is not based only on the seller's inability to implement the contract regarding construction and ownership, but it is linked to a mistake done by him. Thus, there should be a cause and effect relation to entitle the buyer for indemnity.

If the damage is caused by an extraneous factor, then, the buyer, in that case, won't be held responsible. Article (261) of Jordanian Civil law stipulates that if the person proves that the danger was caused by an extraneous factor-like earthquakes or floods, for example, the sufferer is not entitled for indemnity unless agreed upon otherwise.

4.1.3 IMPACTS OF LIABILITY CASE

If the seller didn't implement the contract for any reason, the buyer has the right to ask for the estate or indemnity. Article (246) paragraph (1) of the Jordanian civil law stipulates "if any of the two contracting parties couldn't meet his contractual obligation after being notified, then the other party can ask for contract execution or abrogation. As for the second paragraph of the article, it points out that the court can compel the debtor for immediate execution or adjourn it for a definite time or rule out for abrogation indemnity. The researcher will discuss here three issues:

1- The buyer asks the seller for substantial execution of estate
2- Asking for contract abrogation and indemnity
3- The seller's non-liability, due to an extraneous reason

First, Substantial execution:

According to articles (246) paragraph (1) and real estate ownership law no. (13), paragraph A / C of article (129) of Jordanian civil law, the buyer has the right to ask for contract execution. The buyer should notify the seller for execution through a case of liability infringement filed to the court for

implementation and ownership transfer in compliance with the terms of the contract.[1]

Second, Abrogation:

If the seller didn't meet his contractual obligations, the buyer has the right to ask for abrogation and to be indemnified for the damage caused by the seller. The judge, according to the filed case, considers the seller responsible for abrogation and rules for suitable indemnity.

Article (246) of the civil law stipulates:

1- In accordance with the contract binding to both parties if one of the contractors doesn't meet his obligations, the other party, after notifying the debtor, has the right to ask for contract execution or abrogation.

2- The court can compel the debtor for immediate execution or wait for a definite period, then rules for abrogation and indemnity if justified. If the following terms of the case exist, then the buyer has the right to go to court.

The terms are:

A- The contract is of the mutual type.

B- The one asking for abrogation should be at default in meeting all his obligations and able to restore the estate to the state before contraction.

3- If the seller lags executing his obligations.

Al-Sanhory (1964) in explaining the civil law, points out that abrogation, in origin, has to be through the court. The buyer has the right to ask for

[1] Jordanian real estate ownership No. (43), item 221, 1976

indemnity if contract execution is impossible. Once the abrogation is done, things will go back to what they were before the contract.[1]

Abdul Muneim (1979) in his study of Lebanese and Egyptian laws, indicated that the buyer couldn't ask for indemnity once liability conditions don't reflect negligence on the part of the seller. The creditor who asked for abrogation has the right to ask for indemnity from the debtor for the damage that befell him because of that. In this case indemnity is the result of liability default.[2]

This is what paragraph (2) of article (246) of Jordanian Civil law also confirms.

4- Seller's irresponsibility due to an extraneous reason.

Article (247) of the Jordanian civil law dealt with the issue of not executing the contract because of exceptional circumstances or force majeure stating "if a certain force majeure occurs and makes it impossible to execute the obligation, then the obligation is no more valid, and the contract will be spontaneously abrogated."

In general, the impossibility of execution may result from an event beyond human will which prevents him from meeting his obligations such as: war breaks out; a revolution occurs. A blaze devours the commodity to be delivered to the buyer. Such things are labeled by Al-oji (1995) as unexpected events as referred to in article (342) of Lebanese law of duties.

Article (205) of Jordanian Civil law stipulates that if execution impossibility might result from unusual circumstances, it will be a

[1] Al-Sanhury, Abdel Razzaq. (1964). Mediator in explaining civil law: sources of commitment, p.803.

[2] Al-Saddeh, Abdul Munim. (1979). Sources of commitment: a study in Lebanese and Egyptian laws. Beirut: Dar Al-Nahda for printing, p.487.

temporary one. The judge, in this case, can stop execution until the reasons behind that no more exist, pending that reason are expected to disappear during a limited period of time.

4.0 THIRD TOPIC: BUYER'S WARRANTIES IN A CONTRACT FOR BUYING A BUILDING, FLOOR, OR AN APARTMENT UNDER CONSTRUCTION

This kind of contract arouses different types of disputes between the seller and buyer. What concerns us in this study is how to protect the buyer and to secure execution of the contract and ownership transference in accordance with specification and maps stipulated upon in the contract. The buyer doesn't mostly have an experience in this type of contracts which eventually leads to disputes and risks that lead to inability to execute the construction and transfer the ownership. This topic will be divided into two parts:

The first will discuss warranties of contracting stage, the second will discuss warranties after execution stage.

5.1 WARRANTIES OF CONTRACTING STAGE

In article (128), paragraphs (1, 2) of real estate law, the Jordanian legislator required that when concluding a contract to purchase a building, floor, or an apartment that the contract need to be concluded and registered with the competent director of land registry. That contract should include all the details and specifications and warranties to secure the buyer of the estate. There are some risks which the buyer might encounter and should have been included in the contract. These are:

1- The buyer should be acquainted with maps, specifications, and details about the estate to be bought and to be signed by both parties, in

accordance with Jordanian law of real estate ownership article (128), paragraphs (A & B).

2- Acquaint the buyer to the title of the land on which the estate will be constructed showing that the land is not mortgaged or garnished or franchised to others, generally or privately.

3- The seller should also disclose that he owns an establishment or a construction company that is not mortgaged, garnished, liquidated, or bankrupt and has enough funding to execute its housing projects.

4- He should provide government evidence that the estate is not administratively forbidden to be operated upon being adjacent to military or ruin sites or general public facilities.

5- The seller, for the sake of ensuring project execution, has to get a bank guarantee for project execution and ownership transfer in addition to a guarantee against earthquakes, volcanoes, floods, or fire.

6- A term in favor of the buyer should be added to the contract to explicitly show buyer's rights in the estate bought, an apartment or floor sold taking at the same time guarantees that the buyer is able to pay the price.

7- Based on Jordanian civil law, there is a penal clause regarding a precautionary registry included in article (129) paragraph (A) in the Jordanian law of real estate ownership, Lebanese court of appeal defined it as a temporary procedure a claimer of the right of owning a real estate registered in the real estate record to maintain this right as stipulated in article (25) of decree No. (188)[1], Zein publications (3), p.344-345.

[1] Shams Eddin, Afif. (2011). The classified in real estate diligence. Beirut: Lebanon: Zein publications, (3), pp. 344-345.

Tareq Thiab (1994) defined it as a temporary registry announced in the real estate paper for a certain period to warn that the right is disputed which might be canceled due to the solution relevant to that dispute.

From the preceding definitions, one can define a precautionary registry to be a temporary one announced in the real estate paper to maintain the owner's right till a final solution regarding the dispute between the two parties is reached (Lina Jameel, n.d).

As for bank guarantee, some laws emphasized the necessity to maintain this as one of the buyer's rights to secure the execution of buildings under construction.

The guarantee or the bail given by the bank is a joint one between seller and buyer which secures for the buyer the execution of the project or to pay it to the buyer in case the project wasn't executed. The financial guarantee should not be specified by a certain amount. Whatever the project owner and the guarantor agree upon specifying an amount contradicts the obligation for it might be less than the real cost of construction processes[1].

Legal licensing and company registry at the ministry of industry and trade and in the ministry of public works enable the buyer to check company records, objectives, licensing, capital, and shareholders.

Thus administrative licensing permits the seller to directly start construction. This kind of license is a warranty for the buyer signing a contract to buy a real estate under construction.

[1] Ali, Alaa Hussein (2011). Contract of selling buildings under construction: A legal comparative study. Beirut, Lebanon: Zein Legal circulars, p 180.

5.2 GUARANTEES OF BUYER'S RIGHT DURING CONSTRUCTION STAGE AND OWNERSHIP TRANSFER

Throughout the process of contract execution regarding construction and ownership, the buyer might face numerous risks which could be traced back to the buyer or an extraneous factor. The question that emerges is: what kind of risk that emerges through executing the contract? What are the means which the buyer can use to secure his right in the estate stipulated upon in the contract? The researcher lists down some forms of risk that might occur throughout execution of the contract as follows:

1- The seller might become bankrupt, and the project couldn't be completed. The buyer, in this case, has no option but to file a lawsuit or abrogate the contract.
2- The owner of the estate might die, but the inheritors didn't care about project completion, and that causes damage to the buyer.
3- Exceptional circumstances or a force majeure might occur preventing project completion
4- The company which might be the executor of the project suffers from losses preventing it from project completion.
5- Certain administrative decisions might be issued to exapporporiate the estate for military purposes, thus, preventing completion.
6- The competent authorities might issue a decree to garnish the estate in recompense for income tax debt.
7- Certain circumstances might occur and make it impossible to execute the project, such as a case being filed against the purchased land.

In dealing with these risks, the buyer has guaranteed to which he resorts, in addition to those stated at the time of concluding the contract such as:

1- File a lawsuit to execute and register the estate for himself.
2- Ask the guarantor bank to pay the bail value to the buyer.
3- Abrogate the contract requiring indemnity for the damage that affected the buyer.
4- Abrogate the contract as a result of a force majeure that prevented contract execution.
5- As an insurance company to reimburse the money paid and indemnify for the damage that affected the buyer.

5.0 Conclusion

After the new law of real estate ownership no. (13) 2019 was issued, it was clear that the seller and buyer encountered several problems related to the contract of building, floor, or apartment under construction. The new law is a copy of the old one no. (25) issued in 1968, it didn't refer to the problems that face seller and buyer. The researcher came up to the following findings:

1- Promise sale contract of a building, a floor, or an apartment under construction has special nature as it doesn't have enough guarantees and no specifications of rights and obligations. Thus, once problems emerge, the seller has no option but to ask for execution, abrogation, or ask for indemnity.
2- Several laws stressed the necessity that the buyer gets guarantees the time he concludes a contract so as to know what to do in case problems emerge.
3- The promise sale contract must obtain all the necessary licenses to be able to start construction.
4- The buyer has to know everything about the maps, specifications, and objectives of the project.
5- One of the methods to secure the right of the buyer is to get a mortgage on the property.
6- Risks and problems often start once the construction begins and at the time of property transfer.

6.0 Recommendations

In light of results of the study, the researcher recommends the following:

1- The buyer has to be conversant with all major and minor particulars of the promise sale contract concerning relevant licensing in addition to maps and specifications of the estate as stipulated in the contract.

2- A precautionary contract on the piece of land or the project should be written to be a franchise right for the buyer.

3- Two release forms should be attached to the contract, one from the income tax and another of lawsuit cases from the court affirming that the land to be constructed on is free from judicial cases.

4- The company needs to provide that it has enough funding to execute the project via a bank guarantee to ensure the buyer's right in case problems emerge.

5- The building should be ensured through a promissory contract in case the company goes bankrupt, garnished or appropriated.

The researcher thinks that once these recommendations are taken into consideration, both the buyer and seller will benefit from them, in addition, they serve the general interest.

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QUALIFICATION AND LEGAL STATUS OF PALESTINIANS IN LEBANON

THE NEED FOR INTERNATIONAL PROTECTION AND THE CONTENT OF THE PROTECTION GRANTED IN THE POISE OF HUMAN RIGHTS

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Abstract:

The Palestinian Diaspora's main characteristics are instability, insecurity and grave conditions for vulnerable population of refugees, prevailed because of many discriminating illegal acts, Arab spring's political unrest, economic and social exclusion towards Palestinians.

This research provoked from the latest Lebanese Ministry of Labor crackdown on illegal foreign labor on 15 July 2019 which affected Palestinians in Lebanon, thus the study is discussing the current status of Palestinian refugees in Lebanon, highlighting the main existing

domestic legislation (laws, decrees, ordinances, administrative decisions) that regulate their presence and the related state practices, causing unfair measures affecting their basic rights and livelihood, which contravene the related international provisions and principles.

The study will provide the shortfalls of the international and regional protection regime for Palestinian refugees; it concludes that embodied legal essential means of strengthening protection to the rights of the Palestinian refugees in Lebanon must be subject to clear laws and procedures that preserve their fundamental humanitarian rights.

Keywords: Palestinians; Rights; Protection; International; Refugees.

"Not necessarily deep things are complicated.

Simple things don't necessarily have to be naive ..

The real artistic bias is:

How can one simply say the deep thing…"

Ghassan Kanafani

Introduction

The UN Sustainable Development Goals[1] affirm equality and dignity as essential to the enjoyment of basic human rights, including the right to the highest attainable standard of physical and mental health, which promotes global solidarity among all people, including refugees.

[1]**The UN Sustainable Development Goals, retrieved on 20 September 2019 from: https://www.un.org/sustainabledevelopment/sustainable-development-goals/**

The purpose of this research is to briefly outline the situation of Palestinians in Lebanon, particularly insofar as Lebanese law accommodates or curtails certain aspects of their basic rights under international human rights law. This research includes a short comment on the status of Palestinians under Refugee law, but is not concerned with Palestinian status under international humanitarian law[1].

The terms 'Palestinians in Lebanon' recovers different realities. This research will address the situation of the Palestinians that arrived in Lebanon as a consequence of the 1948 and 1967 Israeli-Arab conflicts, which is designated as 'historical Palestinians'. The research will further focus as well on the Palestinians who fled Syria since 2011 at the beginning of the conflict there. The latter category will be called Palestinian refugees from Syria and referred to as (PRS), as specific rules apply to them.

Problem: Palestinians suffered war, sieges and massacres, which in return creates an ambiguous status for them due to legislative vacuum in the Lebanese's legal structure, nevertheless the absence of neither international nor national mechanisms to solve their problems.

What provoked this research was the latest Lebanese Ministry of Labor crackdown on illegal foreign labor to ensure they have valid work permits; it has raised the ire of Palestinians there as it affects their status as refugees and hardship their working conditions, subjecting them to unfair treatment in the labor market. Protests, demonstration and

[1] **Notably, the International Community has been compelled to address the issue of the legal of Palestinians status under the Fourth Geneva Convention.**

strikes have been taking place since July 15, 2019 against this discriminatory action; as the restrictions within the law were not applicable to Palestinians until now, as they were exempted from these restrictions by the Lebanese government in 2010.

Such discriminatory practices shed light on the livelihood crisis which involves different kinds of violence as the hosting country refuse to ease the severe restrictions which in return make normal life impossible and constitute a form of violence and torture.

Importance of this study: This study aims to qualify the presence of Palestinians in Lebanon, their legal status, and will shed light on the humanitarian concerns, the violations to the enjoyment of basic human rights, in terms of their residency, access to housing, education, health, the labor market, basic services, social services, etc., the study examine the implications for the extent to which individuals benefit from certain protections and entitlements under the national Lebanese legislations and the international conventions.

Methodology: This study is examining the status of Palestinian refugees in Lebanon using a descriptive approach, thru describing the livelihood situations, and analyzing the legal text governing their situation.

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I: BACKGROUND: HISTORICAL OVERVIEW OF PALESTINIAN REFUGEES IN LEBANON

Palestinians diaspora is a witness to the displacement of over one million Palestinians to neighboring countries including Lebanon as a consequence of the 1948 Arab-Israeli war (Nakba), the subsequent war in 1967 and the 1970 Black September events in Jordan. Palestinians have ever since asked the Lebanese authorities to grant them civic and social rights during their obligatory stay in Lebanon, until the time of their return to the homeland, Palestine. Where initially, in the wake of the 1948 events, the attitude of the Lebanese authorities and public has been rather welcoming and tolerant, from the late 50's on, when Israel persistently refused implementing the right to return of the Palestinians[1], the Lebanese authorities have started putting harsh restrictions on the refugees, first and foremost to discourage permanent settlement.

To deal with the waves of refugees the United Nations' General Assembly established in December 1949 UNRWA – United Nation Relief and Work Agency for Palestinian Refugee in the Near East. UNRWA is concerned with '[...] persons whose normal residence was Palestine for a minimum of two years preceding the conflict in 1948 and who, as a result of this conflict lost both their home and their means of livelihood and took refuge in 1948 in one of the countries where UNRWA provides relief. Refugees within this definition and the direct descendants of such refugees are eligible for agency assistance if they are: registered with

[1] **UNGA resolution 194 dated 11 December 1948 (A/RES/194), retrieved on 6 September 2019 from: https://bit.ly/2MT5qMZ**

UNRWA; living in the area of UNRWA operations (Lebanon, Syria, Jordan and, after 1967, the Occupied Territories); and in need. The agency, however, was not granted the power to guarantee safety, security or legal and human rights. Those who are eligible for assistance 'are excluded from the area of competence of UNHCR and from the provisions of the 1951 Refugee Convention[1].

Moreover, on the international level, the UN General Assembly resolution 194 states that "the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for the loss or damage to property which, under principles of international law and in equity, should be made good by the governments or authorities responsible".

Furthermore, Resolution 237 of 1967[2], the UN Security Council affirmed the right of Palestinian refugees displaced in 1967 to return. The UN has repeatedly affirmed the right of return for those Palestinians who find themselves in the position of refugees due to expulsion, deportation, denial of residency rights, and so on.

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[1] **Bolesta, Andrezj,(2002) Socio-Economic conditions of Palestinian Refugees in Jordan, Syria and Lebanon, Tiger Working Papers, No. 35, P4-5, Available at : https://bit.ly/31Ro38i**

[2] **Resolution 237, 14 June 1967 (S/RES/237 (1967), retrieved on 6 September 2019 from: https://bit.ly/2MRzpoE**

'Some 469,555 refugees are registered with UNRWA in Lebanon, representing an 'estimated ten per cent of the population of Lebanon[1]. Sixty percent of registered refugees 'live in 12 UNRWA camps while 38% live in approximately 27 informal communities near the camps or are scattered in Lebanese communities[2]. Notably, however, the Palestinian population in Lebanon is not represented exclusively by registered refugees. There are, in addition, 'an estimated 10,000 to 40,000 non-registered Palestinian refugees and further 3,000-5,000 non-ID Palestinian refugees[3]. These categories have implications for the extent to which individuals benefit from certain protections and entitlements under the law. In particular, 'non-ID refugees' do not possess valid identification for Lebanon and, consequently, are least likely to enjoy the 'benefits' of any formal status or other legal protection in Lebanon.

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[1] UNRWA, retrieved on 6 September 2019 from : http://www.unrwa.org/where-we-work/lebanon

[2] American Near East Refugee Aid, ANERA Report, Palestinian Refugees Living in Lebanon, ,vol3. June 2012, p. 9. available at: http://bit.ly/1Ty1RcJ

[3] According to Amnesty International, 'registered refugees' are persons registered with UNRWA, who are also registered with the Lebanese authorities; 'non-registered refugees' are persons registered with the Lebanese authorities but not registered with UNRWA and 'non-ID refugees' are persons who are not registered with either UNRWA or the Lebanese authorities. Amnesty International, Briefing to the Committee on the Rights of the Child, 42nd session of the Committee on the Rights of the Child (the Committee), May-June 2006: Comments by Amnesty International on the compliance by Lebanon with its obligations under the Convention on the Rights of the Child.

Legally speaking, persons who are "Palestine refugees" are eligible to "be registered in UNRWA's Registration System and to receive UNRWA services", whereas UNRWA "makes its services available to non-registered persons displaced as a result of the 1967 and subsequent hostilities"[1]. However, it should be noted that while having been registered and/or recorded by UNRWA may help an individual prove that he or she falls within the scope of Article 1D of the 1951 Convention, it is not conclusive as to whether he or she falls within that Article's scope. This is for two reasons. First, as stated above, persons falling within Articles 1C, 1E or 1F of the 1951 Convention do not fall within the scope of Article 1D, even if they remain "Palestine refugees" or "displaced persons" whose position is yet to be definitively settled in accordance with the relevant UN General Assembly resolutions. Second, UNRWA has not registered and does not provide services to all persons who are "Palestine refugees", nor does it provide services to all persons who have been "displaced as a result of the 1967 and subsequent hostilities".

Thus, the 1951 Convention be it the main international instrument that provides protection to refugees in its Article 1D incorporates both inclusionary and exclusionary clauses for the protection of Palestinian refugees. The exclusionary clause provides that the 1951 Convention: "Shall not apply to persons who are at present receiving from organs or agencies of the UN other than the UNHCR." However, the second paragraph of 1D provides that: "when such protection or assistance has ceased for any reason, without the position of such persons being

[1] UNRWA, "Consolidated Eligibility and Registration Instructions", 2009, p7, retrieved from: https://bit.ly/2MRE2Py

definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" then these persons should receive protection through the 1951 Convention.

Considering the precarious situation of UNRWA, its limited mandate and short financials, and the defunct UNCCP, Palestinian refugees should fall under the inclusionary clause of Article 1D of the 1951 Convention.

II: PALESTINIANS IN LEBANON: STATUS AND PROTECTIONS UNDER REFUGEE LAW.

A. (Non) Status

According to UNRWA, Palestine refugees are defined as persons whose normal place of residence was Palestine during the period from 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 occupation.[1] The people who fall under this category and the descendants of male Palestine refugees (including adopted children) who live in the West Bank (including East Jerusalem) the Gaza Strip, Jordan, Syria and Lebanon[2] are covered by the mandate

[1] **Ibid, UNRWA, "Consolidated Eligibility and Registration Instructions", p10.**

[2] **UNHCR, *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees*, October 2009, available at , https://www.unhcr.org/4add88379.pdf accessed 3 September 2019, §7 fn. 10.**

of UNRWA, and therefore are not entitled to have refugee status under the 1951 refugee convention by virtue of its Article 1D[1].

It has however been noted that UNRWA's definition of a Palestine refugee is an administrative one, with a less clear juridical status recognized by international law:[2] in fact UNRWA talks about an "operative definition",[3] which means a definition to separate the beneficiaries of assistance from the others. In other words this definition is not definitive in respect of their legal status.[4]

Palestinians who left on account of the 1967 war and who are considered by UNRWA 'displaced persons are also excluded from the refugee convention according to the UNHCR,[5] since UNRWA provides services to them as well.

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[1] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, at: http://www.unhcr.org/refworld/docid/3be01b964.html (hereafter: "1951 Convention"). And U N General Assembly, Protocol Relating to the Status of Refugees, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, at: http://www.unhcr.org/refworld/docid/3ae6b3ae4.html

[2] Bocco Riccardo, (2000)., Background Paper - UNRWA and the Palestinian Refugees in Jordan, the West Bank and Gaza, Paper presented at the UNRWA-CERMOC Meeting of 18-19 June 2000, Amman, on "Rethinking UNRWA Policies towards Palestinian Refugees", p. 5.

[3] http://www.unrwa.org/who-we-are/frequently-asked-questions#beneficiaries

[4] Khalil A., Palestinian Refugees in Arab States: a right-based approach, (2009) CARIM research report, p. 7.

[5] ibid, UNHCR *Revised Note,* p4.

All the other persons which have left Palestine as consequence of other conflicts or who are outside UNRWA's areas of operation do NOT fall under the protection of the UNRWA mandate and therefore are technically covered by the 1951 Convention and the mandate of UNHCR.[1]

UNRWA operates the majority of recognized refugee camps, while providing essential education, health, relief, and social services both inside and outside them; these services are available according to its official website to 'all those living in its area of operations who meet this definition, who are registered with the Agency and who need assistance'.[2]

B. Entitlements

Palestine refugees are entitled to the assistance of UNRWA which, as mentioned above, operates the majority of recognized refugee camps and provide education, health, relief, and social services. Since no official legal document exists (i.e. akin to the 1951 refugee convention), the hosting states do not have obligations arising from this 'non-status'; it is however clear that they will be covered by human rights obligations of the hosting states.[3]

For these reasons it has been observed that 'Palestinian refugees have a precarious existence in these states regarding their legal position and the safeguarding of human and civil rights, which remain subject to

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[1] **Ibid, p5.**

[2] **http://www.unrwa.org/palestine-refugees.**

[3] **Khalil A., Palestinian Refugees in Arab States: a right-based approach, ibid, p. 7.**

political and security considerations of the perspective government' and that 'Palestinian refugees fall into a legal lacuna that sets them outside minimal international protections available for all other refugee groups in the world.'[1]

At the regional level, the Casablanca protocol was adopted by the League of Arab States on 11 September 1965 and ratified by, inter alia, Lebanon (although with reservations), Syria and Jordan. The protocol gives to Palestinians generally the right to work and freedom of movement.[2] Palestine refugees are entitled to different rights and protections granted by the hosting countries, but are relatively limited in Lebanon.

The Security Council resolution 194 of 1948, which created the United Nations Conciliation Commission for Palestine (UNCCP)[3], (which should have carried out the protection function not attributed to the UNRWA) included the right for the Palestine refugees to return to their homes and to be compensated in case of property loss or damage and instructed the Conciliation Commission to facilitate the repatriation, resettlement and

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[1] Khalil, Asem, (2010) "Socioeconomic rights of refugees", the American University in Cairo, Centre for Migration and refugee Studies Regional research, p. 12.

[2] The Casablanca Protocol, League of Arab States, Protocol for the Treatment of Palestinians in Arab States, 11 September 1965, available at: https://bit.ly/369qExM

[3] United Nations Conciliation Commission for Palestine (UNCCP), was created by UN-resolution 194 of 11 December 1948, in order to mediate in the Arab–Israeli conflict. The Commission consisted of France, Turkey and the United States. Its official headquarters was set up in Jerusalem on 24 January 1949. First progress report Archived at: https://bit.ly/2PnpaKd (doc.nr. A/819). 15 March 1949.

economic and social rehabilitation of the refugees.[1] The right to return is also included in the UDHR (Article 13(2)) which is largely considered by customary law.[2]

III: LEGAL STATUS

a. Lack of international protection

International protection is required when states are unable or unwilling to protect refugees and internally displaced persons. The rights and duties of refugees and the obligations of states are set forth in the 1951 Convention relating to the Status of Refugees. The Convention includes special provisions governing the status of 1948 and 1967 Palestinian refugees, which exclude explicitly the Palestinians of the protection granted by the Convention. Hence, Palestinian refugees are denied formal refugee status and protection by UNHCR.

The Office of the UN High Commissioner for Refugees (UNHCR) is the primary body mandated to provide international protection for refugees worldwide. Since the Palestinians fall out of its mandate, the United Nations established a separate organ, the UN Conciliation Commission for Palestine (UNCCP), to provide protection, including the search for a durable solution, for all persons displaced in Palestine during the 1948 War. This organ did not achieve any significant success,

[1] **UNCCP: A/RES/194, https://bit.ly/2NkAxA7**

[2] **UNHCR, European Series, Volume 4, Number 2, 1998/07, NGO manual on international and regional instruments concerning refugees and human rights, p. 41 and 210, available at www.unhcr.org/46e660d70**

thus it's no longer active, and the UN has not established a separate mechanism to provide protection, including implementation of durable solutions. Thus, the legal status of the Palestinians relies currently only on the national law in the host countries.

The fact that Lebanon has not signed the 1951 Refugee Convention is not utterly relevant since the latter does not grant the Palestinians the protection of the refugee status anyway. Lebanon is nevertheless bound by customary principles of Refugee Law, like the non-refoulement principle[1]. The fact that Palestinians are expressly excluded from the protection of the 1951 Refugee Convention does not preclude that as a principle of customary law, it protect Palestinians as well, hence prohibiting the deportation to a country where the individual would be at risk of persecution or gross human rights violations.

b. Legal status in Lebanon and the principle of 'Reciprocity'

The 'status' of Palestinian refugees in Lebanon is fundamentally that of foreigners[2] or even sometimes as a special group of foreigners, thus denying them from some rights granted to other foreigners.

Palestinian refugees in Lebanon are divided into three categories:

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[1] **UNHCR, (EC/SCP/2) Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, retrieved on 21 August 2019 from : https://www.unhcr.org/4d9486929.pdf. See also : https://bit.ly/2BJs447**

[2] **The law regulating entry, residency and exit from Lebanon no 10 of 1962 ,Issued on July 10, 1962, Amended By: Law No. 173 dated 14/2/2000, retrieved on 7 September from: http://ahdath.justice.gov.lb/law-nearby-Foreigners.htm**

- **Registered Refugees with both UNRWA[1] and the Lebanese Authorities: they are granted permanent residency documents and a five year and renewable travel document;**
- **Non Registered Refugees (NR) which are only registered with the Lebanese Authorities[2]: they are issued with permanent residency documents and a Laissez-Passer valid for one year, renewable three times;**
- **Undocumented Refugees (Non-ID) who are not registered neither by UNRWA nor the Lebanese Authorities: they aren't issued any documents and as a consequence lack any formal existence in Lebanon.**

In general terms, they are subject to the implications of the principle of 'reciprocity'[3], which stipulates that the rights and entitlements of foreigners in Lebanon may be equal to, but no more than, the same rights as enjoyed by Lebanese nationals in the foreign country concerned. For Palestinians, from a 'state' that is generally unable to grant and

[1] UNRWA registration entails access to UNRWA services but has no consequences on enjoyment of rights.

[2] There are approximately 30.000 refugees not registered with UNRWA because they would not fit the UNRWA definition of its mandate rationae personae: "persons whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict". Actually, this category was displaced from Palestine after the conflict.

[3] Al Najjar, Mohammed, Rola Badran and Wassim Ahmed. "The Palestinian Refugee Situation." Advocacy Practicum for NGO's Representing Refugees in Lebanon- Conducted by the Palestinian Human Rights Organization (PHRO). June2005. p20.

accommodate foreigners' rights, the reciprocity principle effectively renders all entitlements null and void.

It is extremely difficult for Palestinians to become Lebanese nationals.[1] 'Only a small fraction of Palestinians have acquired Lebanese citizenship, with a mere 3,000 naturalized until the 1980s, and 60,000 were granted citizenship in 1994.[2] This position is underpinned principally by a) Lebanon's position in respect of the 'right of return' of Palestinian refugees: that is, Lebanon maintains that the nationalization of Palestinians would jeopardize – politically, if not legally – their right of return to Palestine, and; [3] b) Lebanon's internal politics: whereby full Palestinian integration is perceived to constitute a threat to Lebanon's delicate religious / sectarian balance.[4]

Although Lebanon has been a party to the Casablanca Protocol of 1965 Protocol for the Treatment of Palestinians in Arab States[5], which assured Palestinians certain rights to, amongst others, residency,

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[1] **Shafie, Sherifa (2007), argues that Palestinians are prohibited from obtaining citizenship by the Constitution of Lebanon. However, nothing in the Constitution expressly prohibits nationalization. See Palestinian Refugees in Lebanon, Forced Migration Online, available at: https://bit.ly/2BSOGPr**

[2].**Hadad, Simon(2000), The Palestinian Predicament in Lebanon, Middle East Quarterly, retrieved from: https://bit.ly/2MSMjCw**

[3] **Bakri, Nada (2010), Lebanon Gives Palestinians New Work Rights, retrieved from: https://nyti.ms/31Qzux1**

[4] **Baraka, Hoda,(2008) Palestinians in Lebanon: Chains of Misery (Bound by the Law and the Market)p 16-17.**

[5] **Casablanca Protocol of 1965, retreived on 7 septembr from : https://bit.ly/369qExM**

freedom of movement, travel documents, and employment. Lebanon made however severe reservations when signing the Protocol. It nevertheless couldn't considerably enhance the situation of the Palestinians in the country especially during the Lebanese civil war, even widespread massacre was committed against Palestinians by the militia close to the Kataeb Party under the eyes of their Israeli allies (ie: Sabra and Shatila 16-18 September 1982)[1]. At that time the Palestinian camps had some level of autonomy and carried out attacks against Israeli targets from Lebanese soil - until Lebanon unilaterally abrogated it by decree on 21.05.1987, thus cancelling all socio-economic rights previously granted to the Palestinians.

A second attempt to formalize the rights of the Palestinians in Lebanon was briefly considered in 1991, when a Ministerial Committee was formed for this purpose. However, nothing concrete resulted from this Committee, since its work was frozen. Since then, Lebanon has placed immense restrictions on the Palestinians in the form of legislation: Palestinian refugees have no political, social or civil rights (UNRWA, 2002). Any question of granting them rights is seen as a step towards permanent integration (USCR Report, 1999: 2).

It is useful to clarify that the registration with UNRWA does not grant any rights to the Palestinians in Lebanon, but it allows them to enjoy a

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[1] **Israeli Crimes Against Humanity: Remembering the Sabra and Shatila Massacre, (2018) Institute for Middle East Understanding and Global Research, retrieved on 16 septembre 2019 from: https://bit.ly/31TxkN0**

whole range of services that UNRWA provides, for instance in the fields of assistance, health and education.

IV: PALESTINIAN REFUGEES FROM SYRIA (PRS)

The conflict in Syria that started in March 2011, have caused a massive influx of refugees in the neighboring countries, and notably Lebanon 1. Amongst those refugees are some Palestinians (PRS) under the mandate of UNRWA 2. When comparing the situation of the PRS to other Syrian refugees, it appears that the PRS are in an even more precarious situation than the other refugees from Syria.

Initially, PRS were granted a three months visa, which they could renew every three months, officially up to one year[3]. In practice, they were allowed to renew their visa even after this period of one year. They would need to pay a yearly fee of 200 USD per person, which many

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[1] UNHCR figures show that on the date of 31 July 2019, Lebanon hosts over 926.717 registered refugees from Syria in Lebanon. This does not include the Palestinian refugees from Syria (PRS). Retrieved from: https://data2.unhcr.org/en/situations/syria/location/71

2 According to UNRWA estimations as of 1 January 2018, 120,000 Palestine refugees (PRS) have left Syria to Lebanon and Jordan, the latest comprehensive head count carried out by UNRWA showed that 32,000 PRS registered with UNRWA in Lebanon. Retrieved from: https://www.unrwa.org/where-we-work/syria

[3] General Lebanese Directorate of the General Security : http://www.general-security.gov.lb/en/posts/91

weren't able to do. Since May 2014, the Government has started restricting access and stay to and in Lebanon for PRS.

According to the May 2014 circular, PRS were allowed to enter Lebanon through official border crossings in exceptional circumstances only 1. Those illegally present in Lebanon were allowed to regularize their stay until 31.12.2014 and get a three months permit but without a possibility of renewal. Those who were legally in the country are not allowed to renew their visa any longer. This will have as a consequence that if the PRS would stay in Lebanon after this period of three months or after the duration of their current visa, they would be illegally in the country and could be deported to Syria. According to UNRWA, and Amnesty when security forces would come across PRS illegally staying in Lebanon, they would issue them an order for deportation[2]. The policy

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[1] Rabil, G. Robert (2016) The Syrian Refugee Crisis in Lebanon: The Double Tragedy of Refugees and impacted Host Communities, Lexington Books, Maryland, p19. According to the circular, those circumstances are:

- **Pre-approval to enter Lebanon (entry permit) from the General Security Office (GSO);**
- **One-year or three-year residency visa for Lebanon;**
- **Valid multiple entry visa for Lebanon; or**
- **Airplane ticket to and visa for a third country.**

According to NRC, in practice only if they have a plane ticket or pre-approval (PRL relative, employer, appointment with Embassy).

[2] UNRWA, UNRWA Response and Services to Palestine Refugees from Syria (PRS) in Lebanon, Issue 21, 9 August 2013, http://bit.ly/1Xdlypb , See also Amnesty International, Denied Refuge, 1 July 2014, pp. 15-17.

mentioned in the circular, which reflects a decision at ministerial level allowed for dramatic changes for the legal environment for the PRS in Lebanon.

As for UNRWA, it services do not formally register the PRS that arrive in Lebanon, since they are already registered in Syria. UNRWA nevertheless records them and they can enjoy the same basic services as the other Palestinians in Lebanon.

V: CIVIL REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS AND ACCESS TO DOCUMENTATION

Historical Palestinians

In 1959, a Department of Palestine Refugees Affairs (DPRA) was created under the Ministry of Interior1. According to its attributions, the DPRA has organized a special registry for the Palestinian refugees in Lebanon, in order to register personal documents related to birth, marriage, divorce, and marriage annulment, change of residence and change of sect or religion.

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[1] **See Legislative Decrees No. 42 and its supplement 927 of (31/03/1959), with its Article 1 stipulating the establishment of a "department within the Lebanese Ministry of Interior to manage Palestinian affairs, later renamed to be the "General Directorate of Palestinian Refugee Affairs", Sulieman, Jaber (2014), Undocumented Palestinians in Lebanon (Non-Id Refugees), Center for Refugee Rights (Aidoun), retrieved from: https://bit.ly/2MRuQe0**

Children born to non-ID[1] Palestinian fathers are not registered with UNRWA nor receive any identity documents from the Lebanese government, but in fact become non-ID as well. Around 5000 Palestinian refugees in Lebanon are not registered with the Lebanese government, nor with the UNRWA[2]. These refugees currently residing in Lebanon originate from the West Bank and Gaza, and were denied renewal of their documents by the countries which gave them these documents initially. Their descendants born in Lebanon from a Palestinian or Lebanese mother are undocumented as well.

Palestinian Refugees from Syria- Civic Documentation

The Lebanese authorities practice a rather restrictive approach on the registration of births, marriages or deaths for refugees from Syria in general and hence for PRS. The current policy on this is that the Lebanese authorities will accept to register any such events only if the person concerned enjoys a legal stay in Lebanon at the moment of the event[3]. Hence, a marriage between PRS or involving at least one PRS will be registered only if the persons concerned enjoy a legal stay in Lebanon.

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[1] Referred to as "Non-ID refugees", The Lebanese authorities usually do not grant Palestinians in this category any kind of identification documents, except for a card issued by the Directorate of the General Security as a proof of identity. They see the stay of these refugees in the Lebanese territory as de facto situation, but consider them as well as illegal residents in the country. See Sulieman, ibid,

[2] In accordance with the statistics published by the International Federation for Human Rights: https://www.fidh.org/en/region/north-africa-middle-east/

[3] UNRWA, protection brief Palestine refugees living in Lebanon, p2, retrieved from: https://bit.ly/32PJzLS

A child that would be born from a PRS will be registered only if his mother (and father) stay(s) legally in Lebanon at the moment of his birth.

Hence, registration of personal status document is quite an adventure. One needs to show a lot of documents that refugees are often unable to produce, due to the circumstances of their departure in general. The conditionality of a legal stay de facto excludes many PRS from the possibility to register events that affect their personal status.

VI: PRESENT-DAY LIVING CONDITIONS FOR PALESTINIAN REFUGEES IN LEBANON

a. Work

Palestinian refugees in Lebanon suffer from a very high unemployment rate reaches 57% according to the latest report by UNRWA in 2019[1].

Palestinians do not enjoy an entitlement to work equal to that of Lebanese nationals. Palestinians are treated as foreigners for the purpose of work. Thus, their prospects of gainful employment are governed by law of 1964[2] and decrees of 1982 (289/1), 1995 (621/1) and 2005 (67/1) – relating generally to the work entitlements of foreigners, and lately by

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[1] **Peoples Dispatch(2019), Palestinian refugees in Lebanon protest discriminatory labor law, retrieved from : https://bit.ly/2MQiS43**

[2]**Presidential Decree 17561 of 18 September 1964 regulates the work of foreign nationals in Lebanon-work permits on the basis of the principle of 'reciprocity'. THE LABOUR SECTOR IN LEBANON: LEGAL FRAMEWORKS, CHALLENGES, AND OPPORTUNITIES, retrieved from: https://bit.ly/2BJtwn5**

the Ministerial decision of 15 July 2019. As foreigners, the Palestinian refugees were initially subjected to the Ministerial Decree 17561/64 that organizes the participation of foreigners in the Lebanese labor market. This Ministerial Decree contains three rules that restrict the employment of Palestinians, those include: the requirement to obtain a work permit prior to employment, the national preference clause, and the principle of reciprocity of treatment[1] in Lebanon, a condition impossible to meet for Palestinians given the inexistence of a Palestinian State in the legal sense[2].

Despite some changes over time, including by way of the 2005 decree, which increased the number of jobs available to Lebanese-born Palestinians, the result, in effect, has been to bar Palestinian refugees from working in over 70 professions. In 2006, 'various ministerial decrees (No. 289/1 of 18 December 1982 and Ministerial Decree [621/1] of 15 December 1995) prohibited Palestinians from around 72 trades and professions.[3]

In 2010, the labor law was amended, foreseeing greater entitlements for Palestinians to work in Lebanon. The law was foreseen to enable Palestinians 'to claim free work permits for private-sector work as well

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[1] **According to which a foreigner is entitled to enjoy rights in Lebanon only if the country of their origin affords its Lebanese residents the same treatment.**

[2] **ILO Policy Brief, "The work of Palestinian refugees in Lebanon is a right and a common interest", 26 June 2014, consulted on 7.9.2019, https://bit.ly/2BPxtGW**

[3] **Shafie, S, ibid, see also Baraka, ibid, p16.**

as claim insurance for work-related accidents[1]. Eventually, the national preference clause was suspended, pensions and limited social security benefits would be granted, but Palestinians would remain barred from professions that require syndicate membership, including law, medicine and engineering.'[2] In effect, under the 2010 amendment, Palestinians continue to be treated as foreigners.

The abrogation of the national preference clause gave Palestinians access to manual and clerical jobs, after obtaining a work permit. But they are still unable to work in professions regulated by professional syndicates.[3] By one account, the result is that 'hiring practices are not likely to change as Palestinian refugees are still not able access the majority of white collar positions'.[4] As for the work permit, it is quite a hassle to obtain and linked to one specific contract. Moreover, as it only allows for limited social benefits, work permits are reportedly requested very rarely[5].

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[1] Amendment of Article 59 of the Labour Law in 2010, exempting Palestinian refugees from paying fees for work permits and ensuring equal treatment for them;

[2] Charles,Tom, (2011) The Unknown Hell of Palestinian Refugees in Lebanon, retrieved from: https://bit.ly/31LCPgM

[3]ILO Policy Brief, ibid, see also: https://nyti.ms/2MSe4vh

[4] ANERA,ibid, p4.

[5] ILO, International Labor Organization, Palestinian Employment in Lebanon (2014) - Facts and Challenges, https://bit.ly/2BQFOK8 A labor force survey among Palestinian refugees shows that only 2 percent of the Palestinian workers have a work permit. According to the figures of the Lebanese Ministry of Labor, the number of work

In terms of consequences, 'thousands of Palestinian refugees, long-term residents in Lebanon, continue to be excluded by law from working in certain professions and accessing other rights available to Lebanese citizens[1], Excluded from the 'syndicate jobs', and largely disadvantaged in terms of access to work-permit jobs. Palestinians are generally only able to find work on the black market. Most Palestinian workers have been particularity active in the commerce and construction sectors and engaging in low-status, low-skilled and insecure jobs, where one out of three Palestinians are paid on a daily, weekly or productivity basis. Hence, according to UNRWA 'more than 60% of Palestinian refugees live below the poverty line.'[2] PRS would be submitted to the same rules, but there is no clarity on this point. If confirmed, applying for a work permit would obviously be possible only for those staying legally in Lebanon.

The massive arrival of refugees from Syria has had some drastic effects on the labor market in Lebanon. Many of these newly arrived have been looking for jobs on the black labor market and have shown themselves available to work for lower wages than the Palestinians from

permits issued for Palestinian workers in 2012 amounted to 401 work permits (including 149 renewed ones).

[1] Amnesty International reports, retrieved from: https://bit.ly/32NIeFo

[2] UNRWA statement on the situation of Palestine Refugees in Lebanon, July 2019, retrieved from: https://bit.ly/2qHumOL https://www.unrwa.org/newsroom/official-statements/unrwa-statement-situation-palestine-refugees-lebanon see also: Christoff, Stefan,(2004), *Living War: Palestinian Refugees in Lebanon, Zmag,* https://bit.ly/2WjJopN

Lebanon, whom were their main competitors in the black market labor segment. This has hence worsened the latter's socio-economic situation.

b. Social Security

Employed Palestinians have limited right to social security in Lebanon[1]. Palestinians in Lebanon suffer from discrimination in their access to social security due to their status as stateless persons, as access to social security for non-citizens in Lebanon is dependent on "reciprocity of treatment".

However, since 2010, these restrictions have been – unfortunately only partially - lifted. Palestinians are now entitled to end of service indemnity as well as to an indemnity in case of abusive dismissal. For that purpose, a separate independent account for the contributions belonging to the Palestinian refugees' workers/laborers has been created within the Administration of the Social Security Fund. As for other social benefits, the 2010 amendment expressly states that Palestinian workers remain excluded from any sickness, maternity and family allowances.

The fact that this shy opening hasn't convinced is reflected in the number of work permits that have been requested since[2]. In 2012, only 2 percent of the Palestinian workers had asked for a work permit. Since it is only this very small number of legally working Palestinians that are entitled to the benefits of this 2010 amendment, we can fearlessly suggest

[1] **Shafie, S, ibid, and ANERA, ibid, p4.**

[2] **Ibid.**

that the impact if this amendment is yet very limited and that the vast majority of the Palestinians remain out of the scope of social benefits.

c. Property

Palestinians in Lebanon are generally not permitted to own, or pass ownership of, property[1], as the Lebanese law prevents Palestinians from acquiring property, and from inheriting or registering real estate. Palestinian refugees are obliged to reside in the overpopulated refugee camps deprived of their human right to 'adequate housing' or to pay a high price for renting an apartment outside the camps, which the majority of refugees cannot afford. Nevertheless, such discrimination between people on the basis of their nationality actively violates the provision of Article 5 of the CERD[2].

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[1] **Presidential Decree 11614 of January 1969, modified in April 2001 by Law No. 296, prohibits persons 'who not carry a citizenship issued by a recognized state' from owning property in Lebanon. Article 1 of the amended decree states: "no non- Lebanese person, either natural or juridical, and also no Lebanese juridical person reputed by the present law to be alien, is entitled to acquire through a contract or any other legal deed concluded between living persons, any real property rights in Lebanese territory or any other real right from among the rights referred to in the present law, except after obtaining a permit granted by a decree issued by the Council of Ministers on the proposal of the Finance Minister." There shall be no exception to this rule except in cases explicitly stated in this present law or in a special text. No real right of any kind may be acquired by any person who does not carry a citizenship issued by a recognized state or by any person if such acquisition contradicts with the provisions of the constitution relating to the prohibition of settlement.'**

[2] **Comments by Amnesty International on the compliance by Lebanon with its obligations under the Convention on the Rights of the Child.**

'In 2001, the Lebanese Parliament passed an amendment to the national property law, which forbids "non-Lebanese persons, who do not possess citizenship issued by a state recognized by Lebanon, to inherit or buy property"'.[1] In lieu of transfer of title – in, for example, the case of death – property is automatically handed over to the Lebanese authorities,[2] effectively preventing property from being bequeathed to family.[3] Moreover, due to legal aspects of land ownership, UNRWA is limited in their ability to provide assistance (housing, water and sanitation) to those refugees living outside the camps.

Finally, in respect of the camps 'the Lebanese Government forbids the reconstruction of totally destroyed camps, and in other camps any reconstruction or building requires a special permit which is usually not issued… Building without a permit is punishable by arrest and detention.[4] As for the land on which the camps are built, it is owned by private Lebanese persons. The Government of Lebanon did initially requisition this land and paid, until 1975, some indemnities to the owners.

d. Freedom of Movement

To travel abroad, freedom of movement for Palestinians is subject to the issuance of travel documents. Since they have no formal citizenship,

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[2] ANERA, ibid, p9.

[1] See note 60.

[2] Christoff, Stefan ,ibid.

[3] Shafie, S,ibid.

[4] ANERA, ibid.

Palestinians can't be issued passports. Hence, travel and work abroad is premised on the issuance of one or other kind of document issued to each of the different categories of Palestinian refugees in Lebanon:

- Refugees registered with both UNRWA and DAPR are issued with permanent residency documents and a 5-year renewable travel document;

- Refugees registered only with DAPR (non-registered refugees) get issued with permanent residency documents and a Laisser Passer with 1 year validity, renewable 3 times;

- Non-ID refugees who are not registered with either UNRWA or DAPR are not issued with any documents at all.

'In 1995, Order No. 478 of the Ministry of Internal Affairs imposed an exit and entry visa, which left many Palestinian refugees and holders of Lebanese travel documents stranded outside of Lebanon, unable to return. In January 1999, the Government eased the visa restrictions.'[1]

Within Lebanon, there are some restrictions on freedom of movement as well, mainly for the people living in the camps in the South. Differing from other Palestinian refugee camps over the Lebanese territories, camps in southern Lebanon are besieged and fenced all around with very narrow and limited number of entrances and exits. For instance Rashidieh camp population is more than 34,584 registered refugees[2], all

[1] **Shafie, S,ibid, See also Hadad, S, The Palestinian Predicament in Lebanon ,ibid.**

[2] **UNRWA , Rashidieh Camp, (2019) https://www.unrwa.org/where-we-work/lebanon/rashidieh-camp**

passing through one entrance–exit check point. Restrictions are imposed on these camps at night starting from 9 p.m. Every entrance to and exit from the southern camps, beyond this time, is subjected to registration from the Lebanese Army. In 2009 the Lebanese Army worked on building a wall around the eastern side of Ain Al Hilweh camp, which increased the isolation of the camp from its surroundings.[1]

Except – often illegal – local curfews that generally apply to all refugees from Syria, PRS do not face specific restrictions of movement. Their main constraint is the often illegality of their stay, which exposes them to deportation. Hence, most refugees who stay illegally in Lebanon, including PRS, prefer stop moving as soon as their visa has expired or if they entered illegally in the country. Noting that since May 2015 the Lebanese government has virtually stopped allowing PRS from entering into Lebanon[2].

e. Education

Palestinian refugee children do not have access to the Lebanese public school system.[3] Law No. 686 of 1998, which amended Article 49 of Decree No. 134/59 provides that free public education 'is a right to every *Lebanese* in the primary education age.'[4] Instead, registered refugees –

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[1] Joint NGO Submission to the Office of the High Commissioner for Human Rights on the occasion of the 9th session of the Universal Periodic Review on Lebanon November 2010, available at https://bit.ly/2or6DSk

[2] Rabil, ibid, p19.

[3] ANERA, Ibid, p3.

[4] Amnesty, Briefing to the Committee ,ibid.

and, possibly, non-ID Palestinians, despite some reports to the contrary – attend UNRWA or private schools.[1] Unlike in other countries where it operates, UNRWA runs secondary schools in Lebanon to address the problem of expensive senior schooling.[2]

Amnesty International reports, however, that 'non-ID Palestinian refugee children are unable to go to secondary schools as they cannot sit for the Lebanese state exams which lead to the award of the brevet, the Lebanese intermediate schooling certificate, as they must possess recognized identification documents to sit for those exams. As such, they are unable to receive recognition of their educational achievement or complete their schooling.' [3]

f. Health Care

Palestinians do not have access to national health services in Lebanon.[4] 'Those living in refugee camps can get primary health care at UNRWA and non-profit clinics, which are understaffed and underfunded. The ratio of doctors to patients is very low: a doctor at an UNRWA health clinic usually sees 117 patients per day… Not all medical services are provided in every camp. So refugees may need to visit another camp for dental work or laboratory tests.'[5]

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[1] **ibid.**

[2] **ibid.**

[3] **Ibid, and see also Shafie, S, ibid.**

[4] **ANERA, ibid, p9.**

[5] **ANERA, ibid, p8.**

VII: The adopted Human Rights Notions in the Lebanese Legal pyramid:

The notion of Human rights principles and basic freedoms emerged and were introduced into Lebanese legislations thru signing up to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)[1], under the law implemented by Decree No. 3855 dated 1/9/1972. Furthermore, the Universal Declaration of Human Rights became part of the preamble to the Constitution under Constitutional Law No. 18 dated 21/9/1990[2], which was enshrined in the second paragraph of the preamble to the Constitution, reading as follows:

"Lebanon is Arab in its identity and in its affiliation. It is a founding and active Member of the League of Arab States and abides by its pacts and covenants. Lebanon is also a founding and active member of the United Nations Organization and abides by its covenants and by the Universal Declaration of Human Rights. The Government shall embody these principles in all fields and areas without exception. "

In the second article of the Code of Civil Procedure, the Lebanese legislature accepted the principle that international conventions supersede ordinary law based on the principle of the 'hierarchy of rules':

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[1] **The ICESCR and ICCPR were adopted by the UN General Assembly on December 16, 1966. They are considered the practical instruments of the Universal Declaration of Human Rights adopted on 10 December 1948**

[2] **This preamble was added to the Lebanese Constitution by Constitutional Law No. 18/1990 after the Taif Agreement that ended the civil war**

"The courts shall comply with the principle of the rules of hierarchy. In the event of conflict between the provisions of international treaties and those of ordinary law, the former shall take precedence over the latter."

Consequently, ICESCR and ICCPR, which Lebanon signed up for and ratified, are part of Lebanese law and supersede it.

Thus, the adaptation of these fundamental rights and freedoms within the Lebanese legislative pyramid should have direct impact on litigation, as making grievances to protect fundamental principles and freedoms that are not explicitly enshrined in the local law. In other words, disputing parties are allowed to include in their legal arguments, in the context of lawsuits or appeals, principles and rights set out in international treaties and all the instruments enshrined in international human rights law.

VIII: The legal essential means of strengthening civil and social protections for Palestinians to adequate standard of living in Lebanon:

These legal commitments are based on the following:

1) **The Universal Declaration of Human Rights, which has become an integral part of the Lebanese Constitution: which enshrines, the right to life liberty security of the person in article 3, and forbids torture in article 5, equality and freedom from slavery and forced labor, it guarantees the right to security in the event of unemployment, the right to equal pay for equal work, the right to form and join unions, the right to rest and leisure, including**

reasonable limitation of working hours, the right to work in safe and fair conditions, and the right to an adequate standard of living[1].

2) **The International Covenant on Civil and Political Rights (ICCPR)[2], Article 5 which prevents any restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent. Also Article 8 of which prohibits slavery and human trafficking; also article 7 that forbids subjecting anyone to torture or to cruel, inhuman or degrading treatment or punishment.**

3) **The International Covenant on Economic, Social and Cultural Rights (ICESCR) [3], Article 6 of which enshrined the right to work; Article 7 the right to the enjoyment of just and favorable conditions of work, including the right to rest, leisure and reasonable limitation of working hours; Article 8 the right to form and join**

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[1] **Articles 23, 24, 25 of UNHD, retrieved from: https://bit.ly/2MS2ekT**

[2] **International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, Retrieved from : https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx**

[3] **International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, retrieved from : https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx**

trade unions; Article 9 to recognize the right for everyone to social security including social insurance; and Article 11 the right of everyone to an adequate standard of living for themselves and his family. Article 12 for the enjoyment of the highest attainable standard of physical and mental health, and article 13 to recognize the right of everyone to education.

4) **The International Convention on the Elimination of All Forms of Racial Discrimination[1], States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, Article 5 of which enshrines the right to equality and freedom of movement; The right to own property, The right to public health, The right to education..etc.**

5) **The Convention on the Rights of the Child[2], where States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention, ex: under article 32, enshrines the right of the child**

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[1] **International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19, retrieved from : https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx**

[2] **Convention on the Rights of the Child , Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 , entry into force 2 September 1990, in accordance with article 49, retrived from : https://www.ohchr.org/en/professionalinterest/pages/crc.aspx**

to be protected from economic exploitation and from performing any work that is likely to be dangerous or interfere with the child's education or to be detrimental to the child's health or its physical, mental, spiritual or moral development. The Convention also compels states to take appropriate measures to establish a minimum age for the admission of children to employment, to establish an appropriate system of working hours and appropriate regulation of the hours and conditions of employment, and impose appropriate penalties or other sanctions to ensure effective enforcement of this article.

6) The International Convention on the Elimination of All Forms of Discrimination against Women[1], which state in article 3 that States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms, ex: Article 11 of which enshrines the right to work, equal hours of work and the right to maternity leave, as well as equal pay for equal work;

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[1] Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979, retrieved from: https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx

7) **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1], which bans all forms of torture and other cruel, inhumane or degrading treatment or punishment and safeguards human dignity; ex: article 2 states that: Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. Also article 3 which state: No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.**

IX: Conclusion

The case of Palestinian refugees has highlighted the state of falling short of meeting the core minimum obligations set by international law. Nevertheless, the international community has failed to uphold the requisites of international protection as dictated by international law towards the Palestinian refugee population.

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[1] **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984**

entry into force 26 June 1987, in accordance with article 27 (1), retrieved from : https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx

Moreover, the dedicated legal frameworks failed from preventing implementing policies which hinder and deny Palestinian refugees the ability to seek, obtain and avail of international protection standards which resulted into an extreme marginalization of their rights and freedoms.

Even though the Palestinians refugees are under the umbrella of UNRWA and the UN General Assembly resolutions i.e.: 194, and the 273 of 1967, but also the international customary law defines the core minimum obligations of states which must be adhered to regardless of whether the states are signatories to the 1951 Convention or not, in providing international protection to refugees and asylum seekers.

This study concludes that: regardless of the Lebanese legal amendments and ministerial decisions that have been issued so far it didn't contribute to making any progress in the Palestinians' rights and conditions, the issue is still controversial at the economic, political and social fronts because of the connection between civil rights and naturalization.

Thus, this study concludes the following:

1- **The lack of protection faced by Palestinian refugees is exacerbated due to states' inconsistencies and ambiguities in interpreting and applying the 1951 Convention, particularly concerning Article 1D.**
2- **One source of the protection gap faced by Palestinian refugees results from states' violations of the non-discrimination and non-refoulement principles of customary international law, ex : PRS.**
3- **Another protection gap characterizing the Palestinian refugee case is resulting from the ineffective special framework created for**

Palestinian refugees in the form of the United Nations Relief and Works Agency (UNRWA) which was mandated to provide humanitarian aid and assistance to Palestinian refugees but lacks a comprehensive protection mandate and struggles with a chronic financial shortages due to political control.

4- **The ineffective United Nations Conciliation Commission on Palestine (UNCCP) which was tasked with providing international protection, including durable solutions, but has been dormant since 1952.**

5- **The lack of political will of the international community to address the Palestinian case, and the continuous flagrant disregard for international law and the right of Palestinian refugees to return to their home of origin.**

6- **In regard to the rights, entitlements and protections under the law afforded to Palestinians in Lebanon, it is reasonable to conclude on the basis of preliminary research that:**

- **The 'status' of Palestinian refugees in Lebanon is fundamentally that of foreigners and are treated alike.**
- **PRS have a very precarious legal status in Lebanon, limited to three months visa's that could not be renewed in the future;**
- **As Palestinians are treated as foreigners, they do not enjoy an entitlement to work equal to that of Lebanese nationals, they are prohibited from practicing 70-120 of professions. Similarly, employed Palestinians have had limited right to social security, which has reflected negatively on their living conditions.**
- **Poverty hits around two thirds of the Palestinian population in Lebanon.**

- **Palestinians in Lebanon are generally not permitted to own, or pass ownership of property.**
- **Palestinian refugee children do not have access to the Lebanese public school system.**
- **Palestinians do not have access to national health services in Lebanon.**
- **Palestinians are subject to real restrictions in terms of freedom of movement, especially in the southern camps.**
- **The lacking of domestic mechanisms to support UNRWA's role.**
- **The living conditions imposed on Palestinians clearly violates Lebanon's obligations under Article 5 and 11 of the International Covenant on the Elimination of All Forms of Racial Discrimination CERD (acceded in 1971). Article 5 states: 'In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of... (d) other civil rights.."**

Recommendations:

- **The absence of specific legislations addressing Palestinians' unique situation has made them vulnerable to marginalization, thus there is a dire need To assure respect to all International conventions and covenants thru implementing obligations to assure effective protection and remedies by the competent authorities, and to amend the Lebanese legislations in order to view Palestinians need as a**

special case and remove the reciprocity of treatment, moreover to implement/activate principles and rights not addressed by national legislations and waive any contradictions within in accordance with the conventions, provisions and principles of international law which should guide states in the development of mechanisms that afford Palestinian refugees their due protections.

- **Lebanon has ratified several international instruments and charters ex; ICESCR and ICCPR, even enriched in its constitution the Universal Declaration of Human Rights. These essential human rights instruments should guide in the development and adaptation of rights-based mechanisms that afford Palestinian refugees their due protections, by an active and robust agency dedicated to pursuing this goal.**
- **There is a need to remove the legal and administrative obstacles that stand in the way of Palestinians receiving fair and legal opportunities, by undertaking measures to regulate free work permit, permits of owning properties, access to education, and explore viable measures that could benefit Palestinians inclusion in health care coverage and social securities. And to assure protection for all the Palestinian Refugees Categories including the non-ID's.**

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ILLEGAL IMMIGRATION AND MEANS OF COMBATING IT IN INTERNATIONAL CONVENTIONS

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Abstract

The phenomenon of illegal immigration has emerged at the local and international levels. The international community has realized the dangers of this phenomenon and many mechanisms have been put in place to combat this phenomenon. However, the efforts proved that they are not able and sufficient to comprehensively solve this dilemma.

It has been concluded through the hypotheses of this research and scrutiny of the causes of the phenomenon of illegal immigration that the most important reasons that have contributed to the failure of the mechanisms adopted by the national and international community alike is the lack of awareness of the real motives and highlight the economic motivation only.

In this study, we have reached a set of conclusions and recommendations which we hope will contribute to solving this phenomenon and focus on all causes, especially political reasons, conflicts and instability conditions.

Keywords: Illegal immigration, Exporting countries, Receiving countries, Transit countries, International mechanisms, Smuggling of migrants.

Introduction:

Article 13, paragraph 2, of the Universal Declaration of Human Rights states: "Everyone has the right to leave any country, including his own, and to return to his country."

The right of legitimate movement is guaranteed; immigration is a natural phenomenon. Human beings, by their nature, move to places where there is decent living. This right, like other rights, is relative and not absolute. In other words, there are national and international restrictions on freedom of movement in order to preserve national and international security and to protect the migrant himself.

There are many reasons for the phenomenon of illegal immigration, including political reasons, armed conflicts, wars and conditions of

instability in general, including economic, social and psychological reasons.

The phenomenon of illegal immigration has several positive and negative impacts; the negative impacts are represented in the high rate of crimes in receiving countries and the violation of rights. These impacts affect the immigrant himself and it is clear that the negative impacts are much more than the positive ones.

Consequently, national and international mechanisms have been adopted to combat this phenomenon, but these mechanisms, while contributing to the reduction of this phenomenon, are not sufficient to reach a comprehensive solution.

Therefore, in this research, we opted to shed light on the phenomenon of illegal immigration, to clarify its concept and distinguish it from similar terms such as human trafficking and smuggling of migrants, as well as to identify the real motives for it, because unless the causes leading to it are resolved, we cannot reach the optimal solution. Also, this research has aimedat showing the national and international efforts to combat illegal immigration and identifying the causes of weakness and strength, taking into account that migration itself is not the goal, but how immigration takes place is our concern, specifically immigration that goes against the laws.

Several questions have been answered, including:

Q1. What is the concept of illegal immigration and what is the difference between it and similar concepts such as asylum and human trafficking?

Q2. What are the reasons behind the phenomenon of illegal immigration and is the economic reason the main reason?

Q3. What are the positive and negative effects of this phenomenon?

Q4. What are the national and international efforts to solve this phenomenon and how effective are they?

FIRST TOPIC

THE CONCEPT OF THE PHENOMENON OF ILLEGAL IMMIGRATION

The phenomenon of illegal immigration has become one of the most common vocabularies internationally and nationally. However, there is no all-encompassing definition of illegal immigration. The concept of illegal immigration is still vague, so we will define the concept of illegal immigration and its causes through the following:

- **Branch I: Concept of illegal immigration.**
- **Branch II: Causes of the phenomenon of illegal immigration**

BRANCH I

CONCEPT OF ILLEGAL IMMIGRATION.

First: Definition of illegal immigration.

The concept of illegal immigration has become one of the most common concepts at the international and local levels. Despite this, there is no universally accepted definition of this phenomenon, meaning that the definition of illegal immigration is still vague until now. There are many opinions in the definition of this phenomenon, not only at the local

level, but also at the international level[1]. Therefore, we will describe the definitions presented for this phenomenon as follows:

1- The Jurisprudential Definition

Jurists of international law did not agree on a specific definition of the phenomenon of illegal immigration. Each of them even defined it according to the interests and needs of his state, according to the type of it: exporting, receiving, or transit.

The first trend of international jurists has defined illegal immigration as "the exit of a citizen from the territory of the state through illegal crossing points designated for that purpose, or from a legitimate crossing point using a forged travel document"[2].

The second trend of international jurists has defined illegal immigration as follows:

Illegal immigration is the illegal entry and exit from and to a region or state by individuals or groups through unspecified places and without restricting or observing the legal controls and conditions defined by each State in the field of movement of persons.[3]

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[1]The United Nations itself has failed to produce a definition that is generally accepted.

[2] Salam, Ahmad Rashad, (2010), The Apparent and Inherent Dangers to National Security for Illegal Migration, Naif Arab University for Security Sciences, Center for Studies and Research, Riyadh, p. 211.

See: Eid, Mohammed Fathi, (2010), International Experiences in Combating Illegal Immigration, Naif Arab University for Security Sciences, Riyadh, edition (1), p. 35.

[3] Al-Wissi, Ajeel, et al. (1988), Al-Munjid in Arabic and Media, Dar Al-Mushrif, Beirut, p. 35. For more information on definitions of illegal immigration, see Al-Tamimi,

The third trend of international jurists has defined it as follows:

"Illegal immigration is the movement from the motherland to the country of immigration with a view to continuously residing in contravention of the rules governing migration between States in accordance with the rules of international and domestic law".[1]

From the foregoing, the extent of the difference between the jurisprudential definitions of the phenomenon of illegal immigration shows that there is one aspect that has focused on both the exporting and receiving countries of immigrants, some of which has focused on the rules governing immigration and the extent of its violation by illegal immigrants.

However, a thorough examination of the above definitions comes to the conclusion that these definitions have deficiencies in several respects. As for the first definition, it has focused on the act of illegal exit only, and omitted illegal entry; it has focused on illegal exit using a false passport or by falsifying the papers required for the transit. This trend has also overlooked individuals who enter legally using legal identification documents but remain in the territory of the state after the expiry of the specified period of residence.

Mohammad Reda, (2011), Illegal Immigration through National Legislation and International Covenants, Policy and Law Journals, No. 4, January, p 20.

[1]Salam, Ahmad Rashad, (2010), The Apparent and Inherent Dangers to National Security for Illegal Migration, Ibid., P. 211.

See Warda, Sharafeddine, (2013), Combating the Crime of Smuggling of Migrants in the Algerian Penal Code, Journal of Jurisprudence, Issue 8, Mohammed Khudair University, Biskra, Algeria, p. 87.

The same criticism, which has been directed to the first trend, has been directed to the second trend, which is the omission of the definition to persons who enter the receiving countries legally by also legal documents and remain after the expiry of their legal residence without the consent of the receiving countries and do not submit to the competent authorities to rectify their situation.

The third and final trend has been found to be deficient in this definition, because it neglects the process of illegal immigrant entry and exit and only provides for illegal residence.Thus, supporters of this view have confined the phenomenon of illegal immigration to this case only.

2. Legal Definition of Illegal Immigration

There are several legislations that address the definition of illegal immigration in their national laws, including but is not limited to the following:

Illegal immigration is defined in Article 2 of the Libyan Law No. 19 of 2010: "Illegal immigration is considered as follows:[1]

1. Admitting or removing illegal immigrants from the country.

2- Transferring and facilitating the transfer of illegal immigrants inside the country, knowing that their presence is illegal.

3- Sheltering, deporting or concealing illegal immigrants in any way from the competent authorities or concealing information about them to enable them to reside in or leave the country.

4- Prepare forged travel documents or false identity for migrants, or provide possession of them for migrants.

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[1]Assia Ben Aziz, (2017), Criminal Policy in Combating Illegal Immigration, Unpublished Ph.D. Thesis, Faculty of Law, University of Batna, p. 26.

5- Organize, assist or direct other persons to carry out any of the acts stipulated in the preceding resolutions.

The Moroccan legislator has defined it as: "Leaving the national territory by any person secretly by using, while crossing the land, sea or air borders, a fraudulent means of evading the submission of the necessary official documents or of carrying out procedures directed by applicable laws and regulations, by using forged means or by impersonating names as well as any person who infiltrated the national territory or left from crossing points or places other than the specially designated border posts.[1]

3. The international definition of the phenomenon of illegal immigration:

The United Nations has defined illegal immigration as: "Unregulated entry of an individual from one country to another by land, air or sea. Such entry does not carry any form of permanent or temporary residence permits, and it also means that the necessary requirements for crossing the state's borders are not respected".[2]

Article 5 of the Convention on the Rights of All Migrant Workers and Members of Their Families stipulates:

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[1]The Moroccan Center for Studies and Research on Judicial and Legal Professions, Illegal Immigration, an article published in the electronic magazine " Qanonak ", available on the official website:

Qanonak.blogs.pot.com on 30/6/2019, visit time: 09:00 pm.

[2]Egyptian Youth and Illegal Immigration, (2010), National Center for Social and Criminal Research, Crime Research Department, Cairo, p. 5.

For the purposes of this Convention, migrant workers and members of their families shall be considered:

(A) " Holders of the necessary documents, or in a regular situation if they are authorized to enter, reside and engage in remunerated activity in the state of employment under the law of that State and under international agreements to which that State is a party";

(B) "In undocumented situation or in an irregular situation if they do not comply with the conditions set forth in subparagraph (a) of this Article."[1]

International Organization on Migration has also defined the phenomenon of illegal immigration:

"Entry or transit through a country without the consent of the authorities of that country, and without the person in transit having the legal conditions for transboundary movement, for not having the necessary documents to travel or counting on their forgery and using illegal crossing points in order to evade customs or security control, whether by land, sea or air.[2]

The European Commission has defined illegal immigration as: "any entry by land, air or sea into the territory of its state illegally by forged

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[1]International Convention on the Protection of the Rights of All Migrant Workers, Office of the United Nations High Commissioner for Human Rights, *"Waqai'" Journal*, No. 74, revised edition (1), adopted by the General Assembly of the United Nations on 18 December 1990.

[2]Rashid Saed, (2012), The Reality of Illegal Immigration in Algeria from the Perspective of Human Security, Master Thesis in Political Science, "unpublished", Faculty of Law and Political Science, University of Mohammed Khudair, Biskra, p. 15.

documents or with the help of organized crime networks, or through legal access to the European Space Area through the consent of the authorities to obtain visa and then staying after the expiry of the specified period, or changing the purpose of the visit, then they stay without the consent of the authorities. Finally, there are asylum seekers who do not get approval for their application but they stay in the country[1].

The International Bureau of Labor has defined an illegal immigrant as "any person who enters or works outside his country or resides abroad without having the necessary licenses".[2]

It should be noted here that the term "illegal immigration" is synonymous with many other terms, including: clandestine immigration, illegal immigration, as well as immigration without possession of identity papers as well as Harraga. The term "Harraga" is used to denote it as an

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[1]Abu Obada, Mohammed bin Abdul Aziz, (2014), The Rights of Illegal Immigrants, "A detailed study of international law," Ph.D. in Philosophy and Security Sciences, "unpublished", Department of Criminal Justice, Naif Arab University for Security Sciences, Riyadh, p. 59. Also see: Shayeb Al-ThraaBenyamina, Gharib Mohamed, (2012), The Security Challenges of Illegal Migration in the Mediterranean Region "Algeria as a Model", an article published in the Academic Journal of Social and Human Studies, Hassiba Ben Bouali University, Chlef, Jwan, p. 298 .

[2]It has defined it in its 92nd session in a report no. (66) for the year 2004.

Buveau international du travail, op. cit, p11 voivaussi : Daniel dormoet Habib sulim refugies immigration dandestine et centres de retentiondoes immigres clandestine en droit international, éditions , bruylant , editions de lu niversite de bruxelles , (2008) .

Qusem, Fadila (2018), The Legal Status of Illegal Immigrants in Receiving Countries, Master Thesis, "Unpublished, Faculty of Law and Political Science, University of Bejaia, p. 11.

illegal immigrant who may burn his papers in the hope of settling his status in the independent state.[1]

In fact, these terms are contrary to Article 13 of the Universal Declaration of Human Rights, which states that everyone has the right to freedom of movement and to leave and return to any country, including his or her home country. These terms give the process of illegal immigration a description of criminality. Therefore, the internationally accepted term is an irregular migrant because it does not comply with international and national laws relating to mobility without criminalizing it.[2]

2. Distinction between illegal immigration and similar terms

The concept of illegal immigration is confused with some similar terms because of some similarity between motives, causes and methods of migration. However, there is a fundamental difference between them, so it was necessary to show the difference between each of them as follows:

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[1] Abdul Malik, Sayesh, (2011), The Fight against Illegal Immigration, A look at the law 09/01, which includes the amendment of the Penal Code, an article published in the academic journal Legal Research Issue No. 1, University of Bejaia, p. 9.

[2]Abdelkader, Taher, (2014), The Rights of Irregular Migrants in the Framework of Euro-Mediterranean Cooperation, unpublished Master Thesis, Faculty of Law and Political Science, University of Oran, p. 18.

It should be noted that the Population Conference held in 1994 preferred the term of "people without documents" instead of the term of "illegal immigration".

Bureau international du travail, une approene equitable pour les travaileurs migrants dans une economie midialialisees , conference international du BIT 92 em ession , rapport n 66, genere , 2004 , p11.

1. The difference between illegal immigration and asylum.

The 1951 Convention relating to the Status of Refugees defines a refugee as:

"Any person who exists because of a well-founded fear of persecution because of his race, religion, nationality, membership of a particular social group or political opinion outside the country of his nationality and cannot or does not want because of that fear to avail himself of the protection of that country, or any person who does not have his nationality and he isoutside his country of residence; his previous habitual residence is known as a result of such events, and he cannot or does not want because of that fear to return to that country".[1]

The difference between a refugee and an illegal immigrant is evident in several respects. In terms of reasons, a refugee must have a well-founded fear of persecution, which is a fundamental condition and there is something that has forced him to leave his homeland and he is often dissatisfied with leaving his homeland. As for the illegal immigrant, it is likely that the decision to leave his country is of his own will and for many

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[1]Convention relating to the Status of Refugees, adopted by resolution No.: 429 of the General Assembly of the United Nations on 14 December 1950. For more information, see the text of article 1, paragraph 2, of the Convention, Bassiouni, Mahmoud Sharif and others (1988), Human Rights. Volume I, International and Regional Documents, Beirut, Dar Al-Ilm for the Millions, p. 344.

The African Convention on the Status of Refugees defined refugee status. See article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; see: Al-Arasi, Sarah Mahmoud, (2014), Asylum and Illegal Immigration to Yemen Between Reality and Challenges, Research published in the Journal of Queen Arwa University. Sana'a, Yemen, No. 4, p. 7.

reasons, including economic or social. War and political conditions may have a role in leaving the country, but he makes this decision at his own free will.[1]

The legal status of both the refugee and the illegal immigrant is also different. Refugees are often viewed with sympathy and compassion by receiving countries because of the difficult and degrading conditions to which a refugee is subjected and is protected under international conventions and covenants. In addition, the right of asylum is enshrined in the Universal Declaration of Human Rights; and he can only be expelled for obvious reasons and internationally sound procedures. [2]As for the illegal immigrant, he is in an illegal situation and is therefore regarded by States as having violated the laws and regulations relating to the residence and entry of foreigners and accordingly his legal status is weak.

2- The difference between the displaced person and the illegal immigrant.

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[1]Assia Ben Aziz, (2017), Criminal Policy in Combating Illegal Immigration, Ibid. P. 33.

[2]Article 14 of the Universal Declaration of Human Rights states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

It should be noted here that some international jurists believe that refugee protection is binding on states even if they are not party to the refugee status institutes. For more on this view, see al-Obeidi, Ali Hamid, the concept of the idea of asylum in international law and its application to humanitarian asylum, p. 8, available at http://wwwjasj.net Date of visit 1/6/2019, visit time: 09:00 pm and see:

Qusem, Fadila (2018), The Legal Status of Illegal Immigrants in Receiving Countries, ibid., P. 19.

Internally displaced persons, as defined in the Guiding Principles on Internal Displacement, means "persons or groups of persons who have been forced or forced to flee or leave their usual homes or places of residence in order to avoid the effects of armed conflict, situations of general violence, human rights violations or human and natural disasters who have not crossed the borders of the State internationally recognized". [1]

In fact, the previous definition of the displaced persons is a descriptive definition of the internationally displaced persons (IDPs), not the legally displaced persons, because it does not indicate the legal status of IDPs. This in turn affects the protection of IDPs, especially in the absence of an organization that oversees their interests. Nevertheless, there remains a clear difference between the displaced persons and the illegal immigrant.

The displaced person leaves his area and goes to another area within the same country, and usually returns to the place of residence after the disappearance of the factors that led to his displacement, he is displaced against his will. The illegal immigrant makes a voluntary decision to emigrate. On the other hand, the displaced person has all his rights within his country and the law of his country applies to him. The legal status of the displaced does not change. It is only that the place of residence within the borders of the same state is changing; he does not

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[1]See the definition of the United Nations Guiding Principles on Internal Displacement, available at:

www.InternationaldISPLaCEMENT.ORG. Date of visit 1/7/2019, the time of visit: 01:00 am.

acquire the status of a foreigner if the place of residence has been changed.[1]

As for illegal immigrant, he gains the status of a foreigner because he exceeds the borders of his country. In addition, he violates the laws relating to the residence and entry of foreigners. Thus, these migrants are usually seen as criminals from the point of view of some receiving countries.

3. Distinction between stateless and illegal immigrants.

One of the most accepted definitions[2] of a stateless person is contained in Article 1 of the Convention relating to the Status of Stateless Persons. It has defined stateless person as:

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[1] Qusem, Fadila (2018), The Legal Status of Illegal Immigrants in Receiving Countries, ibid. P. 21.

It should be noted here that the government of IDPs is responsible for them and does not have the right not to do the necessary protection for them and there is a duty on the international community to protect the displaced as well.

Sadaqa, Salhia Ali, (2015), Displacement and Asylum in Defining the Concepts and Suggested Solutions: Journal of Law for Legal and Economic Research, No. 3, Egypt, p. 290.

[2]Simpering ham ,KIeL : THE INTERNATIONAL PROTECTION OF STATELESS INDIVIDUALS , Call for change , UNI. OF Auck land , june 2003 , page :3

Including article 7 of the Covenant on the Rights of the Child in Islam, 2005, which has been described by the UN Public International Law Commission as Customary International Law. For more information, see: International Law Commission, Articles on diplomatic protection with commentaries, 2006, see Expert Meeting on the Concept of Stateless Persons in accordance with International Law, held by the Office of the

"A person who no State does not consider to be a citizen under its legislation."[1]

From the above, the difference between each of them is evident. Not every irregular migrant is a stateless person; it is an irregular migrant who has not complied with the country's immigration laws and procedures. In relation to the nationality of the migrant, the migrant may be a national of a particular country. The foreigner status in the transit or receiving country is relative to him. As for stateless person, he is a foreigner in the face of all countries, and therefore the status of a foreigner is absolute and not relative.

On the other hand, the scope of protection also varies; for a stateless person, there are also numerous international public and private conventions guaranteeing minimum rights, such as the 1954 Convention relating to the Status of Stateless Persons.[2] For illegal immigrants, the

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United Nations High Commissioner for Refugees (UNHCR), Prato, Italy, (27-28). May (2010), p. 1.

[1]Article 1 of the 1954 Convention relating to the Status of Stateless Persons.

[2]It should be noted here that the Convention on the Status of Stateless Persons stipulated that expulsion is not permissible except for reasons of public order or national security. For its part, it stressed the right of the person to provide data proving his innocence except in the case of force majeure.

See Article 3 of the 1954 Convention relating to the Status of Stateless Persons.

For more information on the legal status of a stateless person, see:

Al-Ka'abneh, AlaaEid, (2019), stateless in the light of international conventions and Arab legislation, "comparative study", unpublished Master Thesis, Faculty of Law, Al-Zaytoonah University of Jordan, Amman, Jordan, 119 and beyond.

scope of protection for him is weak as his legal status is fragile due to his failure to comply with the laws of residence and the entry of foreigners into independent countries.

It should be noted here that illegal immigration may be a cause of statelessness [1]and this will be explained later.

4. The distinction between illegal migration and human trafficking:

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, supplementing the United Nations Convention against Transnational Crime, in article III, paragraph (a), has defined human trafficking as:

Recruiting, transferring, harboring or receiving persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power, exploitation of a situation of vulnerability, or by giving or receiving of funds or benefits to obtain the consent of a person who has control over another person to enforce exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or service, slavery or practices similar to slavery, servitude or removal of organs.[2]

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[1]Al-Ka'abneh, Alaa Eid, The Stateless Persons in the Light of International Conventions and Arab Legislation, "A comparative study", Ibid., P. 94.

[2]See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against International Organized Crime, adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 25, session 55 of 15 November 2000, entered into force on 25 / December 2003.

It should be noted that the crime of human trafficking is not a recent crime and the international community has recognized the magnitude of this dilemma. National legislation has also prohibited it in its own laws.[1]

The above shows the difference between each of them as follows:[2]

In terms of consent, for the crime of illegal immigration, it requires the consent of the illegal immigrant. The crime of trafficking in human beings is carried out either by deception or violence in the sense that it takes place against the will of the victim.

As for the exploitation element, the crime of illegal immigration ends in reaching the specified state, although they are often drowned, dying or trafficked by human trafficking gangs.During the crime of human

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For more, see: Salman, Zahra Thamer, (2012), Trafficking in Persons: Protocol to Prevent Trafficking in Human Beings and Jordan's Commitments to it, Edition (1), Dar Wael Publishing and Distribution, Amman, Jordan, p. 29 et seq.

[1]We mention, but are not limited to, the French legislation in Article 225/14 of the French Penal Code, the US legislator in the Protection of Victims of Trafficking in Persons Act 2000 and its amendments in Part No. 108 of 2003-2005, as well as the Egyptian legislator in Article 2 of the Code of Combating Egyptian Trafficking.

See: Artima, Wijdan Suleiman, (2014), General Provisions for Human Trafficking Crimes Comparative Study, edition (1), Dar Al Thaqafa for Publishing and Distribution, Amman, Jordan, p. 115 et seq.

Al-Arian, Mohamed Ali, (2011), Human Trafficking and Combating Mechanisms, Dar al Jami'ya al Jadeeda, Alexandria, Egypt, p. 67.

[2]Al-Ka'abneh, Alaa Eid, The Stateless Persons in the Light of Arab Legislation and International Conventions, "A comparative study", op. Cit., P. 95 et seq. See: Shibli, Muhannad Hammoud, (2013), the effectiveness of international and national mechanisms to combat the crime of human trafficking, unpublished Master Thesis, Faculty of Law, Middle East University, Amman, Jordan, p. 35 and beyond

trafficking, victims continue to be exploited. Similarly, in terms of nationality, illegal immigration is transnational, and the crime of human trafficking can occur within state borders and may be transnational. In addition, illegal immigration is a violation of the laws of the state itself, it targets the laws of residence and entry of foreigners and therefore it is an attack on the authorities of the state, while the crime of trafficking in human beings, the target groups are humans themselves.

5. Distinction between the phenomenon of illegal migration and smuggling of migrants:

Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air defines the crime of smuggling of migrants:

"Smuggling of migrants" means the illicit entry of a person into a State of which the person is not a national or a permanent resident of the State, in order to obtain directly a financial or other material benefit.[1]

From the foregoing, the crime of smuggling of migrants is considered to be a form of illegal immigration. Migrants often resort to illegal intermediaries to enter a particular country, which in turn leads to these persons being vulnerable to exploitation by illegal smugglers. Illegal immigrants resort to them to achieve the basic purpose of entering the desired destination illegally, illegal immigrant is accused from the point

[1]Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime issued by the United Nations General Assembly Resolution No. 25 at the 55th Session of 15 November 2000 and entered into force on 28 January 2004.

of view of States, but in the crime of smuggling migrants, the person is a victim of smuggled persons.[1]

From the foregoing, it turns out that illegal immigration is not defined in a particular gender or age group as well as that the illegal immigration is carried out by different nationalities[2]. It also found that there are basic cases and types of illegal immigrants, including individuals entering the receiving countries illegally without arranging their legal status[3]. The second type includes persons who enter the receiving countries legally

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[1]Ka'abneh, AlaaEid, Stateless in the light of Arab Legislation and International Conventions, "A Comparative Study", Ibid., P. 94 et seq. See Abdul Malik, Sayesh, (2011), The Fight against Illegal Immigration, ibid. P. 100 et seq., Nour, Othman Al-Hassan Mohammed, Mubarak, Yasser Awad Al-Karim, (2008), Illegal Immigration and Crime, Naif Arab University for Security Sciences, Riyadh, p. 18 and beyond.

[2]VE ROINQUE _ Lassaily –jacobop .cit p.85

Al-Syriani, Mohammad Mahmoud, "Migration of Death Boats Across the Mediterranean Between South and North", Scientific Symposium on Combating Illegal Migration, Naif Arab University for Security Sciences, 8-10 / 02/2010, p. 180.

Al-Daghari, Mubarak Idris, (2016), The dangers of illegal migration from Africa to Europe and the policies taken to combat it, Libyan International Journal, No. (8), Faculty of Education, University of Benghazi, Libya, p. 13, Dalal, Yahri, (2009), Dimensions of the phenomenon of illegal immigration, an introduction to the National Forum on Illegal Immigration (a new problem of law), Faculty of Law and Political Science, Arabi Bin Mahidi University, Umm al-Bawaki, (19-20 April 2009), p. 16.

[3]See: Azhar Abdullah Hassan, Mervan Mustafa, Rashid (2016), the phenomenon of illegal immigration and its legal and political dimensions, an analytical study, research published in Al Noor Journal, No. (30), Faculty of Law and Political Science, University of Kirkuk, p (384- 385).

and then the period of legal residence expires without settling their status[1] and those who work illegally.

BRANCH II

CAUSES OF THE PHENOMENON OF ILLEGAL IMMIGRATION

The resolution of any case in general and the legal issues in particular can only be achieved by knowing the real causes of this case and in view of the importance of the phenomenon of illegal immigration, we consider studying the real reasons that cause it to reach the optimum solution, as follows:

1. Historical Reasons

The historical factor is one of the most important factors causing the phenomenon of illegal immigration. It turns out that the majority of illegal immigrants go to the countries that colonized their countries, which made them feel that the decline and shaking the economic situationin their countries are the responsibility of the colonial countries as they justify that these countries looted their goods and in return they are committed to compensation by bearing the burden of illegal

[1]Qusem, Fadila (2018), The Legal Status of Illegal Immigrants in Receiving Countries, op. Cit., P. 98 et seq. See: Report of François Crippo, Report on the Protection of All Civil, Political, Social, Economic and Cultural Human Rights in accordance with Human Rights Council Resolution 17/12 "Exploitation of Migrant Work, Special Rapporteur on the Human Rights of Migrants, 3 April 2014, Document 35/26 HRC / A, p. 11.

immigrants. The situation is illustrated by what happened in the French colonies with the countries of the Maghreb.[1]

2 - Political and security reasons

The difficult circumstances that the world is experiencing now, including wars and conflicts, whether domestic or international, are among the main causes of the phenomenon of illegal immigration. Also, human rights violations, the absence of democracy, and corruptions in general and political corruptions in particular are all the most important reasons for the spread of illegal immigration[2]. It should be noted in this regard that most researchers in the phenomenon of illegal immigration emphasize that the economic factor is the main cause of the phenomenon of illegal immigration, despite the inaccuracy of this opinion, but that wars, conflicts and security instability are the main factor causing it.[3]

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[1]Assia Ben Aziz, (2017), Criminal Policy in Combating Illegal Immigration, ibid., P. 55.

[2]Sahar Mustafa Hafez, Illegal Immigration Concept, Size and Legislative Confrontation, Ibid., P. 51. See: Bunwa, Jamal Dawli, (2013), The Problem of Illegal Immigration: A Critical Analytical Study in Concepts, Reasons and Solutions, Maarif Magazine, Department of Legal Sciences, Fourth Year, Issue (14), p. 10.For more examples see :Hssanboubakri , migrations intevnationaies et revolution enTunisie , rapport de recherché , 2013/01 robertschamancentre for Advanced studies , institutuniversitaireeuropeen , lately , 2013 .

[3]It was noted that the economic factor constitutes 70% of the reasons leading to the phenomenon of illegal immigration. See about this view: - Aasia Abu Aziz, Criminal Policy in Combating Illegal Immigration, a previous source, p. 49. See: Zakkaoui, Nabil, (2008), Euro-Maghreb Cooperation to Combat Illegal Migration, Post-graduate Memorandum in Public Law, University of Sidi Mohamed Ben Abdellah, Fas, Morocco, p. 15.

3. Economic reasons

The economic factor is one of the most important factors leading to illegal immigration; it is clear that the countries that export illegal immigrants are poor countries that lack development programs. The inevitable result is high unemployment in these countries. Even if there is a job opportunity, especially for the university youth, wages are low. Poverty drives migrants to move elsewhere in search of jobs and improve the economic situation in line with their ambitions. In contrast, countries receiving illegal immigrants are rich. The difference in the economic level is evident between the two countries.[1]

4. Social reasons

Weak social relations, the development of the world, and Western openness are the reasons behind the migration to the West. The rejection of young people of the customs and traditions in their societies, especially with the presence of the media trying to highlight the image of Western societies in the best way make young people live in conflict with the customs and traditions prevailing in their society and admire the West,

[1]Burkan, Fayzeh, (2016), Mechanisms to address illegal immigration, Dar Al-Fikrwalqanoun, Mansoura, Egypt, pp. 70-73.See: Al-Kalai, Al-Amin, (2006), Migration between the two shores of the Mediterranean and the problem of dialogue, research published in the Journal of International Studies, Tunisia, No. (101), p. 36; see: Clary EscovillePerinturetoria, Ayman Khelsa et al. (2008), Economic and Social Rights of Migrants and Refugees in the Euro-Mediterranean Region, Euro-Mediterranean Human Rights Network, Konhagen, p. 10

which in turn leads to their attempt to reach these countries, even illegally.[1]

5. Geographical reasons

Geographic proximity is one of the motivating reasons for the emergence of illegal immigration, for example, Europe is not far from the countries of the Arab Maghreb only a few distances, this factor made young people think in various ways to achieve their goal, which is to reach European countries[2].

The nature of the environment in terms of drought, natural disasters, earthquakes, floods and volcanoes are all causes of migration.[3]

Second Topic: The impacts of the phenomenon of illegal immigration.

After explaining the reasons leading to illegal immigration, it turns out that this phenomenon has many positive and negative effects, including what affects the individual himself (as a living person) and what is related to society, as follows: -

1- Economic impacts

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[1]Tibi, Rabeh, (2009), Illegal immigration (Harraga) in Algeria through the written press, an analytical study in the daily newspaper of Al Shurooq, unpublished master thesis, Faculty of Political Science and Media, p. 43 and beyond.

Qamar, EssamTawfiq, Faisal, Abeer Abdel-Moneim, (2008), Contemporary Social Problems, Dar Al-Fikr for Publishing and Distribution, Amman, Jordan, p. 22.

[2] Azhar Abdullah Hassan, Mervan Mustafa Rashid, the phenomenon of illegal immigration and its legal dimensions, previous source, p. 386

[3]Fakroun, Izz al-Din Mukhtar, Al Jad, Ali Moftah, (2017), The reality of illegal immigration, research published in the Journal of Economics and Business Studies, Volume (6), Issue (1), June / 2017, p. 137.

The economic impact resulting from the phenomenon of illegal migration affects both exporting and receiving countries as well as transit countries. In exporting countries, especially developing countries, which rely heavily on labor and suffer from lack of development projects, migration leads to shortage of labor. On the other hand, receiving countries have a labor force with a much lower wage than a national citizen.[1]

It should be noted here that illegal immigration threatens not only the regional economy but also the entire global economy, when smuggling groups smuggle illegal immigrants to especially countries that are experiencing a period of transition to a market economy in a positive way, where gangs launder their money obtained by illegal means, and tax evasion is being avoided, thus denying countries access to taxes.[2]

2- Social impacts

Illegal migration affects the social structure of both the exporting and receiving countries of migrants. Illegal immigration is usually carried out by young people, specifically "males". This in turn leads to an increase

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[1] Halabi, Ali Abdul Razzaq, (1998), Sociology of Population, edition (4), Dar Al-Maaref, Alexandria, Egypt, p 100.

Toumany mend , I immigration clandestine my theses , my steres et realites , paris , 2009 , p(45 – 47) .

[2]Burkan, Fayzeh, (2016), Mechanisms to address illegal immigration, Ibid., P. 83, and See: Park Naima, Ben Daoudia and Wahiba, (2014), Migration and Development Problems in the Arab Maghreb Countries, Article published in the series of illegal migration in the Mediterranean organization "risks and coping strategy, Ibn Nadim for publication and distribution, Dar Al-Rawafid Al Thaqafiyah, Algeria, p. 334.

in the number of immigrant age group of "youth" in the receiving countries and in contrast to the decline of this age group in the exporting countries on the one hand. Migration, on the other hand, affects the loss of cultural identity and the erosion of good values and principles in receiving countries. In addition, it causes family disintegration due to the immigrant leaving his family and relatives.[1]

3. Political and security impacts

The phenomenon of illegal immigration contributes to the disruption of the security system and the increase in crime rates and diversity. This is often done through the crimes committed by illegal immigrants to obtain money because of the deterioration of their economic situation and this is caused by the spread of extremist ideas and the use of firearms and explosives, drug trafficking and human trafficking.[2]

It should be noted here that the phenomenon of legal immigration is often linked to terrorism, because illegal immigrants enter the receiving countries in a random and unregulated manner, which raises suspicion about their use and recruitment to carry out terrorist acts aimed at the security of the receiving countries. This is all the more dangerous due to the difficulty of detecting the crimes they commit, because of their use of advanced technologies, which in turn requires the security services to

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[1] Badir Mohammed, Emamah Sami, (2009), Unregulated Migration in Egypt between Responsibility and Duty, Socio-Economic Series, No. (77), Publications of the Land Center for Human Rights, Cairo, Egypt, p. 42. For more on this topic see:

[2] Ramadan Mohamed, (2009), Secret migration in Algerian society: its dimensions and its relations with social alienation, a field study, Journal of Humanities, seventh year, No. (43), p. 78.0

update their devices constantly, which in turn leads to a great effort and trouble in addition to spending very high amounts of money.[1]

4. Health impacts

In fact, illegal immigration has very serious health effects because immigrants are not subjected to medical examinations, which are usually required by receiving countries to check for the absence of communicable diseases such as HIV, hepatitis and other infectious diseases. Illegal immigrants may be those who are infected with the disease, and therefore all immigrants with him become threatened by the disease and may be those who are healthy and then infected by immigrants with him on the same trip; and these diseases are transmitted to the citizens of the receiving countries.[2]

Finally, it should be noted that despite the many negative effects of illegal immigration, it must be pointed out the positive effects.

For example, illegal immigration contributes to attracting low-paid labor in receiving countries, and illegal immigrants accept jobs that are not accepted by the citizen. This in turn contributes to the development of the receiving country. It also contributes to the exchange of cultures and knowledge and increases the growth of political awareness. Receiving countries also benefit from illegal immigrants through the taxes they collect from immigrants when they own real estate and other

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[1] Lunissi, Ali, (2012), The Mechanisms of Combating International Terrorism and the Reality of Unilateral International Practices. Thesis "Unpublished", University of Mouloud Mammeri, Yitzi Zouz, Algeria p. 26.

[2] Burkan, Fayzeh, (2016), Mechanisms to address illegal immigration, Ibid., P. 84; see Halabi, Ali Abdul Razzaq, 1998, Sociology of Population, Ibid., P. 80.

sales, as well as when they rent apartments in places where citizens refuse to live, which helps in the reconstruction of these places in the receiving countries.[1]

Receiving countries also benefit when illegal immigrants establish bank accounts, which benefit the economy. In addition, the exporting countries benefit from the transfer of funds to their relatives by illegal immigrants and when they, upon their return to their homeland, invest part of the money in order to improve the living conditions for him and his family members.[2]

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[1] See: Kamal Hammad, (2001), Legitimate Migration and Resistance, in the Light of Public International Law, University Institution, Beirut, p. 81; See: Salam, Ahmed Rashid, (2011), illegal immigration in Egyptian law, a study in private international law, edition (1), Dar Al Nahda Al Arabiya, p. 26.

[2] Look at this controversy between the causes of legalization and criminalization of illegal immigration: Sharon, Hasina, illegal immigration between legalization and criminalization. Research published in the Journal of Jurisprudence, University of Mohammed Khudair Biskra, No. (8), p (23) and beyond

For more see: - Jaqueline Bhabhaet Monette zard, centre detudes sur refugies ,universite doxford,N25,juillet 2006 p:6.

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THE SECOND SECTION

MEANS OF COMBATING ILLEGAL IMMIGRATION IN INTERNATIONAL LAW

Due to the negative effects resulting from the phenomenon of illegal immigration, many national and international[1] efforts have been exerted

[1] For example, the text of article (50) of the Moroccan law No. 03/02 on the entry and residence of foreigners and illegal immigration in the Kingdom of Morocco, published in the Official Gazette number (5160), issued on 13 November 2003 and a special law was issued in 2013 and came into force in 2014; it punishes illegal immigration with the previous penalty, but it does not treat illegal immigrants as criminals but rather try to settle their situation.

As well as the text of Article 545 of the Algerian law of the first of Rabi' al Awwal of 1419 AH corresponding to 25/6/1988 amended and complemented by the Decree No. 76-80 of 23 October 1976 containing the Algerian maritime law and the punishment of immigrants was based on measurement. The legislator amended and removed the confusion with a special provision for illegal immigration which is in Article (175) bis (1) of Law No. 09/01.

Also, the Algerian legislature provided for mitigating cases and aggravating cases of masterminds. See Article (303) bis of the Penal Code issued by Decree No. 66-156 on 12 Safar 1386 AH corresponding to 8 June 1966, Official Gazette No. 47, issued on 9 June 1977.

See Article (303) bis of the Algerian Procedures Law issued by Decree No. 66-55 of 12 Safar 1386 AH corresponding to 8 June 1966, Official Gazette No. 47 issued on 9 June 1977.

See paragraph (202) of Law No. 198/06 of 27 June 1998 defining the general rules relating to civil aviation, Official Gazette No. 48 No. 48, p. 26.

Law No. 8/11 of 25 June 2008 on the conditions of entry, residence and movement of foreigners in Algeria, Official Gazette no. (36) of 2 / July / 2008, for more see: Burkan,

to combat this phenomenon. In this regard, we will undertake the most important efforts made as follows:

The first topic

International conventions on combating illegal immigration

First: The Protocol against the Smuggling of Migrants by Land, Sea and Air.

The purpose of this Protocol is to prevent and combat the smuggling of migrants as well as to promote cooperation between States Parties in line with this end.[1]

Article 3 of the Protocol defines what is meant by the smuggling of migrants.[2]

Fayzeh, (2016), Mechanisms to address illegal immigration, Ibid, p. 118 et seq., See: Assia Ben Aziz, (2017), Criminal Policy in Combating Illegal Immigration, Ibid, p. 226 and beyond.

[1] Article II of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, United Nations, Official Records of the General Assembly, New York.

See: Al-Tamimi, Mohammed Reda, (2011), Illegal migration through national legislation and international charters, the books of politics and law, the fourth issue, Al-Arabi bin al-Mahdi University, Umm al-Buqai, p. 269.

[2] It is the measure of the unlawful entry of a person into a State of which the person is not a national or a permanent resident of the State, in order to obtain, directly or indirectly, another financial or material benefit.

The scope of application of the provisions of this Protocol is defined in accordance with Article IV.[1]

Article 6 stipulates:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses, if committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

A) Smuggling of migrants

(B) To facilitate the smuggling of migrants through the preparation of a forged travel document or identity card and to obtain, provide or possess such a document;

(C) To enable a person who is not a national or a permanent resident of the State concerned to remain in that State without being bound by the conditions necessary for a lawful stay in that State, using the means mentioned in paragraph (b).[2]

Paragraph (b) of the same article defines illegal entry: - "Crossing the border without being bound by the conditions necessary for the legitimate entry into the receiving State."

See Article III of the Protocol against the Smuggling of Migrants by Land, Sea and Air and see: - Faiza Burkan, Mechanisms to Address the phenomenon of illegal immigration, ibid., P. 136.

[1] Except as otherwise provided, "for offenses established in accordance with article 6 of this Protocol, the investigation and prosecution of the perpetrators, while such offenses are transnational in nature and involved by an organized criminal group as well as the protection of the rights of persons who are the object of such offenses.

[2] Article VI of the Protocol against the Smuggling of Migrants by Land and Air.

Article 18 affirms the return of smuggled migrants[1], as well as the need to treat migrants humanely and not to consider migrants as perpetrators. Consequently, they are not criminally responsible in the sense that they are not subject to criminal accountability.[2]

From the foregoing, it turns out that this Protocol clearly emphasized the need for international cooperation in combating the crime of smuggling migrants[3]; as it affects the exporting and receiving state as well as the transit state. In addition, this crime is of a national character perpetrated by a transnational criminal group. This protocol is complementary to the United Nations Convention against Transnational Crime and inevitably has been interpreted in accordance with the main Convention.[4]

2. Statement of Rabat (2006).

Some 60 African and European countries have asked the UN High Commissioner for Refugees (UNHCR) to help with the problem of illegal

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[1]It states:

"Each State shall agree to facilitate and accept, without undue or unreasonable delay, the return of a person who is the object of the conduct set forth in Article 6 of this Protocol and who is a national or has the right to permanent residence in its territory at the time of his return.

[2] On the grounds that they were subject to the conduct described in Article 6 of this Protocol.

See article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Crime.

[3]George Albertinie: pourquoi le chomag, ped, paris, 1981, p40

[4] Burkan, Fayzeh, (2016), Mechanisms to address illegal immigration, Ibid., P. 139.

immigration from Africa to Europe. In fact, the presence of illegal immigrants with refugees on various trips made it difficult for UNHCR. A statement has been issued in the Moroccan capital Rabat and approved by 30 European countries and 27 African countries.[1]

A 10-point action plan has been developed by the UN High Commissioner for Refugees (UNHCR). The aim of the plan is to address illegal migration in a way that does not affect human rights and the international obligations of each country. Several recommendations have been made to emphasize the need for logistical support and agreements, the need to support States facing emergency situations in combating illegal immigration and the need to reintegrate illegal immigrants into their homelands.[2]

3- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

This Convention is the most comprehensive convention for the protection of migrants' rights; it highlights the need for humane

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[1] Burkan, Fayzeh, (2016), Mechanisms to address illegal immigration, Ibid., P. 139.

[2]Al-Qasim, Sayed Mohamed weld, (2004), Maritime Areas under National Jurisdiction under International Maritime Law and Mauritanian Legislation, MA Thesis in International Law and International Relations, Faculty of Law, University of Algiers, p. 87.

Al-Asfar, Ahmad Abdul-Aziz et al. (2010), Fighting Illegal Immigration, Naif Arab University for Security Sciences, Riyadh, p. 152.

Morris Kamto, (2006), Report of the International Law Commission on the Expulsion of Aliens, Special Headquarters, Official Records of the United Nations General Assembly, Fifty-eighth Session, No. 573 / CAU / A, Geneva, p. 17.

treatment of migrants, whether or not they hold documents, and sets out a set of standards that States must comply with in order to protect the rights of migrants in particular and human rights in general and also it addresses the right of children in education and a decent life without paying attention to the legality of their parents' residence.[1]

4. International Convention on the Law of the Sea, 1982.

This Convention is one of the most important international conventions against illegal immigration and has been referred to in Article 7 of the Protocol against the Smuggling of Migrants by Land, Air and Sea.[2]

This agreement affirms the sovereignty of the coastal State and it extends beyond its maritime territory and inland waters to the territorial sea as a "contiguous maritime zone" because the boundaries of the other regions are largely based on the boundaries of the territorial sea. The

[1] Qusem, Fadila (2018), The Legal Status of Illegal Immigrants in Receiving Countries, ibid., P. 25; see: Omar, Saadallah, (2004), Dictionary of Contemporary International Law, edition (2), University Press, Algeria, p. 18; see: Osama Bedair, Sami Mahmoud, (2010), The Secret Immigrants: Guilty or Victims, a research published in the Humanitarian journal, issued by the International Committee of the Red Cross No. (50), p. 17.

[2] It has stipulated the necessity of the cooperation of States Parties in suppressing the smuggling of migrants in accordance with the provisions of the International Law of the Sea. The agreement was created by the UN General Assembly by resolution 3067 and entered into force on November 16, 1994.

State's internal and external borders have thus become clear as defined by this Convention.[1]

The Convention, in the text of Article 19 concerning road traffic, states that it has restricted this right and makes it prohibited if one of the activities mentioned in paragraph (g) is committed[2]. Article 21 also addresses the right of coastal States to adopt laws that ensure that their customs, tax or immigration[3] laws are not burned, and the same applies to riparian States[4] and coastal States[5].

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[1] See: Assia Ben Aziz, (2017), Criminal Policy in Combating Illegal Immigration, ibid. P. 141; see: Imad, Lamamri, (2014), the Compromise Provisions of the United Nations Convention on the Law of the Sea of 1982, doctoral thesis "unpublished", University of Mouloud Mammeri, Tizi Ouzou, Algeria, p. 8.

[2] Paragraph (g) provides for loading or unloading of any commodity, currency or person contrary to the customs, tax, immigration and health laws and regulations of the coastal State.

See Article 19 of the 1982 United Nations Convention on the Law of the Sea.

[3] Article 21 of the 1982 United Nations Convention on the Law of the Sea.

[4] Item (d) of the first paragraph of Article (42) of the United Nations Convention on the Law of the Sea, 1982.

[5] Paragraph (a) of Article (33) of the United Nations Convention on the Law of the Sea of 1982, and paragraph (2) of Article (60) of the same Convention.

It should be noted that Article (87) has allowed freedom of navigation on the high seas as an open area, so if a vessel is discovered for illegal immigrants, they are not considered illegal because they did not cross the territorial sea of any country, but Article (92) and Article (94) specified the conditions that must be met in the vessel to be seaworthy and therefore, the vessels used by illegal immigrants are not seaworthy, so illegal immigrants are drowned and killed.

The second topic

The mechanisms adopted by the European Union to deal with illegal immigration

There are several factors urging the EU countries to shed light on the phenomenon of illegal immigration, especially after the events of September 11, 2001, in addition to the factors related to regional construction. All these factors encouraged the EU countries to put in place mechanisms to deal with illegal immigration.[1]

First: the Schengen Convention.

This agreement provides for the exchange of security and personal information by Member States through an information system (sis) to control borders and to facilitate the task of the security services by obtaining the wanted, unwelcome and missing individuals[2]. This system has helped Member States to limit the entry of illegal immigrants and fill

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Article (110) stipulates that the vessel may be inspected in case of suspicion, and Article (111) stipulates that the vessel may be chased to fight all forms of organized crime.

[1] For more on the factors driving the EU to develop mechanisms to combat illegal immigration, see: Fariha Ahmed, Ladmeh, The Mechanisms Adopted by the European Union to Combat Illegal Immigration, research published in the Journal of the Thinker, Mohammed Khudair University, Biskra, Faculty of Law and Science, No. 12 , P. 189 ff

And see:

Shaukat, Khalid, (2002), Muslims of Europe in distress and accusations, Journal of the Islamic world, the fifth issue, p 1053.

[2] Conseilde ue fiched information elargissement de lespace schengen revl , Bruxelles , le8 november (2007) .

the door of circumvention that was used by them to enter a country other than the country of destination and then obtain a visa to enter another country for tourism and then migrate to the country of destination[1].

Centralization has been shifted from shared borders to special borders and a unified system of internal border control has been adopted by member states through a comprehensive system of information exchange, combating international crime and judicial and security cooperation.[2]

It should be noted that the European Union has adopted several mechanisms, including political, security, economic and other mechanisms that have the same objective. For example, the establishment of Fruitex Agency (2004) aimed at field cooperation on its borders[3] and bilateral and multiple agreements between the countries of

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[1] Ben Khoufa, Amar, (2005), Convention on the law of the use of watercourses for non-navigational purposes and its application on the Euphrates River, Master Thesis "unpublished", Faculty of Law, University of Algiers, p. 33.

[2] Article 17-18-19-32 of the Schengen Agreement signed in Luxembourg in 1795 by 30 countries, most of which are members of the European Union, some of which are non-members including (Norway and Switzerland), see:

[3] See: Fariha Ahmed, Ladmeh, The Mechanisms Adopted by the European Union to Combat Illegal Immigration, Ibid., P. 191 et seq.

As for the bilateral agreements between the countries of the Union and other countries, we mention, for example, the security cooperation agreement between the following:

Italy and Egypt; this agreement provided for the resettlement of the Egyptian authorities to its citizens, as well as the Italian side to provide job opportunities in the labor market. Approximately 7000 Egyptian workers were provided with training and rehabilitation. In 2007, the situation of thousands of illegal Egyptians was reconciled.

the Union[1], including political mechanisms, especially the 5 + 5 dialogue and economic mechanisms, including the European Neighborhood and Partnership Instrument, the Euromed Migration, and the Funding and Implementing Body[2].

In this regard, the role of international organizations and commissions in combating this phenomenon must be addressed. The first is the United Nations, where the UN Secretary-General has recognized the need for

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As well as the agreement signed between Italy and Libya in 2007 in Tripoli, it stipulated that Libya shall organize maritime patrols numbered (6) seconded pieces from Italy, handled by the crew of the Italian and Libyan states to assist and rescue illegal immigrants. The agreement obliged the Italian state to provide the Libyan cadre with three naval units within a maximum period of three years from the date of the agreement.

There are many bilateral agreements, including the agreements concluded between Italy and Tunisia, Morocco and Spain, the Algerian-French and Algerian-Italian co-operation, Spain and Morocco, and Spain and Mauritania; all have the same objective.

See: Fakroun, Izz al-Din Mukhtar, Al Jad, Ali Moftah, the reality of illegal immigration, ibid, P. 139 et seq.

[1] For an expansion on this topic see: -

Bou Aziz, Asia, Criminal Policy in the Fight against Illegal Immigration, op. Cit., P.120 et seq. See: Fariha Ahmed, Ladmeh, The Mechanisms Adopted by the European Union to Combat Illegal Immigration, ibid, P. 191 et seq.

[2] Fariha Ahmed, Ladmeh, The Mechanisms Adopted by the European Union to Combat Illegal Immigration, ibid, p. 191 et seq. The Secretary-General stressed the need to take strict measures against those who smuggle people and trafficking.

See: Fakroun, Izz al-Din Mukhtar, Al Jad, Ali Moftah, the reality of illegal immigration, ibid, P. 139 et seq.

states to come together and provide channels for legal migration while respecting human rights protection. He stressed that developing countries could benefit from migrant remittances, which effectively assist in the development of countries[1]. As part of the UN effort, the UN Children's Fund (UNICEF) has been set up to combat child trafficking[2].

The second is the International Commission on International Migration, which has been tasked with several tasks, including the organizing a dialogue on migration between governments and international organizations and the international community, identifying the causes of vulnerability in the face of the phenomenon of illegal migration, providing suggestions and recommendations to the international community to reach the optimal solution to legal migration, and minimizing the damage of illegal immigration. The Committee has carried out several different activities, including holding regional conferences, presenting research and programs on migration and submitting its report to the Secretary-General of the United Nations in October 2005.[3]

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[1] See Burkan, Fayzeh, Mechanisms to address illegal immigration, ibid., P. 143.

[2] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, General Assembly Resolution 25 / Geneva, United Nations, at the 55th Session, dated 15/111/1987.

[3] It is worth mentioning here that the Committee stressed in this report the inability of the international community to find the best solution. The Committee has drawn conclusions and recommendations. One of the most notable findings was that the Committee emphasized that the role of migrants in development projects should not be overlooked. On the other hand, the recommendations stressed the necessity of cooperation between countries to combat illegal immigration and return of migrants to

It should be noted here that the most important and prominent organizations have been highlighted; however there are many other organizations and committees that have an active role.[1]

their countries and on the other hand, the legal immigrants who have spent a long period should be merged, provided that no action to combat the phenomenon of illegal immigration shall affect human rights.

For more, see: Dreiz, Mohammad Al-Assad, (2003), A study submitted to the Council of Arab Interior Ministers, Exchange of information on the competent gangs, Regulating illegal immigration operations, especially the navy, Dar Sahwa Publishing, Tunis, p. 7.

[1] For more, see: International Labor Organization (ILO), International Organization for Migration (IOM), Arab Labor Organization and Arab Migration Observatory 20007.

See also: Hamza, Ababsa, (2017), Legal Protection of Migrants in International Law, Ph.D. Thesis, Unpublished, Faculty of Law and Political Science, University of Abou Bekr Belkaïd, Texans, p. 385.

See: Report of François Cribo, Special Rapporteur on the human rights of migrants, sixty-eighth session, General Assembly resolution 167-172 / (B-69), document symbol A / 68/283, 7 September 2013, p. 14.

Conclusion

After clarifying the concept of the phenomenon of illegal immigration, deepening its analysis, and explaining its causes and impacts as well as the international mechanisms to combat this phenomenon, a number of results and recommendations have been reached. They are summarized as follows:

Results:

1. Illegal immigration is contrary to the laws of the exporting and receiving countries as well as transit countries.

2. The criminalization of illegal immigration and the attempt to combat it does not come to prevent immigration itself. Freedom of movement is one of the fundamental freedoms of human rights; however this freedom is not absolute but is restricted by laws and regulations at the national and international levels.

3. The debate on illegal immigration has been about the justification for criminalization and legalization. It was pointed out that illegal immigration has positive effects, but its negative effects are much more. If the right of movement is enshrined, the right to life is more important and this right threatens what is known as death boats.

4. A comprehensive solution to eliminate the phenomenon of illegal immigration cannot be reached unless the real causes of it are known.

5. The economic motivation of illegal immigration is usually the focus. This motive is of great importance; however we have found that political motivation, conflicts, wars and instability conditions are at the forefront of all causes.

6. There is a difference between illegal immigrants, displaced persons, stateless persons and refugees in several respects, most importantly the legal status of each.

7. There are many national and international efforts in the face of the phenomenon of illegal immigration, however these efforts have proved unsuccessful and the biggest evidence that this phenomenon is still present and with high rates.

8. The optimal solution to the phenomenon of illegal immigration should focus on all economic, social and political aspects. There must be no preference for one motive over another, as in the EU mechanisms that have focused on the security side, in the sense that there is a synergy between solutions and causes.

9. There is insufficient awareness on the part of migrants themselves on the dangers of illegal immigration, due to several factors, including educational level or psychological motivation, and exposure to severe stress.

From the above we reach several recommendations: -

1. **States should hold regional and international conferences, discuss the phenomenon of illegal immigration, identify its causes and proposed solutions, and intensify the role of civil society institutions in sensitizing groups of society, especially youth, about this phenomenon.**
2. **The need to intensify serious cooperation between States, whether they are exporting, receiving or transit countries.**
3. **The need to train land and sea teams and hold training courses for them to rescue illegal immigrants and help unaccompanied children.**

4. **The need to enact national legislation to ensure the fight against this phenomenon in line with international conventions in this regard.**
5. **The need to conclude bilateral and collective agreements between countries to combat this phenomenon to be comprehensive to address the real causes and not to focus on only side, and the need to fully respect human rights.**
6. **The need to open the door of legal migration for people between States and block the door of illegal migration for the clutches of smuggling illegal immigrants.**
7. **The need to establish development projects in the (poor) countries exporting immigrants that are financed by independent and usually rich countries.**
8. **The need to resolve the situation of illegal immigrants in receiving States whenever possible.**
9. **The need to focus on the use of electronic documents, identity cards and passports because of their effective role in reducing fraud and therefore the need to emphasize the passage of non-holders of identification papers, whether at airports or borders.**
10. **The need to establish an information system in each country and to link this system between the exporting, receiving and transit countries that are usually intended for illegal immigrants.**

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SUICIDE: CONCEPT AND PROVISIONS UNDER ISLAMIC JURISPRUDENCE

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Abstract

This study aims to analyze the suicide concept and its relationship with other concepts that could be confused with it such as the cases related to killing, death, and self - Abuse, and to define the legal provisions related to committing suicide through Quran Texts, Hadith of the Prophet, and by following the inductive method by collecting the texts of jurists and Muslim Scholars which address the inviolability of the human being and the necessity of its preservation, Islam considered self- preservation one

of the most important necessities that came to be achieved by the Islamic Law.

This study presents the consequences of suicide under the Islamic perspective and provide the religious texts to corrects the common misconceptions in the minds of people about belief or unbelief of suicide and with regard to other legal provisions such as sacred washing of a dead body, shrouding, and offering the funeral prayer.

Keywords: The suicide, murder someone, Islamic jurisprudence, shroud the suicide, legal of judgment on suicide

Introduction

Islam emphasizes the necessity to preserve on man's life that should not be harmed, and also the human being himself cannot act in his life in any form of harm.

Killing of oneself is forbidden in Islam that the preservation of the man's life is one of the most important purposes of Islamic law necessary, and also in the highest necessities. Preserves the man's life, religion, mind, offspring, and money are all necessities, so life will be an unbearable fire without preserving them.

preserves the human soul is one of the most important necessities, Islam enacted from adjudications of what is valued and preserved human soul, and also from adjudications to prevent the occurrence of imbalance or to harm the man's life, such as Prohibition of homicide, injury, harm, even in cases of necessity when a person is at risk, Islam gives him license to eat *Haram* (unlawful food) only to save himself from death.

Increased suicides and the multiplicity of its types require increase the awareness of it, in order to address this phenomenon and try to prevent or limit them. This study contributes to preventing the incident of suicide by clarifying the meanings, kinds, and adjudications of the suicide from Islamic perspective; also, it seeks to the common concepts and misconceptions in the minds of people about suicide .

This study aims to explain the concept of suicide and its types under Islamic perspective, then clarifies the legal consequent of the suicide through provisions of Islamic Law and cases of jurists.

Research Methodology:

The study followed the inductive method by collecting the texts of jurists and scholars in Four Islamic Schools and analyze these texts as following:

***Chapter one*: The concept of suicide and its types**

This chapter contains the following issues:

***First issue:* The definition of suicide in terminology and sharia.**

***Second issue:* The types of suicide.**

***Third issue*: The ways of suicide by passive suicidal and jurists' opinions**

***Fourth issue*: Some cases are similar to suicide, but they are not suicide .**

***Chapter two:* The Islamic legal consequences of suicide**

Since suicide is one of the most serious acts committed by human beings and an attack on human life, in addition to being contrary to the provisions of the law, the consequences of suicide should have been stated, so in this chapter contains the following issues:

***First issue*: Injunction of the law in suicide**

***Second issue*: Injunction of the law if suicide does not die.**

***Third issue*: Injunction of the law in washing a dead body, shrouding, and offering the funeral prayer.**

CHAPTER ONE

THE CONCEPT OF SUICIDE AND ITS TYPES

This chapter addresses the meaning of suicide by the dictionary and sharia perspective and explain the means and the ways in which the suicide bomber uses, whether directly or negatively that the suicide committed to save himself when hunger and thirst or when the need for medication, with a view of Sharia with a distinction between cases that are Suicide, which is not suicide. This chapter contains the following issues:

First issue: The definition of suicide in terminology and sharia.

Second issue: The types of suicide.

Third issue: The ways of suicide by passive suicidal and jurists' opinions

Fourth issue: Some cases are similar to suicide, but they are not suicide .

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FIRST ISSUE

THE DEFINITION OF SUICIDE

Suicide (Dictionary definition): **the person who slays above the chest, or the place of the necklace, slaughter a camel *i.e.* stab, the man's suicide, kills himself. On the other hand, people fought for a matter. They gathered to kill each other.** [(1)]

Suicide (Islamic legal terminology): **The Islamic jurists gave expression about the slaughter that: "Cutting the large veins in the neck, it takes blood from the head back to the heart, and throat. Suicide is called on the man who killed himself or terminated his life by any tool. The Islamic jurists gave expression about suicide and referred to the relevant provisions under the title of killing himself.** [(2)]

Abū Huraira **said: "... Allah's Messenger (ﷺ) told his companions about a man who claimed to be a Muslim, "This man is from the people of the Fire." When the battle started, the man fought very bravely and received a great number of wounds and got crippled. On that, a man from among the companions of the Prophet (ﷺ) came and said, "O Allah's Apostle! Do you know what the man you described as of the people of the Fire has done? He has fought very bravely for Allah's Cause**

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(1) el-Firuz Abadi, Majid al-Din Muhammad Ibn Ya'qub, al-Qamus al-muhit, Dar Ehia' al-Turath al-Arabi, Beirut. Edition 1 1991 – 1412 H, al-Razi - Mohammed Ibn Abdul Qader al-Razi. Mokhtar el-Sahah - Arab Center for Culture and Science. P. 474.

(2) al-kasani - Alaa Eddin Abū Bakr Ibn Masood. Bada'im al-Sanayeh fi tatreb alshara', Dar al-kutob al-Amiah, Edition 2 1986-1406, Part 5/41 and 7/236, and al-Asfani - Hussein Ibn Mohammed – al-Mofrdat fi elm al-quraan, Dar al-Ma'arif - Beirut - p. 485.

and he has received many wounds." The Prophet (ﷺ) said, "But he is indeed one of the people of the fire." [1]

SECOND ISSUE

THE TYPES OF SUICIDE.

Suicide is a type of murder or killing that a man ends his life by himself or perishes the person's soul by doing a particular act; it is achieved by passively suicidal or active suicide.

First: The way of active suicide:

It means that a person ends his life by using weapons such as a shotgun or a handgun by shooting himself, or using a sharp tool such as a sword or a knife, or something tapered like a spear or glass, or using a poison with eating or drinking, or shed himself from high place or high surface, or throw himself into the fire , or drown himself in the water and many other means such as using drug, intoxicants, and Hashish, all these are called the active suicide.[2]

Second: The way of passive suicidal

This is to perish the soul and end his life by himself to prevent himself from the matters saving the life as to prevent taking the necessary medicine, or to refuse to eat and drink to survive, or to refuse to get rid of an actual danger, such as a massive fire in a house and refusing to get out of it, or torrent water, or facing a predatory animal that couldn't be able to resist, so these all are intentional suicides even if it is passive

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([1])Bukhari - Muhammad Ibn Ismail - Sahih Bukhari. Dar al-Jeel - Beirut. Bab Alamal Belkhawateem, Part 8 / p. 155

([2]) Same as previous sources.

suicidal because the man refuses to save himself, it means to throw himself into destruction.[1]

THIRD ISSUE

THE WAYS OF SUICIDE BY PASSIVE SUICIDAL AND JURISTS' OPINIONS.

First: Refusing acts and permissible things.

Such as eating and drinking to avoid harm and thirst, and who refuses on eating and drinking until death, he is considered a murderer of himself, suicide, because he led himself to destruction, unanimously by scholars and jurists. [2]

It is imposed on the human to eat foods and drinks that save him to perish, in cases of necessity he has the license to have forbidden such as dead animal, wine, and pork, if he refuses to do until he dies or passes, he is considered a murderer of himself. [3] **Allah Almighty says: [And do not kill yourselves] [an-Nisa (Woman)/ 29].**

The scholars and jurists see that it isn't valid, in the case of coercion, to refuse to eat forbidden food such as pork, dead animal, and blood, which comes out of the sacrifice at the time of slaughter, because it is excluded from the forbidden food when it is necessary. Allah Almighty says: [Excepting that to which you are compelled.][al-An'am /119]

([1])Same as previous sources.

[2] al-Kasani - Bada'im al-Sanayeh 7/167, and al-Jassas - Ahmad Ibn Ali al-Razi – Ahkam al-Quran, Edition - Abdel Rahman Mohamed - Cairo 1/148, and al-Hattab, Mawaheb AlJeel 3/233 , and Ramli–Nehayat al-Mohtaj 7/243, Ibn Qudaamah. Al-Mogani 9/326.

[3] Ibn Abidin - Mohammed Amin Abdeenben Omar. Rad al-Mohtar ala al-dor al-mokhtar. al-Halabi Press. 1966 5/215.

In this case, the Judgment of refusing until the death is considered to be a suicide, because of refusing, he led himself into destruction. [1]

Second: Refuse to take medication and carelessness the treatment

The jurists differed between two cases: *The first case* is to refuse from treatment, because the patient doesn't trust in healing, in this case, the patient is not considered suicide, even carelessness of hard wound is not considered suicide. It should be legal retribution in wounds because the healing is not reliable if it is cured. *The second case* is that if the wound is simple and the reliable treatment is to heal, but the victim, who is carelessness of the nerve to bleed, is considered suicide.

It has not been asked the injurer *Ash-Shafiy* School considered more probable, [2] **but *Hanbali* School disagreed with them, they said that he is not negligent.** [3] **According to *Hanafi* School, carelessness of treatment, in this case, it is not considered guilt, because the healing is unreliable, even if the offender were to hit a man in manslaughter then he died. However, they said that: the carelessness of the light wound is without treatment and the possibility of treatment, but he didn't treat, and the result was the death, they considered him a suicide.** [4]

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[1] al-Kasani. Bada'id al-Sanayah (7/7667), al-Jassas in Ahkam al- Qur'aan (1/149) and al-Hattaab (Mawaheb al-Jaleel). 3/233, and al-Ramli – Nehayat al-Mohtaj 7/243, Ibn Qudaamah. al-Mogani 9/326.

[2] al-Ramli – Nehayat al-mohtaj 7/243.

[3] Ibn Qudaamah. al-Mogani 9/326.

[4] Rad al-Mohtar - Ibn Abidin 5/215 and al-Kasani - Bdayd al-Sanaa 7/176.

Third: Stop the confrontation and leave the movement with the ability.

For example, if a man falls himself into a pool of water or a large basin of water or a running river or thrown into the fire and he was able to save him from water or from the fire and He was able to get rid of it, but he did not do it. He is considered suicide and a killer of him, there is no indemnity for hurting to those who throw him into the water or into the fire, and they explain that the death did not happen by the offender, because he stayed in the water or in the fire, though he was able to save him from it, because he was at its edge and he could do with minimal effort or less movement to come out of it, he did not even and he died. [(1)]

Fourth issue: Cases that are similar to suicide, but they are not suicide.

Many cases in which death gets mixed up on the minds are considered suicide, but they are no suicide or punishment for the committee or sin, such as:

First case: Replace or moving from cause to death to another cause.

In this matter, the offender believes or thinks most likely in both cases, he'll die. If someone traveled by ship, through the journey it burned, and then he threw himself into the sea or the river and he drowned. He knows

(1) Fatawa-e- al-Amgiri - also known as Fatawa-i-Hindiya- Group of Scholars of India - Edition - Bulaq - Cairo - 1311 e. 6/5, and al-Ramli - Nehayat al-mohtaj - 7/243. Ibn Qudaamah – al-Mogani 9/326.

that if he stayed in the ship, the fire would burn him, and if he threw himself, he would drown.

The scholars said that it is permissible. He is not considered suicide. Thus *Imam Abū Hanafi* said that also *Malikite*, *Ash-Shafiy*, and *Hanbali* School. They told him to choose what he wanted. [(1)]

***Imam Abū Hanafi* saw that he has a transition if found to have a slight degree of in killing. [(2)] Moving to another reason where the hope of a longer life transition is the duty. [(3)]**

In the case of *Ash-Shafiy*, if a man chased a person fleeing from him, then he threw himself into water or threw it out of a roof and he died, in this case, he is not negligent, because he perished himself.

Like, if a man coerced to kill himself and did it, it is like suicide. In other words, he should have half of the blood money, [(4)] except that if he falls in a pond because he does not know there is a pond because of the darkness or falling in the roof of the house, someone, who has followed him, he is not negligent because he did not intend to perish himself, [(5)] with such a say, *Hanbali* School said the same, there is no difference between them to be required young or old, mentally sane or bedlam, blind or astute.[(6)]

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(1) Zilai- Othman bin Ali –Tabeen Alhaka'ik sharh Kanz al-Daka'ik- Boulak - Edition 1 - 1313 - 5/190, and Ibn Qudaamah – al-Mugani 10/554, Dardair - Ahmed bin Mohammed – al-Shareh al-Kabeer Ala Mukhtasar Khaleel – Dar Ehya' al-Kotob Al Arabia. 1201. 2/184. Ibn Qudaamah - al-Mugani - 1/552, and Ramli - Nehayat al-Mohtaj 7/333.

(2) Zilai - Othman Ibn Ali –Tabeen Alhaka'ik sharh Kanz AlDaka'ik 5/190.

(3) Al-Kharashi - Abu Abdullah Muhammad al-Kharshi – Sharih Al-Kharashi ala Mokhtasar Khaleel. Boulak - Edition 2. 1317 h. 3/121.

(4) Ramli - Nehayat al-Mohtaj 7/333.

(5) Ramli - Nehayat al-Mohtaj 7/333.

(6) Ibn Qudaamah – al-Mugani 9/507.

Malikite **School divided between being enmity between them or without, if the enmity is between them, and he demanded until the death, it must be legal retribution, and if there is no enmity between them, the blood money of unintentional homicide (the blood money must be paid by the 'Aqilah.").[(1)]**

Al-Dardair said:"Someone who prevents food from a person until he died or prevents drinking, there is retaliation, If he meant his death, but if he meant the intent just torture, only to know that he will die, he must pay the blood money, he followed his intention".[(2)]

Second case: The sacrifice of Muslim himself in the battle.

It is known that Jihad and fighting in the way cause of Allah and defend the right are the best proximity to Allah, glorified and exalted be He. If a Muslim fighter was on the battlefield alone and faced enemies and he knew that he will be killed certainly, Is this considered suicide?

Many scholars including Malikite School are said that it is permissible for a man to fight if his intention is to uphold the word of Allah and he thought to influence them, if he ends his life, as well as if he thought to benefit Muslims.[(3)]

Hanafi said that but they stipulated to affect them and to acerbate them, if it is not that, it is not permissible for him to bear down on them because he does not get anything from his victory of religion. [(4)]

[(1)]al-Htab- Mawaheb al-Jaleel 6/241.
[(2)]al-Dardir – al-Sharh al-Sageer 2/183.
[(3)]al-Dardir - al-Sharh al-Kabeer 4/339. 340. 341.
[(4)] Rad al-Mutahar Ala al-Durr al-Mukhtar - Ibn Abidin 3/222.

Malikite School **gathered that Allah Almighty says: (And of the people is he who sells himself, seeking means to the approval of Allah)(Al-Baqarah/207).**

That is clear, if he seeks to be martyred and a pure intention, it is unobjectionable that a man is to bear down on the great army, if he has strength with a pure intention.

It happened with Muslim armies when the horses of the Muslims escaped from elephants. Also when *Ibn Hanafi* was entrenched in the garden, a Muslim man said, "Put me in *Jahfa* and throw me toward them. They did and he fought them alone and opened the door. [(1)]

It is narrated that Muhammad bin al-Hassan said: If a man were to him to bear down on a thousand of the polytheists, there was nothing wrong with that. If he coveted to save himself, or to acerbate them, if he was not that, an undesirable act because he was compulsion himself to damage. [(2)]

Third case: If he asked someone else to kill him.

If a man told someone to "kill me and I will recover you", and he did. Is he considered suicide?

The scholars differed in this issue on three cases:

First case: This killing is not considered suicide, *Hanafi* and some of *Ash-Shafiy* agreed on it, and in a version by *Malikite* in *Adhhar al-Aqwal,* but there is no law of retribution, because of the permission, this

[(1)]al-Qurtubi - Abu Abdullah Muhammad Ibn Ahmad al-Ansari – Al Jame' Leahkam al-Qurab. Dar al-Qalam. Edition 3- 1966 AD. Edition 2/363, 364.
[(2)]al-Qurtubi – Tafseer al-Qurtubi - I 4/364.

suspicion does not prevent the obligation to pay the blood money because it is willful murder.(1)

Second case: this killing is willful murder; it is not considered suicide, and the perpetrator must be legal retribution. Some of *Hanafi* School agreed it, *Malikite* and *Ash-Shafiy School* saying. They explained that it was murder, it does not be stabbed, and it is not permissible for him, as well as it is the legal retribution of inheritor because his right fell before he had to. (2)

Third case: That murder is considered suicide, there is no law of retribution and no the blood money on his killer, as mentioned *Hanbali, Malikite,* and *Hanafi School* because the permission of killing fells legal retribution and crime, no penalty on suspicion criterion and the legal retribution is an estimated punishment, and it falls by no penalty on suspicion criterion.(3)

Fourth case: Compulsion to commit suicide, it has two cases:

First case: That a person coerces to kill another person by threatening him, by saying "Kill me otherwise I will kill you". It means that is to get spoil selection by dissatisfaction and he does not find it seem to implement the will of the obligor, and he killed him.

In this case, the person, who is under coercion, is considered a suicide, and the murderer must not be the legal retribution or the blood money of unintentional homicide against him, as mentioned *Hanbali* and *Hanafi*

(1) Zaylai – Tabeen al-Haqaeq 5/190, Ibn Abidin – Ead al-Mahtar Ala to al-Durr al-Mukhtar 5/352, Hattab - Mawaheb al-Jaleel 5/352.

(2) al-Kasani – Bada' al-Sane' 7/236, al-Dardir – al-Sharh Al Sageer 4/336 Ramli - Nehayat Almohtaj7/352

(3) al-asani – Bada' al-Sane' 7/236, al-Bahouti - Mansour Bin Younis – Kashaf al-Qena Edition 1, Eastern Amara 1319 e. 5/518.

***School*, and saying *Ash-Shafiy School*. This is explained by the fact that the person, who is under coercion, becomes as a tool by the hand of the obligor.** [1]

In saying *Ash-Shafiy* School, the blood money of unintentional homicide is on obligor because the killing is not permission, but there is no penalty on suspicion criterion to fall the legal retribution.[2]

Second case: a person coerced someone by the coerced person to kill himself by telling him "You kill yourself or I kill you".

In this case, he has no to kill himself because he is considered a suicide, he has a sin because the obligor is no different from the person, who is under coercion, in both cases, he is killed, whether killed himself or killed the other. He is patient and he doesn't kill himself, because the obligor can back down, he survives himself, based on that *Ash-Shafiy* School said there is no legal retribution on the obligor but he has a half of blood money. There is no legal retribution because of the penalty on suspicion criterion that obligor killed himself. [3]

If the obligor said to the person, who is under coercion, throw yourself into the fire or from the top of the mountain or I kill you by the sword, and he chose to throw himself out of the mountain.

***Imam Abū Hanafi and Abū Yusuf* said that is the burdened killing, so the obligor has paid the blood money, Imam Muhammad saw that he was**

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[1] Al Kasani – Bada' al-Sane' 7/175, Zaylai – Tabeen al-Haqaeq 5/181, Ibn Qudaamah – al-Mugani - 8/210, al-Ghazali - Abū Hamed Muhammad Bin Muhammad - al-Wajeez fi al-feqih Al- Shafi'i – al-Adab Press. 1317 AH 2/142.

[2] Ramli - Nehayat al-Mohtaj 7/248.

[3] Ramli - Nehayat al-Mohtaj 7/247.

killed by the sword, but if he threw himself into the fire, so the obligor has paid the blood money, as mentioned *Abū Hanafi*.[1]

CHAPTER TWO

THE ISLAMIC LEGAL CONSEQUENCES OF SUICIDE

It contains the following issues:

This chapter contains the following issues:

***First issue*: Injunction of the law in suicide**

***Second issue*: Injunction of the law if suicide does not die.**

***Third issue*: Injunction of the law in washing a dead body, shrouding, and offering the funeral prayer.**

First issue

The injunction of the sharia law about suicide. Is he a believer or a disbeliever?

There is no dispute between the scholars that the suicide, the exhaustion of the spirit, and an end to human life is forbidden by agreement, and it is the biggest of the greatest sins and evidenced by Quran verses: Allah Almighty says: (And do not kill the soul which Allah has forbidden, except by right.) (al-An'am / 151), Allah Almighty says: (And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.) (al-Nisa/29).

[1] Zaylai – Tabeen al-Haqaeq 5/190.

The man who commits suicide is more sinful and disobedient than the one who kills another, and the appearance of Hadith narrated by *al-Bukhari* and *Muslim* that the killer himself is in the fire.

It is narrated by *al- Bukhari* and *Muslim;* it is narrated on the authority of *Abū Huraira* that the Messenger of Allah (ﷺ) observed:

"He who killed himself with steel (weapon) would be the eternal denizen of the fire and he would have that weapon in his hand and would be thrusting that in his stomach forever and ever, he who drank poison and killed himself would sip that in the fire where he is doomed forever and ever; and he who killed himself by falling from (the top of) a mountain would constantly fall in the fire and would live there forever and ever". [(1)]

Narrated *Jundab* the Prophet (ﷺ) said, "A man was inflicted with wounds and he committed suicide, and so Allah said: My slave has caused death on himself hurriedly, so I forbid Paradise for him."[(2)] Is he a believer or a disbeliever?

The apparent meaning of the previous two *Hadith* is that suicide is disbeliever for his eternity in the fire. The deprivation of Paradise is the reward of the disbelievers in *Sunni* Islam, but none of the four schools mentioned that the suicide is a disbeliever because the unbelief is out of religion, disavowal, and denial, but the great perpetrator does not depart from Islam and that the disobedient ones are tortured and they won't eternalize forever in the fire. The suicide does not come out of Islam, as

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(1) al-Bukhari - Sahih Bukhari – Chapter " Shorb al-Som w al-Dawa Behi"- Part 7/139, and Muslim. Sahih Muslim – Chapter " Galdh Tahreem Katel AlEnsan"

(2) Bukhari - Saheeh al-Bukhaari – Chapter "what came in the killer of the soul" part 2/96

mentioned *Four Schools*, but he is washed and prayed over. They described his action as a sin like all other sins. [1]

As for eternity in the fire is assumed that the suicide considers as legal the death by suicide and that the urgency of death becomes permissible by believing the suicide, it is untrue and the death of suicide becomes a disbeliever.[2]

They also said that the repentance of the suicide is acceptable if he does not die because the texts are absolute in accepting the repentance of the sinner, but acceptable to the disbeliever, that is greater. [3]

It indicates that the suicide is left to the will of Allah Almighty, No one can assert his eternity in the fire, he remains Muslim, but he is a sinner.

Second issue

the injunction of the sharia law if suicide does not die.

- **If a person committed suicide or attempted suicide, but he did not die so to punish him in Islam?.**

Agreed upon matters between jurists, that whoever wanted to kill him committed an act of grievous sins, as well as non-blood money, willful or wrong suicide, because the punishment falls by death from the offender, *Hanafi*, *Malikite* and *Ash-Shafei*, and a narration *Hanbali* about it, as well as in wrongful death is non-blood money, because it is necessary to help

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[1] Ibn Abidin – Rad al-Mohtar Ala al-Durr al-Mukhtar - 1/184, al-Fatawa al-Hindia – 1/186. Ramli - Nehayat al-mohtaj 2/432.

[2] Ramli-Nehayat al-Mohtaj 2/432.

[3] Ibn Abidin - 1/184. al-Dardair – al-Shareh al-Sageer 1/547, Ibn Qudaamah – al-Mughani Ma' al-Shareh al-Kaber 2/418.

the offender and ease with him, so there needn't help, it does not make sense to do it.[1]

It is narrated that *'Amer Ibn al-Akwa* went out on the day of Battle of *Khaibar* to duel, and his arrow returned upon him, then he died, and the Messenger of Allah (ﷺ) didn't spend any of the blood money or anything else.[2]

In a narration on *Hanbali* that the wrongful suicide, it has to the blood money to his heirs, as if he killed others unless they are the heirs because it is not necessary for a person to do the same.[3]

- **Is it obligatory (atonement) to expiate on suicide?**

***Hanafi* and *Malikite* said: There is no expiation for suicide or wrongful killer himself or willful murder, as mentioned *Ash-Shafiy* and *Hanbali* in willful murder because the dead is not fit for the speech, said *Ibn Qudaamah* and this is to the right.[4]**

***Ash-Shafiy* and the view of the *Hanbali* in willful murder said that the blood money is obligatory and taken from the legacy suicide wrongful killer (mistake) or willful murder.**

They quoted the general meaning of Quran's verse, Allah Almighty says: (And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required]) (An-Nesa' /92)

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(1) Ibn Abidin, 5/350. al-Hattab – Mawaheb al-Hattab 6/268, Ibn Qudaamah – al-Mughani 9/509. Nehayat al-Mohtaj 7/366.

(2) al-Qusheiri - Muslim Ibn al-Hajjaj. Sahih Muslim. Halabi Edition. 3/1440.

(3) Ibn Qudaamah – al-Mughani Ma' al-Shareh al-Kaber 9/509.

(4) al-Kasani - Bada'i al-Sanaa 7/252. al-Hattab – Mawaheb al-Jaleel 6/268, al-Kasani - Bada'i al-Sanaa 10/39.

The truth is what the *Hanafi* and *Malikite* pointed out, because the intention here of the verse of the killing of others, according to the verse, Allah Almighty says: (and a compensation payment presented to the deceased's family [is required]), and he killed himself, there is no blood money. [1]

Third issue

washing the dead body, shrouding, and praying over suicide.

The majority of Fuqaha' *Hanafi, Malikite* and *Ash-Shafiy* believe that suicide is intentional, he does not come out of Islam because he killed himself, therefore praying and washing on the suicide because washing and praying are connected to *Malikite*. Both shall be washed and obligatory prayer for him. [2]

Al-Ramli quoted the consensus as saying: Washing, shrouding, praying, carrying and burying him are the collective duty, in the right cases, both at the same killing him and others.[3]

Another group of scholars, including Abū Yusuf of Hanafis and *Omar Ibn Abdul-Aziz* mentioned that it doesn't permit to pray for him, (The dead body) of a person who had killed himself with a broad-headed arrow was brought before the Messenger of Allah (ﷺ), but he did not offer prayers for him.[4]

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[1] Ramli - Nehayat Almohtaj 7/336, Ibn Qudaamah – al-Mughani 7/39.
[2] The Fatwa al-Hindia 1/163 and Ibn Abidin - Rad al-Muhtar 1/584, al-Dardair – al-Sharh al-Sagheer1/543. Ramli - Nehayat Almohtaj 432.
[3] Ramli - Nehayat al-mohtaj 2/432.
[4] The hadith of Jaabir narrated by Muslim in his Sahih 2/672.

Abū Dawud narrated that the man then went to the Prophet (ﷺ) and informed him that he had died.

He asked: Who told you? He replied: I myself saw that he had killed himself with arrowheads. He then said: I shall not pray over him. (1)

Some of them said that suicide does not repent to him, so they should not pray for him. (2)

***Hanbali* said: The imam should not pray for someone who kills himself, but other people pray for him.**

It is explained by the *Hanbali*, the Prophet (ﷺ) when he refused pray on the killer himself, and the Prophet (ﷺ) did not prevent us to pray over him. It is not necessary if the Prophet (ﷺ) leave to pray over him; other people also leave to pray over him. It is indicated by the specialization: as saying: "As for me, I will not pray for him."

***Hanbali* believe that leaving the imam's prayer on suicide is approbation and is not a duty of sanctity. (3)**

In conclusion, the scholars agreed that the *Muslim* dead should be washed, shrouded, and prayed over him, it is the collective duty, and suicide also, and he does not come out of Islam by killing himself.(4)

(1) Abū Dawood - Sulayman ibn al-Ash'ath - Sunan Abū Dawood. Izzet Obaid. [Its chain of narrators is authentic].
(2) (Ibn Abidin 1/584).
(3) Ibn Qudaamah – al-Moghani 2/418.
(4) Zilai – Tabeen al-Haqa'q 1/238, and Aldrder – al-Sharh al-Sagheer 1/543, and Ramli - Nehayat al-Mohtaj 2/432 and al-Bahouti - Mansour Ibn Younis – Keshaf al-Kena' 2/85.

Conclusion and Recommendation

Conclusion

The authors sought through the followings of the religious legal texts and opinions of jurists in suicide to illustrate the concept of suicide from an Islamic perspective and thereafter, the conclusion of the legal provisions, the researcher reached as follows:

- Suicide is one of the forms of murder by ending the life of man for his life by a passive or active way - Suicide, in this form, is forbidden by agreement and it is evidenced by the verses of the Quran and *Sunnah*.

- Suicide is not a disbeliever, but he is a sinner and guilty of the major sins

- Prophetic *Hadith* that show their appearance of the disbeliever is in the fire, but this case indicates to consider as legal death in this way.

- **Islam respects the human soul, prohibits the assault, and saves destinations necessary.**
- **The committed suicide should be washed, shrouded, prayed over him, and buried because he did not come out of Islam.**

Recommendation

To prevent the perpetrators of the crime of suicide, authors of this paper proposed the following:

First: Inviting the competent scientists, doctors, educators, researchers and all those involved to educate the communities about the danger of committing suicide and explaining its negative effects on individuals and communities, by holding lectures and seminars.

Second: Calling on the official institutions of schools, universities and religious institutions to form preventive community initiatives to reduce the phenomenon of suicide

Third: The need to communicate with the concerned specialists in the psychological aspect of psychiatrists, psychologist and counselors in schools, and to work jointly with other official bodies to discuss the risk factors leading to suicide and the factors that limit it, and to take decisions to intervene in accordance with the results of scientific research seized.

Fourth: Religious institutions should raise awareness of the need to introduce causes, medication and psychotherapy in situations that require it and that may lead to suicide, such as depression, mental illness; psychosis; Schizophrenia;and other psychological diseases, and the need to emphasize not to heal by popular way, such as superstition and sorcery.

Fifth: Joint action to combat many phenomena that may increase the .chances of suicide such as addiction, unemployment, forced marriage

Sixth: Spreading religious awareness through the lessons of mosques and through Friday lesson, the sanctity of self-harm and the need to

preserve and preserve them, and spread the spirit of hope and optimism and hatred of despair and despair in the verses of reading and the Prophet's hadiths.

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THE LEGAL FRAMEWORK OF THE DECLARATION OF STATE OF EMERGENCY AND CUSTOMARY PROVISIONS

In The Constitution of The Hashemite Kingdom of Jordan

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Abstract

The aim of this thesis is to examine and analyze the legal system for declaring a state of emergency in the Jordanian constitution for the year 1952 and its amendments. In this thesis you can find a description of what State of Emergency is, its characteristics based on the Jordanian constitution, and the laws that govern declaring state of emergency, types of states of emergency, ways of declaring emergency and structural flaws and loopholes in the laws that govern state of emergency in the constitution. Also, this thesis illustrates the impact of declaring a state of emergency on civilian's citizens and non-citizens. Conclusions and recommendations for modifications for the laws of state of emergency are also included by the authors to protect the civil and political rights of the people.

Keyword: emergency, constitution, political, declaring, system.

Introduction

As a matter of fact the topic of human rights is one of the most important issues that states and international organizations steadily work on protecting. That is because human rights are attached to the existence of humans and their dignity. As these rights are inherent in all human beings irrespective to gender, religion or color . it is noteworthy that the development and evolution of a state in all respects, whether economic, political, social or cultural is closely linked to the extent to which human rights are respected and maintained.

All legislations, whether domestic state legislations or international laws and conventions, had established and since the beginning of time legal systems which aim at protecting human rights; this shall result in the progress and development of countries in all respects.

Notwithstanding that the respect and protection of human rights is linked to the development and power of the country as well as the interdependence between its entity and society; however, the laws regulating human rights cannot be applied in all times and places, since states might experience exceptional circumstances which may be beyond their control and lead to the implementation these laws being impossible.

Some of these circumstances might be political such as wars, or security-related such as civil wars or security disturbances, others are natural such as earthquakes and volcanoes. Therefore, in such situations, the country is required to take adequate measures for the protection of its entity and people. Even though such measures might affect, violate

and restrict human rights in order to protect the country and its people, but this shall result in the interest of the state and its people.

It is noteworthy that the Jordanian Constitution of 1952 and its amendments established some provisions which allow the person allocated by the law to take exceptional measures that might detriment human rights in order to prevent the exceptional event encountered by the country, which is referred to as the state of emergency. This shall be to the extent proportional to the exceptional circumstance and pursuant to several conditions and requirements as will be explained later.

Problem of the study:

The problem of this study originates in the nature of the legal system which regulates the declaration of state of emergency whether stipulated by the Constitution or by related laws. As there are no clear standards to disrupt legislations regulating human rights and freedoms in a manner consistent with the seriousness of state of emergency.

Importance of the Study:

The importance of this study lies on considering the disruption caused to some human rights due to the declaration of state of emergency. The fact which has …. As researcher to assess the legal system which regulates the declaration of state of emergency in the Hashemite Kingdom of Jordan

Questions of the Study:

1) What is the state of emergency?

2) What are the instances that permit the executive authority to declare the state of emergency?

3) What are the types of emergency state in the Jordanian Constitution?

4) Are the types of emergency states established by the Jordanian constitution sufficient to regulate and protect the country during exceptional circumstances?

5) Is the competent authority to declare the state of emergency permitted to abuse its right when declaring the state of emergency according to the provisions of the constitution?

CHAPTER ONE

THE CONCEPT OF STATE OF EMERGENCY

Countries may be subject to situations that are beyond their control that neither constitutional provisions nor normal legislations can prevent. Even though the norm is peace and stability but sometimes exceptional events might occur such as international or civil wars, internal disturbance, or environmental disasters like earthquakes and volcanoes, or epidemics. Therefore, it becomes necessary to face these events striking the country by exceptional rules and procedures which shall protect the country, its components, and its people against such circumstances. These circumstances are called (State of Emergency). It is to be noted in this regard that even though the provisions of the constitution establishes the principle of legality which may not be derogated from, however, deviating from this principle during emergency declaration does not mean breaching constitutional legality which regulates rights and freedoms of individuals to the extent that the objective of declaration of state of emergency is to avoid serious risks;

thereby protecting the country's entity, its institutions, and its residents whether citizens or non-citizens.[1]

Accordingly, the researcher find that constitutional legality during normal circumstances will turn into exceptional constitutional legality. Thus, the declaration of state of emergency stems out of the centre of the constitution and is marked as legitimate whenever declared in consistent with the provisions of the constitution and in a manner which protects the state and its components including people, territory and political authority. [2]

Also, it is to be noted that the Jordanian Constitution of 1952 and its amendments regulates the declaration of state of emergency in several articles, and establishes legal norms which will be discussed in this study, as well as, indicating the types and features of it in this chapter.

SECTION ONE

THE DEFINITION OF STATE OF EMERGENCY

In fact, the Jordanian Constitution of 1952 and its amendments does not define the state of emergency as an exceptional issue [and well done] but rather states the circumstances and regulates it through the provisions of Articles 94, 124 and 125 as an exceptional event which permits exceptional procedures to be taken to address such circumstances. Therefore, the researcher find that the Jordanian

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[1] Al- Adayleh, Amin, 2012, (Al-Wajeez in Constitutional System), 2nd Ed, Dar Al-Thaqafa Publications, Amman, p. 131

[2] For further details, kindly check: Al-Jamal, Yahya, 2005, (The theory of necessity in the Constitutional Law), Dar Al-Nahdda Al-Arabiyyah, 4th Ed, Cairo, p. 20

Constitution adopted a commendable path, in order to narrow the legal concept of state of emergency.

There are several scholarly definitions concerning the state of emergency, as some of them defined it as "a set of exceptional measures which aim at preserving the safety of the country of the potential of an armed attack or a risk of internal disturbances or revolutions, through the establishment of an administrative system applied in the country which is particularly based on the concentration on authorities to achieve stability and security by the most powerful means." While others define it as "an exceptional conditional system justified by the idea of a danger threatening national entity which allows generating legal measures specified for the protection of the whole or part of the country against the dangers resulting from an armed or external attack, and can be prevented by transferring civil authorities to military authorities".[1]

Other scholars consider it "a situation of danger which is difficult to rectify by normal measures, this shall contend authorities which are competent with exceptional circumstances to resort to emergency legal means in order to respond to dangers and face difficulties.[2]

However, it is found that the most comprehensive definition according to the constitutional provisions which regulate emergency declaration and according to the legislations related to emergency declaration is, "unordinary circumstances experienced by the state, whether economic, political, national, or security related, requiring measures and actions to

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[1] **Available at: http://sunah.org/main/.html, last visited on 3/1/2018 at 8 pm**

[2] **Salman, Sameer and other, 2015, (The Impact of exceptional circumstances on constitutional legality), 1st Ed, The National centre for Legal Publications, Cairo, p. 17**

be taken in order to prevent such circumstances. This includes the disruption of some or all effective laws, issuing exceptional laws or provisions according to the seriousness of the circumstances and in cases specified by the Constitution and the legislation issued in accordance to it".

SECTION TWO

EMERGENCY STATE CHARACTERISTICS

The state of emergency has several characteristics in which the researcher explored in the Jordanian Constitution of 1952 and its amendments, as follows:

1) The state of Emergency is an unusual situation (Exceptional).

As previously mentioned, the state of emergency is a set of unusual circumstances which put the state under risk that threatens its entity and existence; this feature requires that these circumstances shall be of a distinct nature other than the circumstances which the country is accustomed with during normal events. Also, such circumstances are required to contradict with the state's legislations. The term "exceptional" provides that it is a temporary situation which ceases by the disappearance of the conditions which leading to it.[1]

2) The state of emergency is an imminent situation.

The state of emergency consist of situations which might cause imminent risk or close danger, thus according to their nature they need

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[1] Athyn, Abdul Rahman, 2008, (The Guarantees of Human Rights in light of Emergency Law), 1st Ed, Dar Al-Hamed Publications, Jordan, pp. 44 - 45

necessary measures to prevent them. It is temporary condition which results from circumstances which are not preconceived.[1]

3) The state of emergency is a serious state.

Emergency state is associated with the existence of a serious danger which is likely to threaten the country's vital interests. As this danger might take the form of threatening the national unity of the country, or endangering the independence and peace of the country, or might even take the form of domestic disturbance which shall alter the functioning of public authorities precluding it from executing its national and international commitments. In this regard, the researcher find that the Jordanian Constitution of 1952 and its amendments does not establish a constant standard to determine the seriousness of emergency state, but rather considers the seriousness of emergency state a standard for the impact of it;[2] as in the event of declaration of customary provisions, the legislator required a more serious situation than that required for the implementation of defense law.[3]

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[1] Al-Dabbas, Majed, 2018, (Human Rights Guarantees in the Jordanian Constitution in light of the Declaration of State of Emergency), Master Thesis, Faculty of Law, Al-Ahliyyah Amman University, p. 44

[2] Al-Hanaineh, Ossama, 2010, (The Kings exceptional power in the Jordanian Constitution), a research published in the Legal Magazine – Kuwait University, No. 4, p. 329

[3] Shatnawi, Ali, 1996, (The Principles of Jordanian Administrative Law), University of Jordan Press, Amman, p. 572

CHAPTER TWO

TYPES OF EMERGENCY STATE AND ITS IMPACT ON THE COUNTRY AND INDIVIDUALS

In order to demonstrate the types of emergency states which are set in the Jordanian Constitution and the impact of it on the country and its individuals; the types of emergency state are set out in section one while the second part discusses the impact of it on the country and its individuals.

SECTION ONE

TYPES OF STATE OF EMERGENCY

The state of emergency is declared in accordance to the situations which required it, as it might be due to political, security or natural circumstances[1], accordingly the researcher explored these types through the provisions of the Constitution as follows.

1) The state of emergency due to political circumstances.

It is an event which is associated with an imminent danger that threatens the security and safety of the Kingdom. As this case requires threats affecting the country's political entity which may result from the threat of war. Its declaration would lead to taking actions that will overcome such risks before they materialize. However, this shall not mean disrupting the fundamental freedoms of individuals or abolishing

[1] **For further details, kindly check: Jamal Al-Deen, Sami, 2003, (Necessity Regulations and the Guarantee of Judicial Control), Al Ma'aref Institute, Alexandria, p. 24**

their natural rights, but rather restricting same in order to protect public interest in a convenient way.[1]

2) The state of emergency due to security measures.

These situations include internal and civil fighting which shall be equivalent to the power of a security force and have the potential to undermine the security of the country and prejudice its safety and peace in a manner that cannot be managed by ordinary means. Thus, there shall be a new legal system which restores the prestige of the country through extending the powers granted to the parties competent of preserving security and imposing restrictions over rights and freedoms.[2]

3) Emergency state due to natural circumstances.

This type in its nature requires that the issue should be beyond the control of the country or any of its components on grounds that are beyond humans' ability such as, environmental and natural disasters, proliferation of diseases and epidemics. It is also necessary that this event shall be of a close risk of happening due to serious indicators and of a severe level that makes the implementation of legal provisions harmful and puts individuals' safety at risk, resulting in the disruption of some laws and human rights, such as right of movement and others.[3]

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[1] Dasouqi, Ra'fat, 2006, (The Dominance of the Executive Authority over the functions of the Parliament), 1st Ed, Al-Ma'aref Institute, Alexandria, p. 187

[2] Al-Ekily, Ali, 2015, (Constitutional protection of rights and freedoms under the State of Emergency), 1st Ed, The National Center for Legal Publications, Cairo, p. 24

[3] Al-Dabbas, Majed, 2018, previous reference, p. 45

SECTION TWO

THE IMPACT OF EMERGENCY STATE ON THE COUNTRY AND INDIVIDUALS

The declaration of emergency state may lead to changing the legal system governing legal rights in the country; whereby the powers of the three authorities might merge, creating certain circumstances which grants governments exceptional powers to take unordinary and broad measures in order to maintain internal and national security. Some of these measures might affect the system of human rights and freedoms protected by the constitution during normal circumstances.[1] This section will discuss the impact of emergency state on the country and individuals.

First- The impact of emergency declaration on the country

There is no doubt that the declaration of state of emergency in a certain country shall result in several impacts, whether political, economic or security; especially changing t political and economic he composition of the country. As during the declaration of emergency state the power of the country's authorities might integrate together and the scales of the legal and constitutional competencies might be turned from one side to another. [2]

In light of the Jordanian Constitution of 1952 and its amendments, it is found that emergency state has various aspects, some which are linked

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[1] Shatnawi, Ali, 2013, (Jordanian Constitutional System), 1st Ed, Dar Wael Publications, Jordan, p. 128

[2] Al-Hameed, Ahmad, 2013, (The effect of emergency state on broadening the functions of the Executive Authority), no date, Law and Judiciary Press, Baghdad, p. 121

to the absence of the legislative authority and the presence of an emergency situation due to an imminent event. While others are linked to maintaining the defense system where defense laws are implemented and customary provisions are declared. In all cases, the Jordanian Constitution of 1952 and its amendments grants the executive authority, as a result of emergency declaration, an exceptional power in order to prevent the risks which threatens the country.

Before discussing the impact of emergency declaration on the country, it is important to note that the Jordanian legislator conferred the executive authority the right to declare emergency state by Royal Decree issued pursuant to a resolution by the Council of Ministers, as the executive authority is competent with the implementation of legislations and the mechanisms of its implementation as well as addressing the imminent events facing the country, provided that the executive authority is the closest to individuals' needs. In addition, emergency circumstances might require exceptional measures which might contradict with the effective legislations of the country and the method of implementing it, thus, the emergency state has an impact on the country whether in terms of altering its political system or its obligations towards the international community. It is noteworthy that the declaration of emergency state should not disrupt constitutional provisions as long as no provision stipulates so.[1]

During the declaration of emergency state institutions aim at restoring balance to the country's' components and preventing risks on the grounds of urgency, this might lead the executive authority to disrupt

[1] **Al-Hanaineh, Ossama, 2010, previous reference, p. 335**

some laws in order to merge the functions of the three authorities or diminishing the power of one of them.

The state of emergency might result in a temporary disruption of the country's obligations towards the international community, as it might lead to disrupting the provisions of international conventions and treaties in line with the necessity of urgent event. Consequently, the country becomes the focus of attention from the international community, just as the country is responsible to protect its individuals' rights; it is also a member of the international community. Therefore, the state of emergency is considered a sensitive matter for the country and the whole international community and constitutes a burden on the entire authorities of the country in a manner making its declaration a hard issue requiring the executive authority precise studies.[1]

Accordingly, the norm of the declaration of state of emergency is that it is serious and temporary, terminates with the cease of the circumstances which led to it, as well as, that it is impossible to face such circumstances without the declaration of it. It is also recommended that it should be proportional with the imminent danger in a way that the executive authority does not abuse its power unless to the extent those competences were legislated for. [2]

Second-The impact of emergency declaration on individuals' rights

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[1] Al-Dabbas, Majed, previous reference, p. 47

[2] Al-Lamsawi, Ashraf, 2007, (The impact of Exceptional Circumstances, State of Emergency, and Provisional Laws on the Principle of Legality in different Legal Systems), 1st Ed, The National Centre for Legal Publications), Cairo, p. 55

The declaration of state of emergency has an impact on individuals' rights; these rights are protected during normal circumstances pursuant to national legislations and international covenants and conventions. Those impacts derive as a result of the cessation of effective laws. Also, by the enactment of exceptional legislations which shall impose restrictions on individuals' rights and freedoms which are usually protected during normal circumstances[1], an important example of this is the powers conferred upon the prime minister pursuant to the Jordanian Law of Defense which shall become effective in the event where emergency state is declared to defend the country, as Article 4 of the Jordanian Constitution of 1992 states:[2]

"The prime minister shall exercise the following:

a) Place restrictions on individuals' freedoms with regard to meeting, moving and residence. And arresting suspects, whom are of danger to national security and public order.

b) Mandate any person to perform any action or perform any service within his/her capacity."

c) Search people, places and vehicles without compliance with the provisions of any other law, and order for use of appropriate force in the event of resistance.

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[1] For further details, kindly check: Suwailem, Mohammad Ali, (2003), The Constitution of The Republic of Egypt, Comments on the provisions of the Constitution 2012, University publications, 1st Edition, Alexandria, p. 815

[2] The Jordanian Law of Defense No. 13 of 1992 published in the Official Gazette No. 3815 on page 586 dated 25/3/1992 and effective on 24/4/1992.)

d) Seizure of movable and immovable property and postponing the fulfillment of debts and obligations.

e) e) Prevent, limit, or restrict the import, export, or transfer of materials from one place to another. As well as, identify the use of such materials, prohibit hiding it, destroying it, buying it, or trading it and pricing it.

f) Seizure of any land, building, road, or source of water or energy, or to set up any works concerning defense or to cut trees or remove premises, and order to manage, use or regulate the use of same.

g) Evacuate some areas, or isolate it, or impose curfew.

h) Determine the opening and closing times of all local shops or some of them.

i) Regulate means of transport and specify them between different regions, and close any road or alley or a water stream or change the path of same or prevent walking on it.

j) Monitoring letters, journals, printouts, publications, drawings, and all means of expression and advertising prior to its publication and seizing and confiscating it and closing the places of its business.

k) Prevent taking photos, undertaking any graphics or maps of any place or certain things which might help enemies. Also, prevent cameras or any material that helps in making such graphics near such places and things. And prevent staying at these places without a justified reason.

l) Cancel the license and seizure of firearms, ammunition, explosives, and potentially explosive substances or any explosive related materials; as well as precluding the manufacture, sale, purchase, transfer or use of same, and closing its shops.

m) Preventing the manufacture, purchase, sale, or acquire of communication devices, and order of its seizure.

By analysis of the above mentioned Article, it is shown that the most important limits which the executive authority imposes over human rights and freedoms are the limitations on the right of movement, property, expression, employment, as well as personal rights. With regard to the right of movement during the declaration of defense law, the executive authority deprives individuals from this right and restricts them from going to certain areas. It also imposes curfews and closes certain places and prevents its access.

As for[1] intellectual freedoms, the executive authority may impose several restrictions over the rights related to opinion and expression. In addition, the executive authority performs strict control over all intellectual activities, especially journals, magazines and publication houses, as these restrictions might go as far to close publication houses and others, also, the executive authority may close newspapers and magazines publication places as well as confiscate printed material and even prevent it from being published if it contains rumors or incite acts of violence and induce the people against the government. Supervision over press and media may be partial and specific pursuant to article (15/5) of the Jordanian Constitution of 1952 and its amendments, which stipulates "In the event of the declaration of martial law or an emergency, the law may impose a limited censorship on newspapers, publications, books and information and communication media in matters related to public safety and national defense purposes."

[1] **Al-Dabbas, Majed, previous reference, p. 49-50**

Moreover, regarding the right of individuals to work and perform their jobs and businesses, the executive authority has the right to preclude individuals from import and export and transportation of goods, it might even prevent them from practicing a certain craft or from importing and exporting a certain product. The executive authority may as well close shops and prevent working in them. It also can restrict individuals' freedoms which are related to property through seizure of movable and immovable property and confiscate it.

The state of emergency might also affect individuals' personal rights through demanding individuals to perform a specific activity which serves public interest.Furthermore, the declaration of state of emergency also has an impact on the judiciary as it affects the principle of judiciary independence and the principle of separation of powers. As during the declaration of state of emergency some of the judiciary powers are granted to the executive authority, for example, during state of emergency a police chief may have the power of an investigating judge such as arresting suspects and referring them to exceptional and military courts. Not to mention the other restrictions which are to be discussed through examination of human rights guarantees under the declaration of emergency state.[1]

The declaration of emergency state has various impacts on individuals' rights reflected as a result of altering the legal system in the country through granting the Executive authority broad powers that

[1] **Fahmi, Omar, 1980, (The legislative function of the President in the presidential and parliamentary systems), 1st Ed, Dar Al-Fikr Al-Araby, Cairo, p. 89**

may amount in granting same ultimate and non-specific competence, as stipulated in the Jordanian Constitution of 1952 and its amendments.

CHAPTER THREE

FORMS OF EMERGENCY STATE IN THE JORDANIAN CONSTITUTION

The state of emergency has a strong impact on individuals' rights as its provisions grants the executive authority the power to impose restrictions on the constitutional rights of individuals as necessary according to threats. The Jordanian Constitution addressed the state of emergency in three situations. Issuance of temporary laws, declaration of defense law, and declaration of customary provisions.[1] In each of these situations, it is found that the Jordanian legislator granted the executive authority broad powers to restrict individuals' rights during emergency state, in significance of the constitutional provisions which granted such powers broadly without limiting the competency of the legislative authority.

It is found that the Jordanian constitutional legislator did not specify the mechanism for declaring state of emergency or the authorized body to declare it, as the provisions of the Jordanian Constitution of 1952 did not include a consistent standard that implies the declaration of emergency state. This raises several legal issues regarding the seriousness of emergency state declaration, consequently, the seriousness of the

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[1] **Al-Halalat, Mohammad, 2016, Guarantees of human rights and Justifications for its restrictions in Jordanian Law (a comparative study), 1st ed, Dar Al-Elmiya Publications, Amman, p. 78**

procedures taken in light of it. However, the Jordanian legislation established several guarantees which shall control the actions of the executive authority and the accountability of it due to the abuse of its power during emergency state. It also granted injured individuals the right in obtaining proper compensation on the basis of the procedures conducted against them in light of emergency declaration. In this chapter, the researcher will demonstrate the types of emergency states and the judicial and legislative guarantees which protect human rights under the Jordanian Constitution of 1952 and its amendments and the laws issued by virtue of it.[1]

SECTION ONE

THE STATE OF EMERGENCY WHICH REQUIRES ISSUING PROVISIONAL LAWS

The state of emergency is one of the events which allow the executive authority to issue laws in the absence of the legislative authority on a temporary basis, until introduced to the legislative authority in its first meeting. Thus, this is considered a departure from the principle of separation of powers in certain circumstances specified by the Jordanian Constitution of 1952 and its amendments by virtue of Article (94) which states:

"1- When the House of Representatives is dissolved, the Council of Ministers – with the approval of the King - shall have the right to issue provisional laws to cover the following matters:

[1] **Al-Dabbas, Majed, previous reference, p. 51**

a. General disasters.

b. The state of war and emergencies.

c. The need for necessary and urgent expenditures which cannot be postponed. The provisional laws - which should not violate the provisions of the Constitution - shall have the force of law, provided they are placed before the Parliament in the first sitting it holds. The Parliament shall take decisions in their regards during two consecutive ordinary sessions from the date of their referral. It may approve, amend or reject such laws. If it rejects them or the period provided for in this Paragraph elapses without decisions, the Council of Ministers should - with the approval of the King - declare their nullity immediately; and from the date of such declaration the force of law they had shall cease provided that this shall not affect contracts or acquired rights.

2- Provisional laws shall come into effect in the manner laws come into effect by virtue of the provision of Article (93) of this Constitution."

By analysis of the previous provision, it is found that the executive authority may issue and implement temporary laws in cases where the national assembly is not sitting or dissolved and under specific requirements as follows:

1) **Dissolution of the national assembly.**

The executive authority is not allowed to issue provisional laws in the duration of the national assembly, as the national assembly is competent with issuing laws. Therefore, if anything requires that the state of emergency should be declared while the national assembly is formed,

then it is their competency to issue laws to prevent the risks and not the executive authority.[1]

2) **The availability of certain conditions specified by the law.**

The Jordanian Constitution exclusively stipulated some conditions which must be available which allow the executive authority to issue provisional laws, such as:

a- General disasters,

b- The state of war and emergencies,

c- The need for necessary and urgent expenditures which cannot be postponed.

However, it can be noted that the legislator did not establish specific standards to determine the nature for each of the aforementioned situations, as well as any controls required by such circumstances or the necessity for which they were legislated. Thus, the issue is left wide open to the executive authority.

3) **To issue such laws on a temporary basis.**

This requirement is based on the legislative nature of these laws, where such laws are issued under exceptional circumstances on an exceptional basis. The constitutional legislator set a practical standard for the temporary period entailed in these laws. Whereby the legislator required that these laws shall be placed before the Parliament in the first sitting it holds, consequently the Parliament shall take decisions in their regards during two consecutive ordinary sessions from the date of their referral. It may approve, amend or reject such laws. However, if it was

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[1] **Al-Majzoub, Mohammad, 2002, (The Constitutional Law and the Political System in Lebanon), Al-Halabi Law Publications, Beirut, p. 299**

rejected or the period of two regular sessions lapsed and it was still pending the Council of Ministers should - with the approval of the King - declare their nullity immediately; and from the date of such declaration the force of law they had shall cease provided that this shall not affect contracts or acquired rights.[1]

The researcher find that the constitutional legislator was keen to ensure that these laws are temporary laws by means of determining the duration needed for the legislative authority to decide upon such laws, and also set that if its refused or not decided upon during the specified period then it shall be considered null.

4) **Provisional laws should not violate the provisions of the Constitution.**

This requirement is stipulated in Article 94 of the Jordanian Constitution of 1952 and its amendments as a standard that limits the power of the executive authority when issuing provisional laws; the Jordanian legislator established a judicial control to ascertain the availability of this requirement through the competency of the constitutional court to verify the constitutionality of these laws.[2]

However, all of the mentioned shall create a situation of contradiction and conflict in the authority's powers; this would be contrary to urgency basis required by such laws. On the other hand, the requirement that provisional laws should not contravene with the provisions of the

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[1] Article 94/1 of the Jordanian Constitution

2 For further details, please review: Al-Jalamdeh, Fairouz, 2016, Judicial Control over the constitutionality of legislations by sub-appeal in the Hashemite Kingdom of Jordan.., Master thesis, Al Ahliyyah Amman University, Amman, p. 44

Constitution does not fit the nature of provisional laws. As the researcher find that the issuance of provisional laws is linked to unordinary circumstances that might even lead to application of the constitutional provisions impossible, especially during wars which is an urgent event requiring extraordinary measures to be taken, and that is according to all legal, judicial and scholarly definitions.

Thus, it is to be said that he legislator have created a confusion in the nature of the emergency state that the jurisprudence regarded as a case to disrupt the laws. As the state of emergency whereby provisional laws are implemented neither permit the laws issued in light of it to contravene with the constitution or the effective laws, nor disrupt any legal provisions.

Accordingly, pursuant to the legitimacy of constitutional provisions, the executive authority is not allowed, citing the emergency concerns, to issue any provisional laws which restrict individuals' rights and freedoms that are protected by the Jordanian Constitution; as the constitutional provisions explicitly stipulated that laws should not contravene with its provisions. On this regard, the researcher consider that constitutional provisions should be amended in a manner that determines exactly the emergency state which requires the issuance of provisional laws as a simple accidental situation which does not require the disruption of legal provisions, especially the ones related to the rights and freedoms of individuals.

SECTION TWO

THE STATE OF EMERGENCY WHICH REQUIRES THE ISSUANCE AND IMPLEMENTATION OF DEFENSE LAW

Article 124 of the Jordanian Constitution of 1952 and its amendments stipulated the following, "In the event of an emergency necessitating the defence of the Kingdom, a law, which shall be known as the Defence Law, shall be enacted giving power to the person specified therein to take such actions and measures as may be necessary, including the suspension of the operation of the ordinary laws of the State, with a view to ensuring the defence of the Kingdom. The Defence Law shall come into force upon its proclamation by a Royal Decree to be issued on the basis of a decision of the Council of Ministers."

By analysis of the previous Article, the researcher found that the Jordanian legislator established a special case of emergency concerning the defense of the country, whereby it requires the implementation of a special law, known as the Defense Law to address the circumstances affecting the country, and it grants a person specified by the law to take procedures and measures capable of dealing with the emergency matter; including the disruption of the laws in a manner that shall restore security and achieve defense.

And from there came the need to study the State of Emergency as an event which requires the issuance and implementation of defense law, this shall be demonstrated as follows.

1) What is the Law of Defense and the state of emergency which requires the implementation of it.

As mentioned earlier, the law of defense is one of the ordinary laws which its enforcement is related to requirement of the necessity to defend the country, as it is a law issued by the legislative authority during its ordinary or an extraordinary meeting as opposed to the issuance of provisional laws.

With regard to the state of emergency which requires the implementation of defense law; the Constitution only required that the Defense Law shall become effective in an event which requires national defense, however, the Defense Law of 1992, which is considered the most recent defense law issued in accordance to Article (124) of the Jordanian Constitution exclusively stipulates the events which require the implementation of defense law, whereby Article (2/a) of the Defense Law, which reads " Should there be a reason that requires national defense in the event of emergency which shall threaten national security or public safety throughout the Kingdom [The Hashemite Kingdom of Jordan] or part thereof, due to war or an event which threatens war, or any disturbances, or internal armed seditions, or natural disasters, or a disease or epidemic, this law shall be declared effective by Royal Decree issued pursuant to a resolution by the Council of Ministers."

2) Declaration of emergency state in light of the Defense Law and the requirements for issuing and declaring defense law.

The researcher found that the provision of Article 124 of the Jordanian Constitution that in order to issue defense law the necessity of an emergency event which calls for national defense is required, without specifying its nature or the procedure for declaring state of emergency,

as mentioned earlier. Furthermore, the Constitution required that defense law shall be implemented by virtue of a Royal Decree in accordance to a resolution by the Council of Ministers.

The researcher find that article (124) of the Jordanian Constitution required that in order to issue defense law there shall be an urgent situation which demand defending the country, without specifying its concept or the mean of declaring it. It also recommended that the defense law shall be issued upon a royal decree by virtue of a resolution of the Council of Ministers.

It is noteworthy that the Jordanian constitutional legislator did not specify a standard to the suspension of defense law by virtue of the substantive and formal aspects but rather left it as a discretionary power for the executive authority. In that, the researcher take a side against the Jordanian legislator for the violation of the principle of relativity which requires that the emergency state which demands the implementation of defense law shall fit the necessity of it. Whenever the emergency circumstance is over it is to restore the situation prior to the event which required and it and terminate the law of defense. However, by reference to the Jordanian Defense Law of 1992, the provision of Article (20) shows that the legislator addressed the formality of the issue of terminating defense law in the same manner it is implemented, and that is in order to terminate defense law, a royal decree shall be issued by virtue of a resolution of the Council of Ministers[1]. However, the reasons and circumstances of termination were not mentioned, thus, this shall leave

[1]**Article (2) of the Jordanian Defense Law of 1992 and its amendments.**

the executive authority invoking the defense law without a real cause of implementing it.

SECTION THREE

STATE OF EMERGENCY WHICH REQUIRES THE DECLARATION OF CUSTOMARY PROVISIONS

To simplify the concept of customary provisions and its requirements, first, the definition of customary provisions should be demonstrated and then the formal and substantive requirements which should be available in order to declare customary provisions will be discussed.

1- The definition of customary provisions.

Customary provisions is one of the most serious measures taken by the executive authority to defend the country's security and peace, as the Jordanian legislator granted the executive authority the power to take exceptional measures and procedures during the declaration of customary provisions in accordance to Article (125) of the Jordanian Constitution of 1952 and its amendments which states

"(i) In the event of an emergency of such a serious nature that action under the preceding Article of the present Constitution will be considered insufficient for the defence of the Kingdom, the King may by a Royal Decree, based on a decision of the Council of Ministers, declare martial law in the whole or any part of the Kingdom.

(ii) When martial law is declared, the King may by a decree issue such orders as may be necessary for the defence of the Kingdom, notwithstanding the provisions of any law in force. Persons charged

with the implementation of such orders shall continue to be subject to legal liability for all acts committed by them under the provisions of any such laws until they are relieved of such responsibility by a special law to enacted for the purpose."

By analysis of the aforementioned provision, it is found that the Jordanian legislator had indicated the seriousness and danger of the state of emergency that requires the declaration of customary provisions. Whereas, the procedures and measures stipulated in Article (124) of the Jordanian Constitution of 1952 and its amendments should be considered inadequate to defend the country. Accordingly, the emergency event which requires the declaration of customary provisions should be of a serious and dangerous nature that threatens national security and peace, and that the implementation of defense law will fail to protect the country.

Based on the aforementioned, it is found that for the legitimacy of the declaration of customary provisions, it is necessary that the procedures and measures established in the defense law were incapable to address the urgent and serious circumstances. Furthermore, it is unconstitutional to declare customary provisions without confirming that the procedures and measures stipulated in the defense law could not protect national security.1

The researcher also found that the Jordanian Constitution of 1952 and its amendments granted the Executive authority broad discretionary power to assess the seriousness of the emergency state facing the country, and whether it requires the implementation of customary provisions or

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[1] **Shatnawwi, Ali, previous reference, p. 128**

not, however, the legislative authority shall not have any role regarding this matter, as the Jordanian Constitution of 1952 and its amendments does not grant the Parliament any power in the events of declaration, extension and termination of customary provisions, this will result in breach of human rights by the executive authority.1

Customary provisions were declared twice in the Hashemite Kingdom of Jordan during the current constitution of 1952. Where it was declared for the first time in 1957 by virtue of a Royal Decree with the approval on the Council of Minister's resolution No. 1 dated 25th of April, 1957, and it was terminated by virtue of a Royal Decree with the approval on the Council of Minister's resolution No. 640 dated 29th of November, 1958 after lasting for a year from its issuance date.

As a result of the termination of customary provisions, a declaration dated 29th of November, 1958 was passed by the Council of Ministers to end all the issued customary instructions in accordance to Article (125) of the Constitution.

The declaration states, "All customary instructions issued by the Government and any of its amendments are considered automatically abolished, on the grounds that such instructions were issued to regulate the situation which requires their issuance. Another time customary provisions were declared was by virtue of a Royal Decree granting the approval on the Council of Minister's resolution no. 254 dated 5th of June, 1992, which lasted for two years, as it was terminated on the basis

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[1] Al-Hayary, Adel, 1972, (Constitutional Law and the Constitutional System), 1st Ed, no publisher, p. 205

of the approval of his Majesty, the King, on the resolution no. 970 in 1992.1

2-The requirements of the declaration and termination of customary provisions.

By analysis of the provision of Article (125) of the Jordanian Constitution of 1952 and its amendments, it is found that,

a- The declaration of customary provisions shall be issued by approval of His Majesty, the king, in accordance to a resolution issued by the Council of Ministers.

b- The state of emergency which requires the declaration of customary provisions shall be of a significant and serious threat of risk.

c- The measures and procedures taken in accordance to the defense law shall not be enough to defend the country.

d- Termination of customary provisions shall be by virtue of a royal decree pursuant to a resolution by the Council of Ministers.

3-The impact of customary provisions on individuals.

The declaration of customary provisions has a direct impact on individuals' rights, as in the case of declaration of defense law. However, with regard to the constitutional nature of the declaration of customary provisions and the broad powers granted for the executive authority during the declaration of customary provisions and as such powers contradict with the principle of legality. Therefore, the declaration of customary provisions has particular effects other than those concerning the implementation of defense law, as follows.

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[1] Shatnawi, Ali, 1996, (The Principles of Jordanian Administrative Law), 1st Ed, Jordan University Press, Amman, pp. 564- 566

The declaration of customary provisions might affect all rights and freedoms of individuals without any specific legal control as opposed to the case were defense law is implemented which stipulates the power of the executive authority in restricting specific rights and freedoms as necessary for national defense. Thus, during the declaration of customary provisions the executive authority is permitted to take any measures which shall defend and protect the country and its components, in this regard the competent persons are granted broad discretionary powers pursuant to the instructions issued by his majesty, the King in accordance to Article (125/2) of the Jordanian Constitution of 1952 and its amendments, which states:

"(ii) When martial law is declared, the King may by a decree issue such orders as may be necessary for the defence of the Kingdom, notwithstanding the provisions of any law in force. Persons charged with the implementation of such orders shall continue to be subject to legal liability for all acts committed by them under the provisions of any such laws until they are relieved of such responsibility by a special law to enacted for the purpose."

The declaration of customary provisions aims to create a situation of authoritarianism and full social control through the strict actions taken by the executive authority against individuals whereby it controls economic, social and political life of citizens reaching a state which makes the country of a police nature, especially that the declaration of emergency state is not restrained to a certain place or time.

The declaration of customary provisions without any supervision, may amount to breach of the most significant human rights and

freedoms. As it grants the executive authority the right to violate all effective laws and regulations; including the ones protecting individuals' rights. Furthermore, the provision of Article (125/5) of the Jordanian Constitution of 1952 and its amendments expressly provided that the instructions issued during the declaration of customary provisions may contravene with the effective laws and regulations.

Conclusion

The state of emergency is an exceptional event encountered by the country which shall disrupt some laws and facilities of the country, whereby the powers granted to the three authorities might merge. Thus, the executive authority is obliged to declare the state of emergency in order to protect the country's entity and individuals whenever it is impossible to protect the country against dangers by ordinary laws. From this point, the researcher have focused in this study on highlighting the legal framework concerning the declaration of state of emergency for the importance of it as it concerns human rights and the protection of the country's entity against the extraordinary circumstances facing the country. At the end, the researcher achieved the following results and recommendations.

Results

1) The state of emergency is an exceptional case which requires that some measures should be taken to maintain social, economic, and national security of the country; as the state of emergency may be required during political or natural circumstances.

2) According to the Jordanian Constitution the state of emergency is centred on three situations. First, the state of emergency which requires

enacting provisional laws. Second, where the law of defense is implemented and last, where customary provisions are declared.

3) The Law of Defense of 1992 imposes several restrictions over human rights and freedoms. Particularly the fundamental freedoms, such as freedom of speech, right of movement, right of ownership, right to work, and personal freedom. These rights are based on achieving the defense system to the extent required by emergency.

4) Customary provisions are a legal measure required in the occurrence of the events where a more serious situation other than that by which the defense law is implemented. Whereby the provisions of the defense law become inadequate to defend the country against the danger. During the declaration of customary provisions the executive authority is granted the power to take any decisions which it deems appropriate to defend national security, regardless of any effective laws at that time.

5) Despite that customary provisions might include provisions which do not comply with the constitution and effective legislations. The Jordanian Constitution established a legal norm implying that urgent circumstances should not be an excuse for the violation of human rights and freedoms.

Recommedations

1) It is recommended that the provisions of the Jordanian Constitution should be amended to establish a consistent standard that differentiates between the events which require the implementation of defense law and those requiring the declaration of customary provisions; through specifying the extent required for both of them so that the Executive Authority does not violate its powers by use of any of them.

2) It is recommended that the constitutional legislator should establish a constitutional standard for the termination of defense law in a manner consistent with the state of emergency. For example if the urgent event is over then defense law should be terminated.

3) It is recommended to set constitutional provisions which emphasizes the role of the judiciary and its independence in light of emergency state, so that the functions of the civil courts is available during the declaration of customary provisions.

4) Article (124) of the Jordanian Constitution should be amended in a way that the person specified by the law for taking the necessity measures to cope with the defense situation should be of a degree of responsibility, like a committee formed of the members of the three authorities.

5) It is necessary that section two of Article (125) of the Jordanian Constitution should be amended by redrafting it in a manner that removed any vagueness and ambiguity regarding the liability of those concerned with the implementation of customary provisions. The legislator should specify the nature of such liability including the individuals acts which are out of the scope of customary provisions; especially that the disruption of laws during the declaration of customary provisions may result in no legal liabilities upon the violation of such.

This makes the aforementioned Articles of an ineffective impact. On the other hand, any private law which might exempt such persons from liability should also exempt the violations of the fundamental rights and freedoms.

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ELECTORAL SYSTEMS IN JORDAN AND THEIR EFFECTS ON THE JORDANIAN COMMUNITY AND PARTY LIFE

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Abstract

In the light of the regional and internal crises due to the Arab Spring, Jordan is seen to be under pressure, and different political and ideological issues have pushed the country to face some political crises. Consequently, Jordan itself has undergone many transformations; also some certain degrees of political liberalizations have made the main objective of political participations for the political system of Jordan and its own various institutions. This kind of regional change in turn has

required all segments of the entire society to participate in which this participation includes minorities, political parties, women, and tribes.

Therefore, the aim of the current study is to expound the issues of political participations in Jordanian Kingdom. More specifically, it investigates the impact of electoral systems on the parties and Jordanian community due to the regional changes. The study found that the electoral systems affected positively the parties' life in Jordan and the community was negatively affected. Furthermore, more studies are recommended in this regard to look to the problem from different corners.

Keywords: Electoral System, Party Life, Community, Arab Spring, Jordanian Context

1- Introduction

One of the most stable democratic institutions that has been proven to be stable is the electoral systems. Thus, a debate about these electoral systems is moved from margins to mainstreams on the political agendas during the 1990s [(1)]. Electoral systems of any country are associated to the economic, social, and political areas of its life[(2)]. Most of the countries all over the world consider the regular and periodic elections to be democracy 'core attributes. Elections, totaled 132,were conducted worldwide in local contests, presidential or legislative in 2016

([1])Norris, P., (1997). Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems. International Political Science Review, 18: 297–312.

([2])Pastarmadzhieva, D. (2019). Majority/Plurality Systems: The Choice Of Least Developed Countries?. *Trakia Journal of Sciences*, *17*(1), 107-114.

(International Institute for Democracy and Electoral Assistance, 2017). These processes of elections held under some conditions and these conditions should meet both regional and global standards as well as give the meaning to the core values of democracy for political equalities and the accountability of governors. Elections, at practical and basic levels, are seen to be critical elements of effective anti-corruption strategies, even though the fear to lose elections is not at all times enough to preventing elected officials who are elected of being corrupted.

In fact, the rules, which are implemented in electoral systems, are critical in showing the practice of democracy in given settings. In this vein, an electoral system is considered the rules in laws or constitutions describing how the votes are being translated into seats. This electoral system is also seen as strong determinants of the democracy 'features as well it displays how the politics 'game is in mobilizations and campaigns. More specifically, these electoral systems strongly influence who lose and who win regarding the number of "seats won" and who lastly form the government itself [(1)].

One of the main goals related to such topic is why this electoral system is significant. Point of fact, it is significant since a small number of people representing a larger number of citizens. The electoral systems are the formulas and rules' set that transforms the votes of the citizens into legislature seats and this kind transforming is made by some ways and it

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([1])Sisk, T. (2017) Elections, Electoral Systems and Party Systems, *International Institute for Democracy and Electoral Assistance,* 1-14.

can produce different results[1]. In this regard, it is explained that these electoral systems are associated to different functioning aspects of a country known as political stability, minorities' representation, party system, economic policies and growth…etc[2].

2-The Problem of the Study

Different types of elections are conducted in many countries such local, parliamentary, and presidential…etc. Each type of these elections is considered important in order to function the democracy. However, those kinds of elections that form the legislature are seen to be the basis for a democratic idea. The elections are the tools in which a different social group might be a representative in the institutions of the government and they are the mechanisms in which the citizens could change one of the political parties with another party, if dissatisfied.

Jordanian Parliament is seen to be an important factor that affects the Jordanian kingdom policies and leaders. Therefore, the main study objective is to investigate the political participation's reality in Jordanian and to identify the main obstacles which thwart effective and real participations in the political life, more specifically, the elections of the parliamentary by looking at the social, political, and demographic Jordanian society's characteristics. In addition, this study aims to see the

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([1])Cortona, P.G.D., Manzi, C., Pennisi, A., Ricca, F., and Simeone, B., Evaluation and optimization of electoral systems. Society for Industrial and Applied Mathematics, Philadelphia, 1987;

([2])Pastarmadzhieva, D. (2019). Majority/Plurality Systems: The Choice Of Least Developed Countries?. *Trakia Journal of Sciences*, *17*(1), 107-114.

effect of the electoral system on the Jordanian community and parties' life.

3- The importance of the Study

In light of electoral systems, international and regional efforts to expand the umbrella of democracy for citizens from any affect that would weaken their rights, and ensure the continuity of the success of electoral systems. In fact, the importance of electoral system is seen to be in three main circles, namely, the political importance in which it aims to consolidate democratic principles and ideas and makes them sustainable social behaviors. This leads to the creation of a high political culture among the members of the national and local group. And therefore, the emergence of competent, experienced and capable leadership elements is also significant to carry out both national and local burdens as well as achieving political balances in society between competing parties.

Secondly, the electoral system has an administrative significance that cannot be ignored. Even though the electoral system is seen to be theoretically fair, it cannot alone achieve fair and transparent elections unless the administrators of elections are qualified, impartial and independent. Lastly, this electoral system has a social importance in which the selection of local and national representatives in a democratic manner and a transparent electoral system that is far away from pressure and forgery, citizens feel a sense of belonging to a society in which they are protected by political rights based on democratic foundations and deeply rooted civilization and social values, this makes the electoral system of great social importance. Additionally, it seeks to see the effect of such electoral systems among community and parties' life. Consequently, the current study is seen to be very important as it

also aims to see the effect parties and tribes on elections as well as in Jordan elections are seen in many different places such as parliament, municipalities and some other places. Hence, it provides policy makers and governments with important recommendations and points.

4-Research Methods

Research methods, which are followed in this present study, are based on the documentary synthesis and analysis, objective truth and people feedback regarding the electoral system implemented in Jordan which made the research possible in order to comprehensively trace the problem. This study is considered as a descriptive study that aims to achieve the following objectives: to indicate to the political freedoms implemented in Jordanian Kingdom, to identify the obstacles that face political participations, the performance of community and political parties, the motivation behind the parliamentary elections' participation, and lastly evaluating the present electoral system and its effect on the community and parties in Jordan. Besides, the researcher will implement his own observation supported by evidence where available.

5- ELECTORAL SYSTEMS

According the political scientists the conventional wisdom confirms these electoral systems reflect the deep-rooted aspects of national characters and political life across democracies [(1)]. "Electoral systems do not arise from a vacuum but from political debate and struggle. They mirror the politics of the time of their creation and are altered when

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([1])Dunleavy, P., &Margetts, H. (1995).Understanding the dynamics of electoral reform. *International Political Science Review*, *16*(1), 9-29. (p.10)

politics change to the point where the existing electoral system becomes too restrictive"[1].The electoral systems are defined as the means by which votes are translated into seats.

6- THE SOCIAL CHARACTERISTICS OF JORDANIAN COMMUNITY

According to the department of statistics in Jordan 2018, the population of Jordan was estimated at 10309000 persons (4851000 female and 5458000 were male) distributed in various governorates[2].

6-1 SOCIAL STRUCTURE OF JORDANIAN COMMUNITY

The historical lifestyles affected the social structure in Jordanian kingdom, where the Jordanian community's vast majority remains attracted to the nomadic life social patterns, especially, in the relations of the community among the family members or between people. Thus, the Bedouin community culture dominated Jordanian community, and the one of the most noticeable characteristics of the Jordanian family is the basic patterns' continuation of tribal relations and its relationships.

([1])Taagepera, R. and M.S. Shugart. (1989). Seats and Votes. New Haven: Yale University Press. (p. 234).

([2]) Department of Statistics in Jordan (2018) Population of the Kingdom by Sex According to the 1952, 1961, 1979 ,1994,2015 and 2018 Censuses, and Estimated Population for Some Selected Years.http://dosweb.dos.gov.jo/DataBank/Population_Estimares/PopulationEstimates

Jordanian community contains two main elements in its structure: the family as well as the tribe[(1)].

6-1-1 FAMILY

Jordanian community has two main families' types: the small nuclear family large and the extended family. The extended family is known as the traditional Jordanian family is seen to be a parental in which it consists a husband and his wife with their children; female and male unmarried and married as well other relatives such as grandmothers, grandfathers, nephews, uncles, or cousins. All of the family members stay in the same housing constituting a political, economic, and social, unite.

6-1-2TRIBE

The tribe system is known as a family extension and a social unit. A tribe links individuals and descendants of the 10th grandfather as it is believed that who has founded this tribe. It is also known that the tribe lives in specific territories and tribe members speak the same language and has among its members a common culture. This participation among the members of the tribe in one specific location, culture, and language, facilitates the interactions of the community as well as creates a belonging sense to a community dominated by the social cohesion, cooperation, and friendship manifestations. Each tribe has its own sheik

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([1])Alazzam, A. A. (2008). *Political participation in Jordan: the impact of party and tribal loyalties since 1989* (Doctoral dissertation, Durham University).

(a leader) the one who represents supervises the political, social, and economic affairs of his tribe and represents the tribe [(1)].

7- THE DEMOCRACY STATUS IN JORDAN

Political participations, in any context, are related to three main factors that constitute the environment of politics of elections in general; the citizens 'social and economic situations, the laws that govern electoral systems and the prevailing culture of politics. Hence, the present study aimed to see political atmosphere and culture in Jordanian context. In fact, political culture is considered a significant factoring which it has strong impact on the behavior of human and this factor has an extremely significant role for both performance and stability of these political systems.

Starting from the Jordanian independence to the beginning of 1980shad been the dominated period by major international and regional political events and significant economic and social changes. During this period the Jordanian parliamentary institutions 'strength in political life has greatly varied [(2)].Three famous scenes are controlling the political environment in the Jordanian parliament context. Firstly, the present electoral laws and systems do not create the political parties as well as political environment. Second, all electoral systems have been experimented and have not approached to new realistic parties. Thirdly,

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([1])Al-Khatybeh, Sayel Z, and BaniNasor, Nader I. (2005)*al-Mojtama' al-Urduni. [The Jordanian Society],* (Amman: Ministry of Culture).

([2])Rath, K. (1994). The process of democratization in Jordan. *Middle Eastern Studies*, *30* (3), 530-557.

people need to be aware about the importance of political parties in the parliament life[1].

8- THE ARAB SPRING CRISES AND THEIR EFFECT ON THE DEMOCRACY IN JORDAN

The Arab Spring Concept started by viewing peaceful protesting movements which have started in various Arab countries since the 2010endings and the 2011 beginning in which this had been calling to change the political regimes. This Arab Spring is seen to be a great historical turning point that happened in the Arab regions[2].In this regard, the democratic conversion concept and its relationships with other concepts such as the political reforms, democratic stabilizations, and democratic transferences were all affected by the Arab Spring [3].

In fact, external variables could form effective factors affecting politically the Jordanian environment since the founding day of Jordan in 1946 up to the present time in which these crises impact changes in politics[4]. These changes could influence Jordanian electoral systems. In

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([1])Alsaleem, I (2019). The electoral systems implemented in Jordan and their effects on party's life and parliament. https://www.addustour.com/articles/1049391-%

([2])Kamseis, K (2014). The Arab Spring Between Revolution & disorder, Journal of Arab Future, Arab Unity Studies Center, Beirut, No. 421, PP.220-225.

([3])Tayem, F. A., Al-Majali, R. M., & Al-Habashnah, S. A. (2018).The Arab Spring Crisis and the Democratic Trend in Jordan. *J. Pol. & L.*, *11*, 98.

([4])Tayem, F. A., Al-Majali, R. M., & Al-Habashnah, S. A. (2018).The Arab Spring Crisis and the Democratic Trend in Jordan. *J. Pol. & L.*, *11*, 98.

this regard, the Tunisia's revolution "at the end of 2010 and through 2011 forced significant changes in the Arab region in economic, security, political and demographic terms". The Ben Ali 'sfall in 2011 followed by the Egyptian regime fall as well as Yemen events have all marked the Arab world(1). More specifically, the seismic political events regarding Arab Spring of the late 2010 and early 2011 brought a wave of proposed and actual electoral reforms that have been set off throughout the Middle East.

For example, Jordan, throughout 1990s up to 2010, was one of the few countries that uses the system of a single non-transferable vote for the election of its parliamentary. This is known to use a simple plurality rule system in multimember districts, in this system each voter is allowed to vote for a single preferred candidate. In the case of Jordan, district sizes have up to seven seats (in such a district, the top seven candidates would each win a seat). The single non-transferable vote is mechanically simple, however, strategically complex, both for candidates and voters. In fact, strong individual candidates could win many votes beyond the number which is needed for winning a seat, yet efforts to coordinate alliances among candidates(2).

These studies show that many Arab countries were affected by the Arab Spring. These effects were not limited to a specific aspect. In fact, it reaches many important parts of a country. Even though the Arab

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([1])Olwan , M., &Shiyab, A. (2012).Forced migration of Syrians to Jordan: An exploratory study. Forthcoming, Migration Policy Centre - European University Institute.

([2])Carey, J. M., & Reynolds, A. (2014).The Impact of Electoral Systems. *Democratization and Authoritarianism in the Arab World*, 174-186.

Spring started in 2010, some Arab countries still suffer as they are affected. The Hashemite Kingdom of Jordan is not directly affected by Arab Spring. It has received many refugees and this kind of event affected Jordan economically. In addition, Jordan has changed its electoral system due to the Arab Spring events in order to form a strong political power to face the regional unstable events.

9- RELATED STUDIES

In fact, many studies were conducted to see the issues related to the electoral system (e.g., Carey & Reynolds, 2014;Kamseis, 2014;Olwan&Shiyab, 2012;Tayem, Al-Majali, & Al-Habashnah, 2018). These studies tried to investigate the issue from different perspectives. For example, the election systems' impact was investigated by Carey and Reynolds (2011). This study aimed to see what the important criteria to evaluate the election systems design. Besides, it highlights that there is no single elections method is seen to be the best for all countries. Additionally, historical and demographic particularities need to weigh in the choices. That is to say, the reformers of electoral systems should follow certain general objectives. In addition, a study was conducted by Olwanand Shiyab (2012)to see Syrians 'migration to Jordan. This study stated that many countries and aspects were impacted by the Arab Spring and one of these aspects is the electoral system and Jordan was an example of this change.

These four studies are totally different from the current study as the present one seeks to see the effect of the electoral system on the parties' life and community. The former sees the electoral system effect and the later seeks the Arabian Spring influence of the Syrians' migration to

Jordan. The other studies (Kamseis, 2014;Tayem, et al, 2018) are also seen to be different. Furthermore, a study conducted by Abduljaber and Kalin(2019) aims to see the globalization effect and other process of social transformation such as the change of countries' political structure according to parties' levels in Arab context and Jordan as well as Egypt are included as a case study.

The findings show that the ideological structures in both Jordan and Egypt to be dimensional structure s as it was in 1980s multidimensional structures. This kind of effect included political structure. Prior to the globalization intensification in the 1990s up to 2000s in Egypt and Jordan, three key political factors are found: the governing coalition as well as the supporters of it, namely the royalist and monarchy forces and loyal parties in Jordan and in the 1993 elections and the National Democratic Parties in Egypt. Secondly, the Islamic opposition mainstream represented by the Brotherhood in Jordan and Egypt, and the Islamic Action Front, the political wing of the group, in Jordan. Thirdly, the parties of pan-Arab and communists represented by the left-wing forces in Egypt like the Labor Party and Al-Ahrar (liberals) and the Ba'th in Jordan. Finally, the Islamic Center Parties 'emergence is seen as the only the multifarious developments in the national political spaces 'composition in the Arab context.

Another study was carried out by Köprülü(2014) to investigate the status of Jordan since Arab Spring and identify the case of stability and change. This study highlights that the electoral system has been affected due to these uprising events. The study concluded two main fundamental aspects that are inherent in the political reform process in Jordan and the extent in which the reforms are applied to in Jordan in the uprising

sera of Post-Arab Spring. Firstly, these concerns are associated to theist Bank activism re-emergence with increased political reformation's demands. Secondly, it is associated to a new fragility in between the Ikhwan(the brotherhood), others and the throne[(1)].

Moreover, Alazzam (2008) and Alsaleem(2019) investigated the Jordanian electoral system. However, these two studies are also different from the current study. Alazzam (2008) investigated the participation of the politics in Jordanian kingdom and the party and tribal loyalties' impact since 1989. As for Alsaleem(2019) , his study included the electoral systems implemented in Jordanian context and their effects on party's life and parliament. It seems that these two studies are not as same as the present study. Hence, the gap and the value of this study are still seen as important. Also, the researcher is encouraged to conduct the present study.

To sum up previous literature, it can be noticed that various studies attempted to see the electoral system related issues. However, to the best knowledge of the researcher, the current issue of this study was not completely present as this study also aims to see the role of Arab Spring and the effect of electoral system on the Jordanian community and parties. This kind of difference proves the value of the current research. In this regard, the present study addresses the two gaps. Firstly, a practical gap as it is the first to study the Jordanian context. In addition, a theoretical gap is noticed as studying the effective role of electoral

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([1])Köprülü, N. (2014). Jordan since the uprisings: Between change and stability. *Middle East Policy*, *21*(2), 111-126.

systems while other studies did not include this issue in their investigations.

10- DISCUSSION

Point of fact, the choice and design of electoral systems affect the type of elections, many interactions nature of political parties and the policy space, or the issues and ideologies 'range in the regional, local or national political arena. The electoral systems' effect as rules that translate votes into seats in which it affects how parties are organized as well arranged in relation to each other in party systems, is also highly complex and it varies in accordance to the context. Nowadays, a debate about the elections 'problems are clearly appeared and more specifically, in how the electoral systems influence turnout[(1)]. This kind of explanation shows clearly how electoral system could really affect the parties as well as it may also affect the community itself.

In fact, this study found that the electoral system affect, in Jordanian context both the community and parties. As it was clear from previous studies and current studies such as Abduljaber and Kalin (2019) that the society, governments, and parties are all affected by the election in general and its system in specific as Jordan is divided into three main parts governing coalition as well as their supporters. Next, the Islamic opposition mainstream as it is represented by the Brotherhood. Then, the parties of pan-Arab and communists the such as the Ba'th in Jordan.

([1])Frantz, E. and Geddes, B., (2013) 'Latin America's authoritarian drift: The threat from the populist left', *Journal of Democracy*, 24/3, pp. 18–32

Finally, in Jordanian case, the study can add that the Jordanian communities are affected due to the electoral systems. This kind of effect is totally clear since as the same community is divided due to the tribe and personal relations rather that the quality of a person. This kind of division is separating the community and creating many problems. For example, you can see in the Jordanian society two cousins are being candidate in the same province against each other. This kind of division is considered a problem because it is stated by Al-Khatybeh, Sayel and BaniNasor (2005) Jordan has a strong family relation and a systematic tribal system which make Jordan as a special country with a strong community relation. Even though these strong relation among the family itself and the tribe, many problems were noticed due to the electoral system. In contrary, the parties are getting advantages from the new electoral system and this finding is supported by other studies [(1)].

11-CONCLUSION

This study is seen to be important as it attempts to deal with a real issue. It aimed to see the effect of electoral systems into the Jordanian communities and among the political parties. Some findings were supported by previous studies. For examples, the participation in the parliament is closer to be socio-economic rather than a political process. This claim is supported by another study [(2)]. In addition, the present

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([1])Alsaleem, I (2019). The electoral systems implemented in Jordan and their effects on party's life and parliament. https://www.addustour.com/articles/1049391-%

([2])Alazzam, A. A. (2008). *Political participation in Jordan: the impact of party and tribal loyalties since 1989* (Doctoral dissertation, Durham University).

study indicates that the community is affected negatively in the electoral systems as many personal problems will be raised during the elections.This finding disagrees with Alazzam(2008) who states that the Jordanian community has a strong relation and they are united during the election.

According the researcher' own observation the study of Alazzam(2008) could be right but before Arab Spring and not after as well as the change of electoral system affected this kind of community relation.As for the effect of electoral system on the parties in the Jordanian context, the finding of the current study agrees with Alsaleem(2019) who states that the new change of electoral system in Jordan affected positively the attitudes of parties towards elections. This finding is supported by the varieties of parties' participations in elections. This study also recommends adeeper study to investigate such issue from the point of view of some previous candidates as well as voters to look at the issue from a different corner.

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Pastarmadzhieva, D. (2019). Majority/Plurality Systems: The Choice Of Least Developed Countries?. *Trakia Journal of Sciences, 17*(1), 107-114.

Rath, K. (1994). The process of democratization in Jordan. *Middle Eastern Studies, 30* (3), 530-557.

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DIVIDING BENEFIT "AL- MOHAYA'A" AND IT'S IMPLICATIONS

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ABSTRACT

Dividing benefit is a good method to exploit common partner assets, when the partners do not desire to end common assets case, or when they can not do so. The same provision of the lease apply to benefit dividing agreement.

There are two types of benefit division, first one is called spatial division in which partners allocate – by mutual consent - a certain share commensurate with his share to each partner to exploit it for a specific period , in the second type, partners allocate _ by mutual consent_ a specific period to each partner commensurate with his share to exploit it . If the partners do not agree on dividing benefits, then they will be entitled to law.

In Jordanian law, the division of benefits lasts for five years and this period may be extended for another similar period.

While in Egyptian law, the division of benefits lasts up to fifteen years, at the end of fifteen years the division of benefits shall be turned to final division.

KEY WORDS Dividing benefit, Partners obligations, Lessor, Lease contract Partnership in property, Common assets

Introduction

Dividing benefit "Al- Mohaya'a", one of the most important methods of utilizing common partners assets, because it aims to rid the partners the difficulties of managing the common assets, and avoiding the partners the complexity of this management, partners agreement on a certain way to use and exploit common assets is the best settle method between them and to protect their interests.

Dividing benefit "Al- Mohaya'a" will not end assets common situation, but it is used by partners either because the assets are not suitable for common beneficial, or because partners desire not to end assets common situation, where they may prefer to remain common case for assets, either to consolidate social relations as in the case of the heirs, they inherit a land blot and benefit from it jointly, or because economic reasons, where they believe that profits within the common situation of the assets are more than profits after dividing the assets.

The Jordanian legislator regulates the provisions of Dividing benefit "Al- Mohaya'a" within articles (1054_1059) of the Jordanian Civil Laws, whereas the Egyptian legislator has regulated its provisions in articles 846 to 849 of the Civil Law, and there are no equivalent provisions for such division within foreign regulations.

Due to the importance of dividing benefits "Al- Mohaya'a" Jordanian and Egyptian legislators have organized a law showing the duties and rights of the participants also we will examine the extent to which the law chosen by the legislator is applicable to dividing benefit agreement.

In practice it has been shown that dividing benefits is a useful process and the parties have avoided May problems, we advise owners of common assets whether in Jordan, Egypt or other countries to study the issue of benefit sharing wellness to see how important it is.

We will show this search in two researchers, first research, definition of dividing benefit "al- mohaya'a", on the second research , implications of dividing benefit "al- mohaya'a".

FIRST RESEARCH

DEFINITION OF DIVIDING BENEFIT "AL-MOHAYA'A"

"Al- Mohaya'a", is dividing benefits between partners, and it will not end partnership in property ،the aim is to enable each partner to benefit from a portion of the common assets, within a ratio suits his share, it is therefore, partner is practicing the authorities of exploitation and beneficiation. Partner may exploit all the common assets for a certain period of time that match his share hold.

Dividing benefit "Al- Mohaya'a" is divided into a spatial or temporal dividing, both spatial dividing and temporal dividing may be carried out either by partners' agreement or by judicial.

Within this research, we will address the general concept of the Dividing benefit "Al- Mohaya'a", the first chapter will zoom out on the characteristics of Dividing benefit "Al- Mohaya'a", while types of the same will be discussed in the second chapter.

Chapter I

Meaning of Dividing benefit "Al- Mohaya'a"

(Dividing benefit "Al- Mohaya'a") is defined as dividing for the benefits of the common assets between the partners[1], or it is a temporary division that aims to enable each partner in the common assets to benefit from it, either by assigning a dedicated part for each partner, matching with his share[2], or all partners agree on that each partner will use all over the common assets independently and exploit it within a specified period, utilization and exploitation will be transferred to another partner[3], or it

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[1] **Dr. Mohamed Kamel Morsi Pasha, Original Real Rights, Part II, Types of Ownership, Rights Deriving from Right to Ownership, "Usage, Use, Housing, Monopolizing, Easement" Second Edition, 1951, p. 252. Also D. Abdel Moneim Farag Al-Sada, the Original Rights in Real, "A Study in Lebanese and Egyptian Law, Dar Al-Nahda Al-Arabiya, Egypt, 1982, p. 247.**

[2] **Nabil Ibrahim Saad, the original rights, the establishment of knowledge, Alexandria, Egypt, 2001, p. 108. Also Dr. Jameel Al-Sharqawi, The Original Rights, First Book, The Right of Ownership, Dar Al-Nahda Al-Arabiya, Egypt, Cairo, 1973, p. 115.**

[3] **Dr. Ali Al-Tayeb Mustafa Ahmad, Real Estate Ownership Rights on Common (Comparative Analytical Study), 2015, p. 55. As well as Dr. Jameel Al-Sharqawi, Previous Reference, p. 116.**

will be divided by a benefit not divided by ownership[1] According to these definitions we note that the "Al- Mohaya'a" is a benefit exchange, and does not end partnership in properties, it is a method that the partners could benefit from the things which they earn jointly, "Al-Mohaya'a" applies to non-fungible things, but not the fungible things[2], because it is possible to benefit from the former, whereas it is not possible to benefit from the fungible things and the property will remain.

Based on the above, we conclude that the (Dividing benefit "Al-Mohaya'a") has several characteristics, which are:

I- As the (Dividing benefit "Al- Mohaya'a ") governs how partners benefit from common assets, and that each partner benefits part of the common assets, according to his shareholder, Therefore, first of these characteristics is that each partner has the right either to benefit himself or through others, No other partner shall hold accountable on him for management and organization of his share, meanwhile, the partner who currently benefits shall not interfere in management and organizing during other partners benefiting period.

II- "Al- Mohaya'a"is exchanging benefits contract, each partner takes an interest against what he has shared with and will pay for his uses. Since the partner benefits from the common assets, therefore in return, other partners will use the assets for another period (Temporal method of "Al –Mohaya'a") or he will exploit a

[1] Dr. Reda Abdel-Halim Abdel-Mageed Abdel-Bari, Proprietary and the rights of dependent in-kind, Benha University, Faculty of Law, p. 102.

[2] Dr. Mohammed Kamel Morsi Pasha, Previous Reference, P. 253.

dedicated portion of the common assets equivalent with his share in the partnership (Spatial Method of "Al Mohaya'a").

III- "Al Mohaya'a" is a type of obligation contracts between partners[1], the beneficial partner for the common assets for a period of time, or beneficial partner for a part of the common assets is in commitment for a set of rights and obligations, as well as other partners are also in commitment for rights and obligations.

IV- According to Jordanian law, "Al Mohaya'a" will not end partnership in properties regardless of time duration, other than Egyptian law.

V- "Al-Mohaya'a" applies to non-fungible things, but not the fungible things, because it is possible to benefit from the former, whereas it is not possible to benefit from the fungible things and the property will remain.

VI- The Jordanian legislator stipulated that "Al- Mohaya'a" duration should not exceed five years[2], which shape it as a management contract, whereas different than the Egyptian law, which states that If " Al-Mohaya'a" continued for 15 years, the running division will

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[1] The decision of the Court of Cassation of Jordan No. (3335/2013) dated on 16/3/2014 publications of your legal decision. As well as Decision No. (1963/2008) on dated 28/4/2009 as well as Judge Qabbad Shirdar Nuri, Adapters in common property - a comparative study - research submitted to the Council of the Judiciary, Iraq, 2016, p. 4

[2] The Third Article of the Jordanian Law on the Division of Joint Immovable Property and its amendments

be switched into as a final division[1], within the concept of Article 846 of the Egyptian Law, if no condition to determine the time period for "Al-Mohaya'a", or if the agreed period has expired and there was no new agreement, it will be automatically renewed, if the beneficial partner did not announce to other partners that he is not willing to renew, before three months the agreed expiry date, No equivalent provision within the Jordanian Civil Laws.

VII- The law does not require documenting "Al Mohaya'a" division distribution at the Department of Land and Survey, since Article (16) of the Land and Water Settlement Law mentioned a list of exclusive tasks relating to the lands in which the settlement needed, accordingly which must be documented in the land department[2].

"Al –Mohaya'a" was not listed among Article (16) list.

VIII- (Dividing benefit "Al- Mohaya'a ") is a division based on actuality, meaning that when the partners agree on a division, they behave according to their own desire, which does not need to take precise distances and dimensions, for example, if the place of the (Dividing benefit "Al- Mohaya'a ") is a multi-owned land and the partners want to make the division as (Dividing benefit "Al-Mohaya'a "), they may share according to their self- estimation, without an expert to take accurate distances and dimensions[3].

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[1] Article 846/1 of the Egyptian Civil Code.

[2] The decision of the Jordanian Court of Cassation No. (2796/2011) dated 11/10/2011.

[3] Ortley Laila and Saoula Zoubida, Managing Common Money in the Algerian Civil Law, Memorandum for Master's Degree, Abdel Rahman Meera University, Bejaia, Algeria, Faculty of Law and Political Science, 2014_2015, p. 16

CHAPTER II

(DIVIDING BENEFIT "AL- MOHAYA'A") TYPES.

The (Dividing benefit "Al- Mohaya'a") could be implemented either by a spatial or by temporal. Also, it may be implemented by partner's agreement, which is called a consensual dividing. Or may one of the partners raise a lawsuit at the competent court requesting for (Dividing benefit "Al- Mohaya'a ") incase other partners do not agree to divide, this case will be called a judicial (Dividing benefit "Al- Mohaya'a "),

In which we will go through all these types of (Dividing benefit "Al-Mohaya'a") within this chapter respectively.

Article (1054) of the Jordanian Civil Law stipulates that (The (Dividing benefit "Al- Mohaya'a") may be temporal or spatial, within the temporal dividing, partners alternate to use all the common property for a period commensurate with the share of each of them, while within the spatial dividing each partner benefit a certain part of the common property).

Also, Article (1058) stipulates in paragraphs (2 and 3): (If one of the common property partners request for (Dividing benefit "Al-Mohaya'a"), while other partners did not request for the dividing benefit or refrain, therefore all partners will be forced for dividing. And if one of the partners requests the (Dividing benefit "Al- Mohaya'a") in the

common property that is not divisible while other partners refrain, all partners will be forced for (Dividing benefit "Al- Mohaya'a").

According to the two clear statements the above Article, the (Dividing benefit "Al- Mohaya'a") has four types:

a. Spatial type of (Dividing benefit "Al- Mohaya'a")

Spatial (Dividing benefit "Al- Mohaya'a") can be defined as the partners' agreement that each partner shall be competent to benefit a segregated portion equal to his share of the common asset but in return for relinquishing the use of the rest of the parts to the other partners[1].

Therefore, in the spatial dividing, each partner in the communion is concerned with a part of the common asset that is equal to his share in that asset.

Such a partner who has a segregated asset shall be independent by his administration, exploitation, and utilization[2] provided that the other partners are not harmed, and he is not allowed to disturb and misuse his dedicated segregated portion[3].

If the common asset is a residential building, and the segregated portion for the partner within the (Dividing benefit "Al- Mohaya'a") is

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[1] The decision of the Jordanian Court of Cassation No. (515/2006) dated 31/7/2006.

[2] Dr. Mohammed Kamel Morsi Pasha, Previous Reference, P. 254. as well as D. Abdul Moneim Faraj al-Sada, Previous Reference, P. 248, as well as D. Jamil Sharqawi, Previous Reference, P. 116.

[3] Dr. Abdul Razzaq al-Sanhouri, Mediator in the Explanation of the Civil Code, Right of Ownership, Part VIII, Revised by Counselor Ahmed Medhat El Maraghy, 2006, p.60 Abd al-Moneim Faraj al-Saddah, previous reference, P. 248.

an apartment, by which he is allowed to live or provide it for lease, even if the (Dividing benefit "Al- Mohaya'a") is agricultural land, the partner has the right to cultivate his segregated portion at his own expense and to offer it for lease, and he may use it by himself or through others, and no partner may oppose it.

The law restricted the freedom of the partners. The agreement on the duration of the (Dividing benefit "Al- Mohaya'a") was not allowed for more than five years. If the duration of the agreement exceeds five years, this period shall be refunded for five years. And if the (Dividing benefit "Al- Mohaya'a") is a judicial type and the partners do not agree on a period, the court shall appoint the time frame, considering the nature of the dispute and the common asset, also it may be agreed to renew the period after the end of the first period.

b. Temporal type of (Dividing benefit "Al- Mohaya'a")

If the partners cannot use the common asset jointly and they have no desire to end the common situation, they have the right to organize the common asset among them.

Thus, each partner will benefit from all over the common asset and the duration of each partner's use will be determined (time period) reflected by the amount of its share[1].

The temporal (Dividing benefit "Al- Mohaya'a") in terms of proof, protest and duration shall be subject to the provisions of the spatial (Dividing benefit "Al- Mohaya'a"), and the temporal (Dividing benefit

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[1] Dr. Abd al-Moneim Faraj al-Saddah, previous reference, P. 248. as well as D. Abdul Razzaq al-Sanhouri, previous reference, P. 773. The decision of the Jordanian Court of Cassation No. (515/2006) dated on 31/7/2006.

"Al- Mohaya'a") shall finish upon its expiry, which shall be renewed by partners agreement.

c. Consensual type of (Dividing benefit "Al- Mohaya'a")

The essence of the (Dividing benefit "Al- Mohaya'a") (spatial or temporal) is the agreement and unanimity of the partners[1] to conduct the (Dividing benefit "Al- Mohaya'a"). Therefore, no partner may be obliged to the (Dividing benefit "Al- Mohaya'a") without his consent, this is the basic, but there are cases in which the judicial type of (Dividing benefit "Al- Mohaya'a") is resorted to, which we will address next.

d. Judicial type of (Dividing benefit "Al- Mohaya'a")

Although the basic of the (Dividing benefit "Al- Mohaya'a") is consensual among the partners, there are cases where the (Dividing

[1] The base of the (Dividing benefit "Al- Mohaya'a") in Egyptian law is partner agreement. This is what we came into from Article 846 of the Egyptian Civil Law, which stated:" The (Dividing benefit "Al- Mohaya'a"), defined as that the partners' agreed that each shall benefit from a segregated part of the common asset equal to his share, in return to he shall abdicate the remain of the common asset parts to the other partners for benefit, and this agreement is not valid for more than five years. "While the Jordanian legislature did not stipulate that the (Dividing benefit "Al- Mohaya'a") is an agreement, Well, what the Jordanian legislator did because there will be cases of request for (Dividing benefit "Al- Mohaya'a") that will refer for the judicial. Article (1054) of the Jordanian Civil Law stipulates that the (Dividing benefit "Al- Mohaya'a") is dividing benefits, it may be temporal or spatial, In the temporal case, the partners will alternately use all the common asset for a period commensurate with their share, while in the spatial case each partner will benefit a certain part of the common asset

benefit "Al- Mohaya'a") is made through the judiciary. When the partners do not agree on the (Dividing benefit "Al- Mohaya'a"), such if one of the partners wants to conduct the (Dividing benefit "Al- Mohaya'a"), while other partners refuse it, then the court will be resorted to and the court will issue a decision to perform the (Dividing benefit "Al- Mohaya'a").

Both Judicial and Consensual type of (Dividing benefit "Al- Mohaya'a") differs in several ways:

1- **The Judicial (Dividing benefit "Al- Mohaya'a") is not carried out with the consent of all partners, which may be requested by one of the partners without the rest, while the Consensual (Dividing benefit "Al- Mohaya'a") will be carried under all partners' agreement[1].**
2- **In the judicial type of (Dividing benefit "Al- Mohaya'a"), the duration is determined by the court taking into account the nature of the dispute and the common property, while it is different from Consensual type of (Dividing benefit "Al- Mohaya'a"), where all parties determine the duration of the (Dividing benefit "Al- Mohaya'a").**
3- **Within the judicial (Dividing benefit "Al- Mohaya'a"), the sweepstakes method is considered to determine the part of each partner for his use and exploitation purpose, whereas the agreement between the partners determines each part of the partner (if it is a spatial (Dividing benefit "Al- Mohaya'a")) and the time period (if it is a temporal (Dividing benefit "Al- Mohaya'a")).**

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[1] **Dr. Abdul Razzaq al-Sanhouri, previous reference, P. 775.**

4- In the judicial type of (Dividing benefit "Al- Mohaya'a"), in the course of the final division proceedings (Commonality Removal), the joint property may be divided as (Dividing benefit "Al- Mohaya'a") between partners till the completion of final division. If partners do not agree, the court may, "upon request of one of the partners", instruct to proceed by (Dividing benefit "Al- Mohaya'a") and the court may seek the assistance of an expert and / or more if necessary[1].

This leads us to the conclusion that the Consensual (Dividing benefit "Al- Mohaya'a") time period should not exceed five years. However, in the event of a commencement final division proceedings (Commonality Removal), the (Dividing benefit "Al- Mohaya'a") will continue until court final decision upon commonality removal[2].

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[1] Article No. (849) on the Egyptian civilian

[2] Dr. Abdul Razzaq al-Sanhouri, previous reference, P. 775. Judge Qabbad Shirdar Nuri, Previous Reference. P.14

SECOND RESEARCH

IMPLICATIONS OF DIVIDING BENEFIT "AL- MOHAYA'A"

The provisions of (Dividing benefit "Al- Mohaya'a") was subjected by both Jordanian and Egyptian Legislators in terms of protest against third parties, eligibility of the shareholders, their rights, obligations and methods of proofing to lease contract provisions if it not inconsistent with the dividing benefit nature, in accordance with Article 1056 of the Jordanian Civil Law and Article 848 of the Egyptian Law. By subjecting the provisions of the dividing benefit "Al- Mohaya'a" to lease contract provisions, there will be two consequences (two Results)

First Result : That the partner in (Divided benefit "Al- Mohaya'a") will be considered as a lessor of his share in the common assets and as a tenant for other partners shares and his status will be governed by the provisions of lessor and lessee, as long as these provisions do not conflict with provisions of dividing benefit .

Second Result: The agreement on the (dividing benefit "Al-Mohaya'a") applies to the public and private successor of the partner as if he sold it or donated it, accordingly, the provisions of Divided benefit (Al- Mohaya'a) will apply to the gifted and the buyer, provided that the

dividing date before transferring property ownership date, with no requirement of the successor knowledge of the dividing[1].

By referring to the provisions which govern the lease contracts, we will notice that it include a sum of obligations toward the lessor (namely partners in the case of (Divided benefit "Al- Mohaya'a") excluding the beneficiary partner) represented in handing the property, property maintenance, ensuring avoiding lessor exposure, and to ensure hidden defects, - We will go through the details of exposure within this study-.

It also contains the beneficiary partner obligations of in the (Divided benefit "Al- Mohaya'a") (as a tenant from the other partners.

Within chapter one, we will address the obligations of the partners towards the beneficiary partner, while the obligations of the beneficiary partner will be discussed in a second chapter.

FIRST CHAPTER

PARTNERS OBLIGATIONS IN CASE OF (DIVIDED BENEFIT "AL- MOHAYA'A")

As the rules and provisions of (Divided benefit "Al- Mohaya'a") are subjected to Lease Contract rules and provisions according to both Jordanian and Egyptian legislators, as long as these provisions do not contradict with provisions of this (Divided benefit "Al- Mohaya'a"), and as the partners in the (Divided benefit "Al- Mohaya'a") are lessors,

[1] See in D. Abdul Razzaq al-Sanhouri's meaning, previous reference, P. 774 as well as D. Jamil al-Sharqawi, Previous reference. P. 117.

they have obligations which are the same as the lessor's obligations contained in the lease contract provisions; In this section we will address these obligations by presenting them in general and then apply/convert them to the (Divided benefit "Al- Mohaya'a"), by indicating whether this converted obligation is inconsistent with the provisions of the (Divided benefit "Al- Mohaya'a") or not?

I- Commitment for Handing

Article (677) of the Jordanian Civil law[1] stipulates the following: -

(1) The lessor shall deliver the property and the supplements in a suitable condition, which enables to fulfil the intended benefit in full

(2) The handling/ delivery process should enable the tenant to receive property without any obstacle to benefit, and remain in tenant control continuously until the lease period has elapsed.

Upon reading the above provision, it becomes clear that the lessor has an obligatory obligation to deliver the property to the lessee In a condition that fits to fulfil what it has been required for, according to what agreed-upon[2], as this obligation falls to the lessor within lease contracts.

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[1] As well as Article Ref. (564) of the Egyptian Civil Law, which states: "The lessor shall handover the property and it's all annexures"

[2] Dr. Hussam al-Din Kamel al-Ahwani, the lease contract in the Civil Code and in the lease laws, according to the third edition, 1998, p. 90. As Well as D. Samir Abdel Sayed Tanago, Lease Agreement, New Edition, 1997_1998, p. 125, D. Ali Hadi Al-Obeidi, Nominated Contracts, Sale and Lease and Landlords and Tenants Law in accordance with the latest amendments with the Judicial Applications of the Court of Cassation, according to the 6th Edition, Dar Al Thaqafa for Publishing and Distribution, Jordan, Amman, p. 272.

Based on his obligation to deliver the property, the lessor required to do two things:

a- Carrying out the reforms, which is required according to the necessity of this benefit, regardless of these reforms were simple or major[1], and the reforms are not limited to the property but extend to include accessories such as maintaining doors, windows, and sewage pipes, whether the property was for housing or trade purpose, and repair the water well in land case, and repair the agriculture tools If the property is agricultural land.

b- Handing/Deliver Property supplements

In addition to the initial obligation of the lessor to hand over the property, another obligation fall into the lessor to deliver the agreed property extensions. The aim of the necessity for handing over property extensions is that it is likely that the lessee is unable to use the property as intended without its extension[2].

Determining the objects as an extension or not, is a varies depends on the circumstances, and the judge is who will assess whether the object is considered an extension or not, therefore the lessor will be obliged to

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[1] Dr. Mustafa Al-Jamal, the mediator in the provisions of the lease, the provisions of the lease contract in the Civil Code and the provisions of the legislation of rent places in the light of the applications of the judiciary and explanations of jurisprudence, the first edition, 1991 p 341, as well as d. Abdel Fattah Abdel Baqi, lease _ General provisions, 1st part, Dar Alketab Al-Araby in Egypt, p 161. And also D. Ali Hadi al-Obeidi, Previous Reference, P. 272.

[2] Dr. Ramadan Abul-Saud, Lease Contract, Nominated Contracts (General Provisions in Lease), El Maaref Establishment, Alexandria, Egypt, 1996, p. 321.

hand it over, the guides for this process will be the intention of the contract parties, market imitations, and the nature of the property[1].

How the handing over will be?

Handing over can be done in two methods, Physical (actual) handing over or by moral method , The physical method is to enable the tenant into controlling the property so that he can occupy it without any obstacles - even if he does not physically occupy it, if the asset was a house for accommodation, handing over will be by handing the keys, and if the asset was agriculture land plot the landlord should evacuate the machines or any obstacles against tenant access.

As for the moral handing over method, the property is into tenant control before the conclusion of the lease for any reason, such as being mortgaged by the tenant, the handing over in this scenario shall be as an agreement between the landlord and the tenant as to remain the property within tenant control.

This commitment applies to (Divided benefit "Al- Mohaya'a") as its provisions are subject to the terms of the lease provisions, as the partners (The Partners excluding the beneficiary partner) are considered as lessors, they have an obligation to enable the beneficiary partner (as a tenant) to use the common asset according to the type of (Divided benefit "Al- Mohaya'a") either Temporal or Spatial.

[1] **Dr. Ramadan Abu al-Saud, previous reference, p. 321.**

To fulfil this commitment, partners (As Lessors) must hand over the property and put it at tenant disposal so that he can control it and use it without any hindrance[1].

As described above, handing over can be either by actual method or by moral method, where there is nothing within the (Divided benefit "Al-Mohaya'a") prevent in handing over the assets of (Divided benefit "Al-Mohaya'a") by actual or moral handing over method, for the actual method, the handing over of the asset into beneficiary partner control so to take advantage of (Divided benefit "Al- Mohaya'a") asset without any hindrance, and leave it unimpeded for the beneficiary partner as he is considered as tenant, while within the moral method the (Divided benefit "Al- Mohaya'a") asset is already within the beneficiary partner control before applying the (Divided benefit "Al- Mohaya'a") agreement, for any reason , In this case, handing over will occur once all partners have agreed to (Divided benefit "Al- Mohaya'a") divide, so the common asset will remain within beneficiary partner control after the agreement[2].

The partners (as Lessors) are obliged to hand over the (Divided benefit "Al- Mohaya'a") asset once the (Divided benefit "Al- Mohaya'a")

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[1] Dr. Saheb Obeid al-Fatlawi, Legal provisions for the division of the al-muhai'a between Islamic jurisprudence and positive laws, research published on the Internet, p. 24. As well as D. Ali Eltayeb Mustafa Ahmed, Restrictions on the Common Real Estate Right (Comparative Study), Ph.D. Degree in Law, National Ribat University, 2015, p. 70. Judge Qabbad Shirdar Nuri, Previous Reference, P. 16.

[2] Dr. Saheb Obaid al-Fatlawi, Previous reference, p. 26_27. As well as, Akouni Mohamed, the Usage of the Common Property in Algerian Legislation, Ph.D. Dissertation in Law, Real Estate Law, University of Khedr Biskra, Faculty of Law and Political Science, Algeria, 2015-2016, p. 84.

agreement took place, If the location of the (Divided benefit "Al-Mohaya'a") is occupied, for example, if it is a real estate, the partners shall vacate it and hand it over to the beneficiary partner who has the role to benefit unless there is an agreement between the partners or legal stipulation to the contrary.

It is also self-evident that lessor is obligated to hand over the asset extension accessories to the tenant, so the partners of the (Divided benefit "Al- Mohaya'a") are obliged to hand over the beneficiary partner who has the role the extensions/accessories of the (Divided benefit "Al-Mohaya'a") asset so that he can make full use of it[1].

As described above, the handing over requires the necessary maintenance, and once this rule applied to into the (Divided benefit "Al-Mohaya'a") all partners (including the beneficiary partner who has the role to benefit) are in commitment to do the necessary maintenance, but not the repairs which occur during leasing period as it is beneficiary partner responsibility, who is solely responsible for any damage or loss resulting from unusual use[2].

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[1] **Dr. Saheb Obeid al-Fatlawi, previous reference p. no. 24, as well as, Akoni Muhammad, , Previous Reference, p. 85**

[2] **Dr. Ali al-Tayyib Mustafa Ahmad, previous reference, P. 72, As well as Judge Qabbad Shirdar , Previous Reference, P. 17, and Akoni Muhammad, , Previous Reference, P. 83.**

II- Lessor obligation by maintenance.

The second obligation which falls on the lessor is to carry out maintenance, Article (681)[1] of the Jordanian Civil Law stipulates the following:

(1) The lessor shall be required to remedy the defect in the property which affects the fulfillment of the intended benefit. If the lessor fails to do so, the tenant has the right to terminate the contract or obtain from the court permission authorizes him to rectify the defect and to be repaid the expenses from the lessor according to the standard common fees.

(2) If the defect level that the landlord must repair is a major or urgent that does not bear the delay, and the tenant has requested the lessor to fix it, but delay or inability to contact the lessor occurred. The tenant may repair, and repair fees which are within standard fees shall be deducted from the rent allowance.

What kind of maintenance required from the lessor?

The lessor commitment to maintenance is limited to repairing the defection which may happen for the property that may affect the fulfillment of the intended benefit (necessary repairs), these maintenances are either required to maintain the property, as repairing

[1] **Also Article ref. no. 567/1 stipulates that "The lessor shall undertake the maintenance of the leased property to maintain the condition in which it was handed over and to perform during the lease period all necessary repairs except leasing repairs... All this will be active unless otherwise required by the agreement."**

a rickety wall, or it's needed to use the property such as elevator repairing[1].

The Jordanian legislature did not condition the urgency in the repairs, unlike the Egyptian legislator[2].

If the lessor refrains from carrying out this necessary maintenance which requires to maintain the property to avoid its destruction, the tenant will be permitted to proceed in the maintenance process, and repair fees shall be re-paid by the lessor.

The lessor is obliged to make the necessary maintenance for the defects, either it was caused by him, by others or by Majeure force, subject to that the tenant or one of his belongs is not causative for the defect[3].

Whereas the necessary maintenance that affects the fulfilment of the intended benefit falls into lessor responsibility, there is a common practice that the tenant will carry out necessary but simple maintenance such as window repairs, but this does not mean that the tenant is in commitment to do each minor renovation as a common practice

If the lessor refrains from acting the necessary repairs, the tenant may request for contract cancellation or obtaining permission from the court

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[1] Dr. Mustafa al-Jamal, Previous Reference. 355, Dr. Ramadan Abu al-Saud , Previous Reference., P. 362. And Dr. Hossam al-Din al-Ahwani, Previous Reference., p. 97-98.

[2] Dr. Ali Hadi al-Obeidi, Previous Reference. p. 279.

[3] Dr. Ali Hadi al-Obeidi, , Previous Reference., P. 276, as well as Dr. Hossam al-Din Kamel al-Ahwani,, Previous Reference., P. 99.

to carry out these repairs, then to be re-paid the expenses from lessor[1] accordingly. However, there are cases where the tenant may take immediate corrective action toward the defects without obtaining court permission, subject to meet certain conditions[2]:

a- If the reforms are simple or urgent, which are needed for property usage, and within affordably fees, so referring to the court can be avoided, such as simple maintenance for the Elevator.

b- If the tenant notified the lessor by such required repairs and there was a delay by the lessor to perform, in this case, the tenant has the right to do these reforms without returning to the court[3].

The nature of the necessary reforms:

The necessary reforms are an obligation on the landlord and also his right at the same time[4], it is an obligation to enable the tenant to benefit from the property, as the lease contract consider an ongoing contract, and it is a Landlord right as to avoid the property from damages since he is the owner, based on that, two matters will be entail:

A) The tenant is not permitted to prevent the landlord from performing by reforms, by the pretext that these renovations affecting to his usage of the property, because in order the full

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[1] **Dr. Hossam al-Din Kamel al-Ahwani, Previous Reference., P. 101.**

[2] **Dr. Ramadan Abu Saud, Previous Reference., pages no. 380_ 381. Hossam al-Din Kamel al-Ahwani,, Previous Reference., P. 102**

[3] **Dr. Ramadan Abu al-Saud, Previous Reference., P. no. 379.**

[4] **Dr. Ali Hadi al-Obeidi, Previous Reference., Pages 278_279. As well as Dr. Ramadan Abu Saud, Previous Reference., P. 394.**

usage of the property by the tenant, he must provide the landlord access to carry out the reforms.

B) The law gave the landlord the right to evacuate the property to carry out the necessary reforms if required.

III- Lessor's obligation to guarantee exposure

Article (684) of the Jordanian Civil law stipulates that:

(1)- The lessor shall not be exposed to the lessee in a way as to disturb the lessee benefit of the property within the tenancy period, and there shall be no modification in the property which may prevent the tenant from using the property, or prejudicial the benefit which agreed in the contract, otherwise, it shall be a guarantor.

(2)- The landlord's guarantee shall not be limited to the action by him or any of his followers but shall extend to any exposure or damage based on a legal reason issued by any other tenant or any person who has received the right from the lessor.

This equivalent to Article (571) of the Egyptian Civil Law.

According to the above article it will be understood that tenant exposure may be either from the lessor or from the third party.

We will address this matter through two points, in the first point-will discuss the exposure from the lessor, while the second point will discuss exposure from others:-

"First point: Exposure from the lessor"

Exposure by the lessor can be personal exposures represented in any physical action issued by the lessor or one of his followers that would

disturb the tenant by earning the benefit[1], here are some examples of the actions which may originate by the lessor and considered as personal exposure: entering into the property by the lessor without the tenant's permission[2], or changing into the property components or elements, such as opening new windows or closing windows[3].

Or as legal exposure, which defined as the Lessor claim a right into the property against the tenant[4], example as if a person leasing a property belongs to other tenant, and then this person became the owner of this property because of inheritance, the person will not be entitled to object to the tenant against this property for the purpose of recovery, on the pretext that the lease contract wasn't issued by the current owner.

Personal exposure is subjected to four conditions[5]:

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[1] Dr. Ramadan Abu Saud, Previous Reference. p. 403.

[2] Dr. Samir Abdel Sayed Tanago, previous reference, p. 162, as well as Dr. Ali Hadi al-Obeidi, previous reference, P. 286.

[3] Dr. Wahba Al-Zuhaili, Contracts Named in the UAE Civil Transactions Law and the Jordanian Civil Law, First Edition, Dar Al-Fikr for Printing, Distribution, and Publishing, Syria, Damascus, 1987, p. Hossam al-Din Kamel al-Ahwani, , Previous Reference, P. 112. It is the amend that the landlord abstains from that which would prejudice an important violation of the use of the eye, but if the minor breach is tolerated by custom, it is not considered as an exposure.

[4] Dr. Ramadan Abu al-Saud, Previous Reference., P. 405. As well as Dr. Hussam al-Din Kamel al-Ahwani, Previous Reference., P. 111.

[5] Dr. Samir Abdel Sayed Tanago, previous ref., P. 158. And also Dr. Ramadan Abu al-Saud, Previous Reference., Pp. 406--412.

a- **If Exposure already occurred, as if the exposure action shall deprive the tenant of the use of the property or any of its extension as agreed in the lease contract.**

b- **Exposure should be act during the lease period.**

c- **Exposure breaches the property benefits usage by the tenant.**

d- **The exposure being by unlawful reason, but if the landlord owns legal right based on law or agreement (such as the landlord undertakes the necessary maintenance activities to safe the property), then this action will not be defined as personal exposure[1].**

If the exposure causes that the tenant deprived of the usage of the wage, The tenant will be permitted to terminate the lease contract (in case of (Divided benefit "Al- Mohaya'a") the beneficiary partner has the right to terminate the contract), with the right to compensation for the occurred damage, the annulment decision shall be subject to the discretion of the court, which will acknowledge on contract termination validity, if found that the exposure have impaired the property usage severely [2].

"Second point: Exposure from third party"

Exposure by the third party can be either legal exposure, as a third party claiming by his right on the property in which this claim may contradict with tenant's right, example as a third party claiming by the

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[1] **Dr. Hussam al-Din Kamel al-Ahwani, Previous Reference., P. 111.**

[2] **Dr. Hossam al-Din Kamel al-Ahwani, Previous Reference., P. 117 and p. 123. Dr. Ramadan Abu al-Saud, Previous Reference., P. 448.**

ownership of the property, therefore he objects on the validity of the lease contract.

The Jordanian legislator did not oblige the lessee to notify the lessor upon an exposure occur by the third party to enable the lessor to repel such exposure.

If the lessor (The partners in the case of (Divided benefit "Al-Mohaya'a") excluding the beneficiary partner) aware of the exposure which occurred by the third party to the lessee (The beneficial partner in the case of (Divided benefit "Al- Mohaya'a")), the lessor shall repel such exposure[1] (in-kind implementation),and The lessor must proceed by all legal procedures to repel such exposure, for example, the lessor may raise objection lawsuit, and in case the third-party raised a lawsuit against the tenant alleging that he has a right to the property that contradicts the tenant, the lessor shall intervene into the lawsuit to repel it[2].

The lessor may succeed to repel such an exposure, in which case he has fulfilled his obligation to guarantee the exposure by an in-kind implementation, therefore the lessor and lessee (All partners including the beneficiary partner) have the right to recourse to the objector for compensation due to his illegal claim.

Or the lessor may fail, therefore the tenant will be deprived of the use of the property, in such a case, the tenant shall have the right to terminate the contract along with right for compensation to the damages.

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[1] **Dr. Ali Hadi al-Obeidi, previous ref., P. 290. Ramadan Abu al-Saud, Previous Reference., P. 448.**

[2] **Dr. Hossam al-Din Kamel al-Ahwani,, Previous Reference., P. 118.**

The exposure by the third party may be non-physical, which have been explained already above, the lessor (The partners in the case of (Divided benefit "Al- Mohaya'a")) does not guarantee physical exposure which occurs by third parties, which is the standard[1], if the third party act a physical activity against the tenant in which may prevent the tenant (beneficiary partner) from Property usage, the tenant can't refer to the lessor, as long as this third party is not based on a legal right to carry out such action, as if the neighbour had damaged the cultivation of his neighbourhood.

However, the lessor is obliged to repel the physical exposure from third parties in two cases[2]:

1- **The existence of an agreement between the parties, in which the lessor grants the tenant a guarantee against any physical exposure occurred by the third party.**
2- **If the exposure is so severe that the tenant deprives of property usage, with no kind of responsibility toward the tenant in such physical exposure, such as destroying the property by the third party as a result of war or raping the property by others.**

By applying this obligation to the (Divided benefit "Al- Mohaya'a"), we will notice that the beneficiary partner, as a tenant, has the right to rent the part in which he benefits effectively in spite the rest of the partners of (Divided benefit "Al- Mohaya'a"), and they shall not be exposed to the beneficiary partner even if they are the major shareholders in the ownership of the common asset.

[1] **D. Ali Hadi al-Obeidi, Previous Reference., P. 292.**

[2] **Dr. Saheb Abid al-Fatlawi, Previous Reference., P. 32.**

Thus, the beneficiary partner who has the role in the utilization shall benefit and exploit what has been allocated to him, either by himself or through others, without the rest of the partners, and he shall have the right to sub-lease, as long as he is free to use and exploit his allocated part[1].

All partners shall refrain from any exposure that prevents the beneficiary partner from benefiting from his allocated part, and they are not allowed by any act which may affect such benefit, this obligation is not limited to the partners acts, but also partners shall ensure any action emanates from their followers or from any person has granted the right on behave them[2].

IV- lessor's obligation to guarantee hidden defects

Article (686)[3] stipulates the following:

1- The lessor shall guarantee to the lessee all defects in the property that may obstruct the property from being used or grossly diminished it, this does not include the defects which may be neglected as a common practice.

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[1] Judge Cappad Shirdar Nuri, Previous Reference, P. 20.

[2] It corresponds with Article 576 and the Egyptian Civil Code.

[3] Look at the, Previous Reference. P. 515_516 to know the meaning of Dr. Ramadan Abu al-Saud regarding this issue, as well as Dr. Hossam al-Din Kamel al-Ahwani, , Previous Reference., P. 138. Ali Hadi al-Obeidi, Previous Reference., P. 294.

2- The defects that the tenant aware about it upon the contract stage, as well as, the simply distinguished defects are excluded from the guarantee.

By focusing on the statement of this Article, we can recognize that the defect will be subject to guarantee according to the availability of two conditions:

a- The defect being effective.

b- The defect invisibility.

Where we will address these conditions individually:

a- The defect being effective.

The defect shall be considered as effective if it deprives the tenant of using the property or its annexes, and it obstructs the property from being used according to the purpose of the lease contract, If the property was housing apartment so the purpose will be housing, therefore any defect that prevents the tenant from living in it, shall be subjected to guarantee[1].

The definition of effective defect is not limited to above, utility grossly shortage, as omitting the water and electrical infrastructure, or the useless water and electricity installations, are considered effective defects.

Minor defects, which are neglectable according to the common practice are not covered by lessor guarantees, such as the apartment's habitual moisture, or the interior doors and windows defects.

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[1] Dr. Hossam al-Din Kamel al-Ahwani, previous ref., 139, as well as Dr. Ali Hadi al-Obeidi, previous ref., 295

b- The defect invisibility :

The hidden defect which the tenant cannot distinguish it during inspecting the property due to his ordinary skills[1] , and these defects which will appear later, while the lessor confirmed initially that the property is defect-free, will be considered guaranteed defects even if the defect was apparent, as well as the defects which were hidden by the lessor.

Which means that the lessor does not guarantee the defect if it is apparent or the tenant could distinguish it as an ordinary person.

It is not condition that the defect being old, where the lessor guarantees the defect which occurs beyond handing over because the lease contract is considered as a continuous contract, in which the lessor guarantees the tenant a peaceful occupation for the property[2].

It should be noted here, that lease contract termination is subject to the authority of court discretion, and according to its discretion of the seriousness of the defect and the consequent deprivation for the tenant by obstructing the property from being used or grossly diminished.

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[1] **Dr. Hossam al-Din Kamel al-Ahwani, Previous Reference., P. 139.**

[2] **Article reference 579 of the Egyptian Civil Code.**

SECOND CHAPTER

BENEFICIARY PARTNER OBLIGATIONS

The beneficiary partner is obliged by number of commitments, starting by his obligation to preserve the property of (Divided benefit "Al- Mohaya'a") and to use it as it is supposed to, as well as the beneficiary partner is obliged to refine the property according to what has been agreed upon, or which are within his obligation customarily, and not to occur any deviation on the property of (Divided benefit "Al-Mohaya'a") or its annexes, unless other partners approval have been obtained, the beneficiary partner obligation is not limited to above ,he is also obliged by law to remove sand and waste upon his benefit period expired, finally he is obliged to hand over the asset of (Divided benefit "Al- Mohaya'a") back, to enable rest of the partners to benefit from it.

These obligations are not mentioned within the provisions which govern the (Divided benefit "Al- Mohaya'a"), but it is considered as in lease contract agreement provisions which rule the (Divided benefit "Al-Mohaya'a") in terms of partners obligation.

Within this section, we will address the tenant's obligations generally, then to apply these obligations on the beneficiary partner of (Divided benefit "Al- Mohaya'a") as he is considered a tenant.

I- The Obligation to maintain the property.

The first paragraph of Article (692)[1] of the Jordanian Civil law stipulates that "The tenant is a trustee into the property, and he guarantees the missing items, damages or losses which resulted due to his lackluster or his infringement, and he shall preserve the property as an ordinary person".

By analyzing this Article we will note that the tenant's obligation to maintain the property is the obligation of the ordinary person by his best efforts in maintaining the property[2].

To maintain the property by the tenant requires him to use it as agreed upon[3], also the tenant is obliged not to undertake any activity which may sabotage the property, and to monitor people entering the property such as his family or his guests to avoid any act may result for property sabotage, the tenant's obligation is an obligation to achieve a result.

Additionally, there are other obligations that branched from this obligation, which we will address successively:

1- <u>Tenant's obligation to undertake the maintenance.</u>

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[1] Dr. Wahba Al-Zuhaili, Previous Reference, P. 234.

[2] Dr. Hossam al-Din Kamel al-Ahwani, Previous Reference., P. 144. Article 693 of the Jordanian Civil Code. Dr. Wahba Al-Zuhaili, Previous Reference, P. 233. It should be noted that Jordanian law did not supply such an obligation and the reason for this was the assignment of general rules, as well as Dr. Abid al-Fatlawi, , Previous Reference., P. 28.

[3] Dr. Ramadan Abu al-Saud, ibid., Pp. 613_614. Zerrougui Khadija, Tenant Obligations in the properties and Movables lease contract, Memorandum for Master Degree in Comparative Business Law, Faculty of Law and Political Science, University of Oran, Algeria, 2012_2013, p. 90.

Paragraph (1) of Article (695) stipulates (The tenant shall undertake the maintenance as agreed upon or as the common customary practice).

As well as, Article (582) of the Egyptian Civil Law stipulates (Unless otherwise agreed, the tenant shall undertake the required maintenance according to common customary practice).

The meaning of the above-pointed maintenance is the Maintenance which will be carried out by the tenant for the minor repairs that's required to use the property in ordinary use or it is tenant obligation based on the common customary practice, such doors, and window repairing[1].

As a result for not defining the maintenance obliged on the tenant by the Jordanian legislator, the identification of such maintenance depends on the common customary practice, and if there is no any such customary practice, it will be determined by the judge upon conflict, who is owning a wide discretion on regards this matter.

But what about the maintenance for the common elements, which are multi-tenants sharing, who will undertake the maintenance??

In terms of this matter, Jurisprudence split into two opinions, a party tended to that tenants bear it by sharing, while the second party believes that it is under lessor scope, as the common elements are not within tenant control[2], and it's a joint benefit for all tenants.

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[1]Dr. Ramadan Abu Saud, , Previous Reference., P. 617, as well as Dr. Samir Abdel Sayed Tanago, previous ref., P. 240

[2] Dr. Hossam al-Din Kamel al-Ahwani, Previous Reference., P. 147.

Tenant's obligation to undertake the maintenance is not related to the General System, it may be agreed to amend it either by increasing its limits, or mitigation its limits, or exemption the tenant from it, so it's allowed to agree that tenant undertakes the maintenance caused by the force majeure or the fault of the lessor, or It may be agreed that the tenant should bear any maintenance if it a result of customary use.

2- **Tenant is forbidden to occur amend in the property or its annexes[1] without landlord permission unless it is necessitated by the tenant to refine it, subject to not cause damage to it[2].**

The definition of the Amend within this Article is a Physical Amend[3], the tenant must obtain permission from the lessor if he wishes to undertake any amend, if not that, he will be forbidden to undertake any physical amend which may occur damages on the asset.

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[1] **Corresponding to the article (580) of the Egyptian Civil Code as well as Dr. Ramadan Abu Saud, Previous Reference., P. 586 and Dr. Wahba Al-Zuhaili, , Previous Reference., P. 234.**

[2] **Dr. Samir Abdel Sayed Tanago, previous ref., p 232 as well as Dr. Ramadan Abu al-Saud , Previous Reference., P. 586.**

[3] [3] **Dr. Hossam al-Din Kamel al-Ahwani, , Previous Reference, P. 144 as well as Dr. Ramadan Abu al-Saud, , Previous Reference., P. 587., Dr. Wahba Al-Zuhaili, , Previous Reference., P. 234, as well as Dr. Samir Abdel Sayed Tanago, , Previous Reference., P. 233**

The tenant is allowed to proceed by undertaking the amend which does not harm the lessor[1], where it is mostly simple amends as well as the urgent amends that do not tolerate delays[2], these activities are not subjected to landlord permission such as erecting a wooden partition to divide two rooms or garden coordination without uprooting trees, this rule is not related to the General System, it is possible for agreed otherwise, therefore lessor may condition the tenant not to undertake any amend, even if it does not harm him, as well as, the lessor may permit the tenant to undertake amend, even if it's harming him[3].

3- <u>The tenant obligation to clean the property and get rid of the sand accumulation, waste, and all other requirements according to the common customary practice.</u>

The second paragraph of Article (695) of the Jordanian Civil Law stipulates that "The tenant shall have the responsibility during the tenancy period to clean the property and remove any accumulated sand or waste and all required according to the common customary practice."

By Applying this obligation to the (Divided benefit "Al-Mohaya'a"), the Beneficiary Partner who has the role to benefit is obliged to preserve the common asset, as he is restricted by using asset only according to the prepared purpose for, it is not limited

[1] **Article no. 681/2 of the Jordanian Civil Code.**

[2] **Dr. Samir Abdel Sayed Tanago,, Previous Reference., P. 241**

[3] **Ali al-Tayeb Mustafa Ahmad, Previous Reference., P. 73.**

to this matter only, but he is forbidden to occur any amend in the asset of (Divided benefit "Al- Mohaya'a")[1].

Some views believe that there are two exceptions[2] to this obligation:

First Exception: Property agreed use type may be amended if other partners agree.

Second Exception: if the rules of the common customary practice of short term use, tolerate amends that not occurring far changes from the agreed using function, so that it does not cause any harm to other partners, subjected to beneficiary partner commitment to restore the condition of the property, to its condition at receipt stage upon handing over the allocated part for beneficiary partner.

If the beneficiary partner undertakes an amendment to the part which he is benefiting from, he is obliged to restore its condition as it was at the end of his benefit role in the (Divided benefit "Al-Mohaya'a").

The beneficiary partner is also obliged to undertake renovations that had been agreed upon or as acknowledged by common customary, which is simple renovations and not affect the asset, such as repairing doors, and windows.

When the beneficiary partner period expired form the part he was benefiting from, he must clean it, and get rid the garbage and hand it

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[1] Dr. Abid al-Fatlawi, , Previous Reference., Pp. 30-31, as well as Akoni Mohammed , Previous Reference., P. 87.

[2] Dr . Abdel Fattah Abdel Baqi, previous ref., Dr. Wahba Al-Zuhaili, , Previous Reference., P. 236. Zerrougui Khadija, Previous Reference, P. 172.

over back to the partners in the same condition in which he received, to enable next partner to benefit from it.

II- Tenant commitment to hand over back the property.

Paragraph (1) of Article (700) of the Jordanian Civil Law stipulates that "The Tenant shall handover back the property upon the expiry of the rent period to the lessor, in the same condition which he received it". Article 590 of the Egyptian Civil Law correspond with the above mentioned Jordanian Law Article.

By analyzing the above provision, we will note that the tenant must hand over back the property with all its annexes similar to its condition when received it[1] ,and the lessee's obligation to hand over the property is an obligation ends by result, not an obligation to care ,meaning that if the property condition during tenant usage has been changed, he will be considered as responsible for this change unless he proves that he has no responsibility toward this change, and it was occurred for example by a force majeure or a defect in the property[2].

The method of handing over back the property shall take place in the same manner of receiving it, meaning that, by enabling the lessor placing hand and controlling the property, thus he can acquire and exploit it without any hindrance, even if the landlord has not taken the property over physically, as long as he has been informed by the tenant[3].

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[1] Dr. Wahba Al-Zuhaili, , Previous Reference., P. 236

[2] Dr. Ramadan Abu al-Saud, Previous Reference., P. 652. Abd al-Fattah 'Abd al-Baqi, Previous Reference., P. 387. Zerrougui Khadija, Previous Reference, P. 175. As Well as Dr. Ali al-Tayeb Mustafa Ahmad, Previous Reference., P. 74. `

[3] Article (685) of the Jordanian Civil Law stipulates that "if the exposure entails depriving the tenant of the use of the wage in accordance with the contract, he may

By applying this obligation to the rules and provisions of (Divided benefit "Al- Mohaya'a") we will notice that it match the tenant obligation generally, as the beneficiary partner is committed to handing over back the common asset, or the part that was used with all its annexes by the same condition in which it was received, If the condition of asset of (Divided benefit "Al- Mohaya'a")which was by beneficiary partner's control has been changed, this change will be beneficiary partner full responsibility, unless he proves that the change occurred with no kind of responsibility toward him, such as a force majeure or a defect in the (Divided benefit "Al- Mohaya'a") asset.

The method of handing over back the asset of (Divided benefit "Al-Mohaya'a") by the Beneficiary Partner will be by enabling the partners placing hand and controlling the property, thus they can acquire and exploit it without any hindrance, even if the partners do not hand over the property physically, as long as they have been informed by the Beneficiary Partner.

As we addressed partners obligations in the (Divided benefit "Al-Mohaya'a"), a question arises if the Jordanian and Egyptian legislators subjected the provisions and rules of termination the (Divided benefit "Al- Mohaya'a") to the provisions and rules of termination lease contract, or just applying the provisions exclusively to protest against others, in terms of the eligibility of the shareholders and their rights and obligations and methods of proof.

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request the annulment or the reduction of the fare while guaranteeing the damage suffered."

To answer this question, we must explain the cases in which the (Divided benefit "Al- Mohaya'a") status ends, then we will study whether these cases apply to the termination of the lease contract.

If the (Divided benefit "Al- Mohaya'a") has been concluded properly and it meets all the terms and conditions, it shall be obliged and its provisions will be applied, agreement parties shall be obliged to implement the arising commitments therefrom, the partners are not permitted to renounce, modify or dissolve it, unless by mutual consent, litigation, or pursuant to a provision of the law.

a- End of the (Divided benefit "Al- Mohaya'a") by the end of its duration.

As the (Divided benefit "Al- Mohaya'a") is a time period contract in which time is considered a core element, the (Divided benefit "Al-Mohaya'a") ends with the expiry of the agreed period by the partners, regardless the (Divided benefit "Al- Mohaya'a") was temporal or spatial, and whether the (Divided benefit "Al- Mohaya'a") was founded by partners satisfaction or by judiciary. The period of (Divided benefit "Al-Mohaya'a") may be renewed upon expiry.

Upon the expiry of the agreed period, the (Divided benefit "Al-Mohaya'a") will terminate, none of the partners is forced to inform other partners by expiry term, but some believe, which we agree upon, that informing the partners at the end of the term of the (Divided benefit "Al-Mohaya'a") grants practical benefit, as any of partners may desire not to renew.

Additionally, informing partners by the end of the (Divided benefit "Al- Mohaya'a") will avoid the conflicts may arise between the partners

if any of them claim that the (Divided benefit "Al- Mohaya'a") implicitly renewed.

b- Ending the (Divided benefit "Al- Mohaya'a") by Annulment

The Jordanian and Egyptian civil laws did not contain any statement about termination of the (Divided benefit "Al- Mohaya'a"), but since both the Jordanian and Egyptian legislators were subjected provisions of(Divided benefit "Al- Mohaya'a") to the provisions of the lease contract in terms of the rights and partners obligations, unless it inconsistent with its nature, the partners of (Divided benefit "Al- Mohaya'a") have the rights to dissolve it, if the termination reasons available.

By reading extensively for the lease contract provisions in the Jordanian Civil Law, we will notice that the Law indicated the cases in which the lessor and the tenant can terminate the contract, for example, Article (681) of the Jordanian Civil Law granted the right to terminate the contract to the tenant, if the lessor fails to remedy the defects at the property which affect the fulfillment of the intended benefit.

Also, Article 683 of the Jordanian Civil Law have permitted the lessor to forbid the tenant on undertaking any activity in which may sabotage or a change in the property nature or installing machinery and equipment may harm or diminish the property value, if the same ignored by tenant, the lessor may request the court to annul Contract and to ensure the tenant guarantee in terms the damages caused by this infringement.

Also, as one of the cases in which the tenant has the right to terminate the contract if he deprived of the property use's as exposure results, …

in addition to the guarantee against the harms which he suffered[1], or if there was a defect on the property denied the tenant to use of the property[2], or an instruction issued by the competent authorities, which prevents the tenant from the total use of the property[3], with no kind of responsibility toward the tenant in terms of issuing such instruction.

c- Division request by all partners or one of them.

One of the reasons that terminate the (Divided benefit "Al-Mohaya'a") is the division request, If division request raised by one of common asset partners, while other partner asked for the (Divided benefit "Al- Mohaya'a") the division claim will be accepted.

This Article shall be applied if division request raised before activating the (Divided benefit "Al- Mohaya'a") between partners, legislator wisdom in that the division is always preferable by the legislator because it ends the common situation. However, if the (Divided benefit "Al- Mohaya'a") was activated (spatial or temporal) either by satisfaction or jurisdiction, and each partner start benefit from the common asset, no partner permitted to terminate the (Divided benefit "Al- Mohaya'a") by requesting for division , unless all partners agree to

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[1] **Article 687 of the Jordanian Civil Law stipulates that "if the defect deprives the tenant of the use of the wage, he may request the annulment or the reduction of the fare while guaranteeing the damage caused."**

[2] **Article (698) of paragraph (1) of the Jordanian Civil Law stipulates that "if issued by the competent authorities, whatsoever prevents the total use of the property without a reason from the tenant, lease contract will dissolve ....."**

[3] **Article (1058) The first paragraph of the Jordanian Civil Code**

do so, because the request for division leads to the revocation of the (Divided benefit "Al- Mohaya'a") before the expiry of its duration, while the(Divided benefit "Al- Mohaya'a")is a Binding contract to all partners.

By reading extensively the cases where the (Divided benefit "Al- Mohaya'a") terminates, we note that the provisions and rules of termination of the (Divided benefit "Al- Mohaya'a") apply to provision and rules termination of lease contract, because the lease contract expires at the end of its time period as well as lease contract may be terminated if one of the partners breach his obligations.

Conclusion:

Through this study, we have addressed the topic of the (Divided benefit "Al- Mohaya'a") and the implications of applying it, and we have clarified what is meant by it, also we went through the characteristics and types of it, and the implications of applying the (Divided benefit "Al- Mohaya'a"), and thereof, we came into the following results:

1- **The (Divided benefit "Al- Mohaya'a") is partners agreement to regulate the use of common assets, the regulate method could be either Spatial or Temporal. Partners agreement is considered an essential element to apply the (Divided benefit "Al- Mohaya'a"), except in some cases where the (Divided benefit "Al- Mohaya'a") takes place by court force by exceeded the condition of partners consensus.**

2- **According to the Jordanian Law, applying the (Divided benefit "Al- Mohaya'a") will not lead to end Asset common ownership situation, while according to the Egyptian Law, applying the (Divided benefit "Al- Mohaya'a") for fifteen years is a reason to end the common ownership situation of the Asset.**

3- **The Jordanian and Egyptian legislators have subjected the provisions of the (Divided benefit "Al- Mohaya'a") to the provisions of the lease contract, to the extent that these provisions do not conflict with its nature.**

4- **We have concluded that the contract type of the (Divided benefit "Al- Mohaya'a") is of the binding type contracts toward all parties, as well as it is a compensation contract type.**

5- **The (Divided benefit "Al- Mohaya'a") situation and its obligations shall not end with the death of a partner or all partners, the rights and obligations of the deceased will be transferred to his heirs.**

Recommendations

1- **Looking forward that the Jordanian legislator to apply what the Egyptian legislator legalized, in regards to that the status of the Common Asset will convert to a final division in the event that the (Divided benefit "Al- Mohaya'a") continues for fifteen years.**

2- **It is advisable that the Common Assets partners recording the contract of (Divided benefit "Al- Mohaya'a"), and also hoping that the Jordanian and Egyptian legislators condition the contract availability in (Divided benefit "Al- Mohaya'a") agreements, so that the contract be considered as condition, not as proof in order to avoid conflicts.**

3- **Partners of the (Divided benefit "Al- Mohaya'a") are advised to recourse by legal advisors' assistance to identify their rights and duties when concluding the (Divided benefit "Al- Mohaya'a") contract.**

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