

Extent of the Legislative under-regulation of Profiteering Defect in the Jordanian Civil Law

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Abstract

I have addressed in this research, titled "Extent of the Legislative under-regulation of Profiteering Defect in the Jordanian Civil Law," the absence of a general theory for the profiteering defect in the Jordanian Civil Law with the exception of a single application which is "taking advantage of the farmer's need in the Al-Salemsale (Al-Salem sale is the sale of postponed –delivery property for an immediate price). I have reviewed the defects affecting consent provided for by the Jordanian legislator, namely duress, deceit with serious damage, and mistake, compared with the profiteering defect. It has been found that these defects are not a substitute for regulating profiteering defect. Therefore, this defect which affects the will of the contractor and results in disruption of the contracting balance affects the principle of justice in the Jordanian Civil Law. This principle was deduced from a range of provisions of the law. I have shown the position of the Islamic Jurisprudence of the profiteering defect, which provided for variant applications to this defect such as the sale and purchase of the Mutter (the destitute), the sale of Al-Hadher Lil-Badi ((between a person resident in the city and a person living in the desert), the sale of Al-Rukban (between a person who knows about the arrival of a convoy carrying goods and commodities to beholden the city, and this person takes advantage of their ignorance of the prices in the city and buys it for less than the real price, before arrival to the city.), and the sale of Al-Mistarsel (when a contractor takes advantages of the other contractor due to his ignorance of market prices, and makes him enter into an unfair contract with him). I have come to the conclusion that the Jordanian legislator needs to regulate profiteering defect theory, providing for a profiteering defect in the farmer's need in the Al-Salem sale in not sufficient

Keywords: Profiteering defect, defects affecting consent, legislative under-regulation.

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The Jordanian legislator did not regulate profiteering defect in Civil Law, but he cited a single application to it, which is "taking advantage of the farmer's need in the Al-Salemsale only. In this regard, the question arises, is there a need to provide for this defect a general theory or that the regulation of other defects affecting consent by the legislator is enough, and therefore, there is no need to regulate profiteering defect, and whether this is in consistence with the principle of fairness and balance of interests between the parties to contract, which the Jordanian legislator is keen on?

To answer the above shall be addressed in 2 chapters as follows:

Chapter I: the sufficiency of defects affecting consent set forth in the Jordanian Civil Law as a rationale for not regulating Profiteering Defect.

Chapter II: the effect of the not regulating profiteering defect on the principle of justice in the Jordanian Civil Law.

Chapter I: the sufficiency of defects affecting consent set forth in the Jordanian Civil Law as a rationale for not regulating Profiteering Defect.

Jurisprudential debate has erupted about the need to regulate profiteering defect, some scholars believed that the profiteering defect is integrated with other defects affecting consent, and that there is no need to regulate this defect, because the provision for the profiteering defect would repeat the defects affecting consent⁽²⁾.

Other scholars believe⁽³⁾ that it is not possible to integrate the profiteering defect with other defects affecting consent, and it has to be regulated independently of all other defects. The answer to those who objected to the theory of profiteering is: (many feared this general text contained in the new law for profiteering, and saw it as subjecting dealings to instability and confusion. They reckoned that it would be a source of many disputes and litigations. However, we see no justification for this concern. The Egyptian judiciary has already faced cases of profiteering in the examples that we have presented, and addressed them to the extent possible by the application of the general rules. We have seen that general rules are not sufficient here and that a general provision for the profiteering, especially if the provision covered situations of impressions, is also imposed by necessity and required for the dealings. The judge faces what actually is presented to him of cases of profiteering by a valid text to control the dealings, and by which reasons of dispute and hesitation are interrupted.

It is strange that the profiteering theory opponents contradict each other. One team sees that this general text for the profiteering would be a source of frequent disputes and lawsuits. The other team sees the complete opposite, that the text is rarely applied, and cases of profiteering raised before the courts in countries, which its laws

included this, text, were few so that the text became useless).

To illustrate the reality of the situation in the Jordanian Civil Law, and the sufficiency of the defects affecting consent stipulated by the Jordanian law, the profiteering defect should be compared with the duress, deceit with serious damage, and mistake, in order to show the extent of the independence of profiteering defect from the rest of defects affecting consent, as well as to indicate the adequacy of the wording of Section (538) of the Civil Law, which regulates taking advantage of the farmer's need in the Al-Salemsale. All these will be dealt with in the parts as follows:

Part I: comparison of profiteering defect with duress defect

The Jordanian legislator regulated duress defect in Sections(135-142) of the Jordanian Civil Law. It has been defined by the Jordanian legislator in Section135, which reads as follows: (Duress is the unjustifiable obligation of a person to commit a deed without his consent and it may be material or moral).

The French Jurisprudence(TRELLARD) defined it as follows: (the use of illegitimate pressure that causes fear to the contractor in order to make him contract without his consent) ⁽⁴⁾.

Duress negates consent and invalidates choice if it is an obligatory duress, and does not negate choice if non-obligatory, where Section(138) of the Civil Law provides as follows: (The obligatory duress negates consent and invalidates volition and the non-obligatory duress negates consent but does not invalidate volition).

The duress may be physical or moral, it is physical if it actually took place on the body of the person under duress, and moral if it is a threat of causing harm or kill.

Also, the duress may be positive, by threatening to do something harmful, and may be negative, by threatening to abstain from doing something, like a doctor who takes advantages of the need of his patient to undergo urgent operation and bargains with the intent to get a greater payment, and threatens him not to make it without this payment, so the patient accepts that unwillingly and contracts with the doctor. Or a ship's captain who takes advantage of another drowning ship asking for help, by demanding a large sum to save same ⁽⁵⁾. In these cases, the source of the duress which motivates to contract was not the other contractor, but arose from the need and automatic, difficult conditions, and so approaches the profiteering defect. Will this case be a duress defect or a profiteering defect?

The French Jurisprudence was divided on this matter. Some ⁽⁶⁾believed that the necessity case cannot be integrated with the duress defect, duress is made by threat, while, in necessity case, the contractor does not resort to any threat, but takes a negative attitude. The other some ⁽⁷⁾ believes in the possibility of integrating necessity into the duress defect, arguing that there is no significance to the differences between sources of duress.

With regard to the position of the Jordanian Civil Law, it lacks any provision that deals with duress arising from the case of necessity, at a time when justice requires considering the duress arising from the case of necessity. If a general theory of profiteering in the Jordanian Civil Law was found, it would be possible to include this type of duress under the image of profiteering necessity or need. Arab legislation has provided for theory of 'different types of' profiteering, including the profiteering of the necessity or need, such as the Iraqi Civil Law in Section(125), the Kuwaiti Civil Law in Section(159), and the Lebanese Law of Obligations and Contracts in Section (214) and Section (210).The Egyptian Civil Law provides two forms of profiteering, apparent recklessness and unbridled desires. The first paragraph of Section(129) of the Egyptian Civil Law states the following: (If the obligations of one of the contractors are not equal at all to the benefit which this contractor has obtained under the contract or with the other contractor's obligations, and it has been found that the aggrieved contractor did not enter into the contract only because the other contractor has taken advantage of the apparentrecklessnessand unbridled passion in him, it is permissible for the judge at the request of the aggrieved contractor to invalidate the contract or diminish the obligations of this contractor) .

From the above, we can see that regulation of duress defect by the Jordanian legislator does not substitute the need to regulate profiteering defect in its different forms such as in; need, necessity, apparent recklessness and unbridled passion.

Part II: the profiteering defect in comparison with deceitwithserious damage

The Jordanian legislator regulated the defect of deceit with the serious damage in Sections(143-150) of the Civil Law. The legislator defines deceit in Section(143) stating: (Deceit is the deceiving of one of the contracting parties by the other by tricky means whether by word of mouth or deed in order to oblige him to consent to what he would not consent to without thee means). The legislator defines the serious damage in Section(146) saying: (Serious damage of immoveable and other property shall be that which is not allowed by estimators).

From the above, in order to establish the defect of deceit, the following conditions must be met:

1. The use of fraudulent means whether by words or actions.
2. The deceit is the reason to contract.
3. The deceit results in serious damage⁽⁸⁾.

The difference between defect of deceit with the serious damage and profiteering defect is that the defect of deceit requires the use of fraudulent means by one of the contracting parties or a third-party in order to be established, while this is not required in order to establish the defect of profiteering.

From the above, it can be said that the regulation of defect of deceit with the serious damage by the Jordanian legislator does not preclude the need to regulate defect of profiteering. Since claiming a defect of deceit with the serious damage requires establishing the contractor use of fraudulent means whether by words or actions. This represents a positive aspect to conduct these means, while in the defect of profiteering the contractor does not perform any act or fraudulent means whether by words or actions. This represents a negative aspect that lies in taking advantage of the other contractor's need, recklessness, or unbridled desires.

Part III: the defect of profiteering in comparison with the defect of mistake

The mistake is an illusion in the mind of the contractor that makes him believe in the unreal. Scholars distinguish between automatic or simple mistake, which is caused by no one, which the person slips into it by himself which is the defect of mistake, and the mistake caused by deceit⁽⁹⁾.

The Jordanian legislator regulated the defect mistake in Sections(151-156) of the Jordanian Civil Law. Section(151) provides as follows: (Mistake shall not be material except as to the provision of the contract or as proved by the circumstances of the case, the nature of things or custom). The legislator has authorized the contractor to rescind the contract in certain situations, whereby Section (153) states as follows: (The contracting party shall be entitled to rescind the contract if he commits a mistake in a required matter like a description of the object of the contract, the person of the other contracting party or a description of that party). Section(154) provides as follows: (The contracting party shall unless the law otherwise provides be entitled to rescind the contract if a mistake of law is committed by him and the prerequisites of the mistake of fact as prescribed in Sections (151 and 153 are fulfilled).

From the above, the contract defected by the mistake shall be non-obligatory to the contractor, who committed the mistake, whether the mistake is in a required matter like a description of the consideration of the contract, the person of the other contracting party or a description of that party, which is called the elapse of the required description.

The mistake may result in damage to the value of the amount paid by the contractor, and this damage is a result of the unawareness of the contractor of the value of a thing, if he knew the truth of the thing, he would not have contracted, or would contract for less than paid in return. This differs from the defect of profiteering, because the contractor in the defect of profiteering contracts while aware of being aggrieved, but forced by need, necessity, apparent recklessness and unbridled desire.

Profiteering may occur as a result of lack of knowledge of the contractor of the real price of the thing, so the defect of profiteering may include the notion of the mistake, noting that the Jordanian Civil Law did not adopt 'mistake of value', but addressed same in the serious damage situations, noting that the Jordanian legislator considered serious damage only if it was a result of deceit. However, the legislator added an exception to the above-mentioned and considered serious damage inflicted without deceit in situations where the contract's consideration is a property of an interdicted person, a trust property or a property of the state. Section(149) of the Civil Law provides as follows: (The contract shall not be rescinded because of serious damage inflicted without deceit except in respect of the property of an interdicted person, the trust property and the property of the state).

From the above, we can see that the provision of the legislator for the defect of mistake is not enough to protect contractor from the defect of profiteering. I have already indicated that the defect of duress and the defect of deceit with the serious damage are not sufficient to protect the contractor from the defect of profiteering. Accordingly, I wish that the Jordanian legislator would regulate the defect of profiteering.

Part IV: the adequacy of the wording of Section(538) of the Civil Law "the defect of taking advantage of the farmer's need in the Al-Salem sale"

Section (538) of the Civil Law provides as follows: (1. If the purchaser in Al-Salem shall take advantage of the farmer's need and buys from him future crop or under conditions which are clearly prejudicial the vendor shall when fulfillment is due be entitled to apply to the Court for the amendment of the price or condition in a manner which abates the prejudice and the Court shall for that purpose take into consideration the circumstances of the time and place and the levels of the general prices and their difference between the dates of contracting and

delivery as is prescribed by custom. 2. The purchaser shall have the right not to accept the amendment which the Court decides and to be repaid the actual price he paid to the vendor and the vendor shall then have the right to sell his crop to whomsoever he chooses. 3. And every agreement or condition for the forfeiture of the said right shall be void whether it is a condition in Al-Salem itself or it is any other independent obligation of whatever kind).

In order to apply the said Section (538), the following certain conditions must be met:

1. The sale is Salem:

Section(532) the Civil Law has defined Al-Salem sale as follows: (Al-Salem sale is the sale of postponed – delivery property for an immediate price) such as when a person sells the farm's crop of apple that has not yet matured, at a price of 800 dinars per ton, provided that he pays the price immediately, and waits until the maturity of the apple. However, if the sale was not Salem, as if the sale was absolute, the buyer receives the crop immediately and pays the price, and this does not apply to the wording of Section(538) of the Civil Law.

2. The buyer takes advantage of the farmer's need for money. Meaning that profiteering to which we apply the profiteering theory in the Al-Salem sale to, is the profiteering of the buyer, if the profiteering is of the seller, then the wording of Section(538) does not apply, instead the general rules shall be applicable, and the general rules did not regulate defect of profiteering.

The profiteering recognized by law in the Section, which is under discussion, is the taking advantage of the seller's need (Farmer) for money to buy seeds, fertilizer, pesticides, or for any other need.

3. Profiteering from the farmer's needs due to the selling his crop at an unfair price or unfavorable terms clearly prejudicial against him, and the clear lyprejudicialprice is a price out of the ordinary. As for the unfair terms, these are terms that can be accepted only under the pressure of urgent need⁽¹⁰⁾.

4.The seller is a farmer.

If the conditions set forth in Section(538) are met, the seller (farmer) is entitled to apply, at the time of the maturation of the crop,tothe Court to amend the price or the conditions to relieve the prejudice, provided that the Court shall take into account the time and place as well as the general level of prices and its differences between the date of the contract and the delivery.

The legislator has granted the buyer the right not to accept the amendment which the Court deems for the price or the conditions. The buyer in this case may recover the amount already paid to the seller, and the farmer may in this situation sell the crop to anyone else.

It cannot be said, that the legislator's regulation of defect of taking advantage of the farmer's need in Al-Salem sale, has provided for a defect of profiteering as a general theory. Section(538) of the Civil Law is limited to a taking advantage of a farmer's need, and not any other , actually it is only limited to taking advantage of the farmer's need in Al-Salem sale, that is, the sale of the crop before maturity, at a price to be paid in advance at the time of conclusion of the contract.

Chapter II: the effect of under-regulating profiteering defect on the principle of justice in the Jordanian Civil Law.

In this Chapter, I will be addressing the effect of under-regulation of defect of profiteering on the principle of justice in the Jordanian Civil Law. At the beginning, I will provide a summary of the principle of justice in the Jordanian Civil Law, and then explain the effect of the not regulating the defect of profiteering on this principle, this shall be in two parts as follows:

Part I: Summary of the principle of justice in the Jordanian Civil Law.

Part II: the effect of under-regulating defect of profiteering on the principle of justice.

Part I: Summary of the principle of justice in the Jordanian Civil Law

The principle and idea of justice in the Jordanian Civil Law can be driven from the following:

1. The Jordanian Civil Law is established on the basis of the collectivity, which confirms its respect for the contractual justice appreciated by the society and called Mutual Justice, not as appreciated by the individual when he consents to the contract.⁽¹¹⁾

2. The Explanatory Notes of the Jordanian Civil Law provide for the general trends of this law, rendering justice and making good its ultimate doctrine.⁽¹²⁾

3. The Jordanian Civil Law granted the judge a broad discretion for the administration of justice between contractors. One of the applications for this is the protection of the adhering party in a contract of adhesion by modifying the arbitrary conditions or releasing the party from same. Section(204) of the Jordanian Civil Law provides as follows: (If the contract is entered into by adhesion and includes oppressive terms the Court may amend those terms or exempt the adhering party from them in accordance with the prescriptions of equity , and every agreement to the a contrary effect shall be void).

4. The protection of the contractor who is overburdened by the implementation of his obligations which threaten him with a heavy loss, as a result of the occurrence of general exceptional incidents that could not be predicted and cannot be warded off. Section(205) of the Civil Law provides as follows: (If general abnormal incidents which could not be foreseen occur and due to their occurrence the performance of the contractual obligation though not becoming impossible is rendered cumbersome to the debtor threatening him with serious loss, the court may according to the circumstances and after balancing the interests of both parties reduce the cumbersome obligation to the reasonable extent if so prescribed by equity, and every agreement to a contrary effect shall be void).

5. The legislator authorized anyone who has suffered serious injustice in the consensual division to request the dissolution of the division, where Section(1050) of the Civil Law provides as follows: (Whoever suffers serious injustice in a consensual division may apply to the Court for the rescission of the division and its repetition in a just manner).

6. The Jordanian legislator provided for the "abuse of the use of right" theory, where Section(66) of the Civil Law provides as follows: (1. Liability for damage shall be due from the person who exercises his right unlawfully. 2. The exercise of the right shall be unlawful as follows:

- a. If there is intent to aggress.
- b. if the interest to be achieved from the act is unlawful.
- c. if the benefit there from is disproportionate with the damage inflicted on others.
- d. if it exceeds custom and usage).

7. The amendment of penalty clause (agreed compensation), where Section(364) of the Civil Law provides as follows: (1. The two contracting parties may in advance and subject to the provisions of the law limit the amount of damages by express provision in the contract or by a subsequent agreement.2. And the Court may in all cases and on the application of either party amend that agreement to render the estimation equal to the damage and any contrary agreement shall be void).

Part II: the effect of under-regulating the defect of profiteering on the principle of justice

The lack of regulation in the Jordanian Civil Law for the defect of profiteering as a general theory is incompatible with the principle of justice upon which the law is based upon. The Jordanian legislator is keen on this principle through different and multiple applications that have been reviewed in Part I of this Chapter. These applications are designed to protect the parties to contract, the balance and justice between them.

That defects affecting consent stipulated by the Jordanian legislator in the Civil Law, being duress, deceit with the serious damage, and mistake, fall short of achieving the protection of the contractor who has been taken advantage of⁽¹³⁾, and the result was a serious damage, a feeling of injustice and weakness in the will for the contractor. The other contractor takes advantage of his need and lack of resourcefulness. The said contractor finds no legal protection to curb the unruliness of the contractor that takes advantage of the needy contractor.

Given the importance of the defect of profiteering as a general theory and its role in achieving justice, most Arab laws regulated same. For example, it is regulated by the Egyptian Civil Law in Section(129), the Syrian Civil Law in Section(130), the Libyan Civil Law in Section (129), the Iraqi Civil Law in Section(125), the Algerian Civil Law in Section(90), the Lebanese Law of Obligations and Contracts in Section(214), the Kuwaiti Civil Law of in Sections (159-161), the Moroccan law in Section(54), and the Tunisian Journal of Obligations and Contracts in Section(59).

Although the Islamic Jurisprudence did not introduce a general theory for the "defect of profiteering," it defined different applications for same, such as:

- a. The sale and purchase of Al-Muthhtar (the destitute):

The Islamic Jurisprudence provides for the need to protect the contractor who sells or buys under an urgent necessity, and considers his will defective if inflicted by a serious damage. If the person was in need of food, drink or dress, and the seller took advantage of this need and sold them to him for an unfair prices, and the buyer agreed to pay the price for his urgent need for them, then the will of the buyer shall be considered defective. The same principle applies if someone needed some money, and concluded a contract for the sale of an in-kind property which he owned, and the buyer took advantage of the seller's need for money and bought it at a very low price in which there is injustice, the will of the seller shall be defective.⁽¹⁴⁾

- b. The sale of Al-Hadher Lil-Badi:

Means in this case Al-Hadher (a person resident in the city) purchases from Al-Badi (a person living in the desert) all the goods, which people in the city needs, brought by Al-Badi. Al-Hadher does so in order to resell the goods by installment, which increases demand and thus prices goes up (since people need these goods) and Al-Hader sells same with a great profit. The Islamic Jurisprudence prohibited this kind of sale.⁽¹⁵⁾

- c. The sale of the Al-Rukban:

This refers to that person who knows about the arrival of a convoy carrying goods and commodities to be sold in the city, and this person takes advantage of the convoy owners' ignorance of the prices in the city and buys it for

less than the real price. Prophet Muhammad (peace be upon him) has forbidden this sale, and given them the option to revoke the sale if they arrived at the market and found out that they had been deceived.⁽¹⁶⁾

d. The sale of Al-Mistarsel:

This form is represented when a contractor takes advantages of the other contractor due to his ignorance of market prices, and makes him enter into an unfair contract with him. The Islamic Jurisprudence provides for granting the contractor who has been taken advantage of in this case the option to rescind the contract.⁽¹⁷⁾

Accordingly, I wish that the Jordanian legislator would regulate a general theory of profiteering, in order to avoid these legislative deficiencies, so as to consolidate the principle and the idea of justice governing the Jordanian Civil Law.

Results and recommendations

After the completion of this study titled "extent of legislative under-regulation of profiteering defect in the Jordanian Civil Law", I have reached the following results and recommendations: -

First: Results

1. The legislator did not regulate the defect of profiteering as a general theory in the Jordanian Civil Law, with the exception of a single application, namely the taking advantage of the farmer's need in the Al-Salem sale.

2. By comparing the defects affecting consent provided for by the Jordanian legislator namely the duress, deceit with serious damage, and mistake with the defect of profiteering, it has been found out that all of these defects are not a substitute for regulating defect of profiteering.

3. The failure to regulate profiteering as a general theory of defect in the Jordanian Civil Law affects the principle of justice in the law.

Second: Recommendations

I wish the Jordanian legislator would regulate a general theory of the defect of profiteering to avoid the legislative deficiencies, so as to consolidate the principle and the idea of justice underlying the Jordanian Civil Law.

Footnotes

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⁽⁶⁾ Nuran, Part XV, paragraph 519, p. 76.

⁽⁷⁾ Baudan, Contracts and Obligations, 1906, paragraph 123, Damuj, Obligations, Part I, paragraph 320, referred to with Tawfiq Hassan Faraj, p. 140.

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