

Private Law, Public Justice: Another Look at Imprisonment for Debt under the Jordanian Law

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Abstract—Debtors' imprisonment in Jordan is a problematic issue since it impinges upon required financial guarantees that are presumably offered by debtors on the one hand, and infringes flagrantly the International Covenant on Civil and Political Rights on the other hand. Jordan lacks regulatory provisions in this respect and debtors' imprisonment is indirectly exercised in Jordan without giving a special legal attention to this concern. From this perspective, this research reviews the available regulations, standard laws and codes of conduct that might guide the implementation of the International Covenant on Civil and Political Rights in the Jordanian context. Furthermore, this article will examine the suitability of the Jordanian legal system in providing sufficient protection for debtors. The author argues that there are serious obstacles in this aspect.

Keywords—The Jordanian Civil Code, the Jordanian Execution Law, imprisonment for debt, good faith, the Jordanian Constitution, the International Covenant on Civil and Political Rights.

I. INTRODUCTION

DEBTOR'S imprisonment is a mechanism that can be deployed effectively in resolving disputes between individuals by providing a remedy, not necessarily financial remedy, to the creditor against the debtor. Creditors are viewed as being "aggrieved parties" as opposed to debtors which are considered as being "wrongdoers". Effectively, the purpose of debtor's imprisonment is to compel fulfillment of obligations, particularly where the debtor is capable of performance. From this perspective, the state, as a representative of the society, strongly disapproves of such actions which are deemed particularly injurious to the general public and "punish" those who fail to observe the standards by imposing debtor's imprisonment.

According to the Jordanian Judicial Council, 143000 cases related to financial matters are under consideration [1]. This huge number can be easily duplicated due to exponential rates of COVID-19 occurrences in the country with all associated financial difficulties.

Debtors' imprisonment is a controversial issue in Jordan and elsewhere. On the one hand, it will affect substantially business and financial transactions guarantees, being sometime the sole resort for creditors to enforce their rights towards their debtors. This is due to the fact that the Jordanian law on obligations was not built on the rationale that creditors are supposed or required to conduct a thorough investigation on debtors' ability to repay their debts. On the other hand, it might be argued that debtors' imprisonment might lower the

chances to pay the debt back on time and in full, and turn them into a burden on the government. But, perhaps most importantly, it contravenes the International Covenant on Civil and Political Rights. This controversy is manifested by article 11 of the International Covenant on Civil and Political Rights (hereinafter referred to as Covenant) which provides unequivocally that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. In this context, according to article 2 of the Covenant, being party to this covenant shall be construed as a state's undertaking to adopt legislation that guarantees rights provided for in this Covenant, and to amend existing legislations accordingly [2]. By contrast, and in a more generic terms, article 22 of the Jordanian Execution Law (hereinafter referred to as JEL) entitles creditors in a civil obligation (contractual and/or non-contractual), notwithstanding the amount of the debt, to request the competent court to issue a decree of imprisonment to the non-fulfilling debtor, not exceeding 90 days per year, whereby the court has large discretionary power either to approve or deny such motion. Article 25 of JEL went further to state that an imprisonment sentence does not entail a discharge of future performance of the said obligation. In other words, imprisonment and discharge are mutually exclusive [3]. In this scenario, and before resorting to imprisonment orders, the courts in Jordan has a large discretionary power to determine whether the debtor is capable of paying quarter of the debt as a first installment in a scheduled plan of fulfillment under the auspices of the court. This is sought to strike the right balance between the creditor and the debtor. Apparently, all these issues are to be decided by the trial judge. If this scenario would cause hardship to the creditor, then the judge is supposed to provide a preferential treatment to the creditor at the expense of the debtor, i.e., issuing an imprisonment order.

If the benefit of debtors is disproportionate with the damage inflicted on creditors, Jordanian courts have systematically view this as an abusive use of right, particularly, where an intention of creating detrimental effects on creditors is more evident. Indeed, the Jordanian courts appear to be sympathetic to creditors.

II. RELATIONSHIP BETWEEN NATIONAL AND INTERNATIONAL LAWS UNDER THE JORDANIAN LEGAL SYSTEM

As other Arab countries, the Jordanian legal system is a civil law legal system. To be more precise, the Jordanian Civil Code (JCC) mixed civilian rules, structure, content and style with the law of Islam. In other words, rules and principles of Islamic jurisprudence shall be relied upon in the

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understanding, construction and interpretation of the law. In this respect, it is vital to acknowledge that Islamic Law is not an obscure and defective system. Some of the maxims of Moslem law are similar to those maxims that can be found in other civil codes. Some others can be also traced in the maxims of Equity in common law [4]. In a nutshell, the Jordanian law can be described as an Islamic-oriented approach which is largely based on Islamic principles as it has been derived from the Ottoman Empire Majalla of 1876, which was enacted when Jordan was ruled by the Ottoman Empire. Historically, the Ottoman Empire adopted the "Hanafi" Islamic school of thought. There are four schools of jurisprudence in Islam: the Hanafi, the Maliki, the Shafi and the Hanbali. Islamic jurisprudence studies the nature, sources, efficiency, form and substance of law and legal institutions. In Jordan, it has been said that Jordanian law has been influenced to a large extent by Islamic Jurists' comments and proposals. However, in Jordan, jurists' opinions are supplementary source of law and judges refer to such opinions for guidance only. If Islamic jurisprudence cannot provide an appropriate answer to the issue under consideration, then reference must be made to the Law of Sari'a which is based on The Holy Qur'an and the Prophet Sunnah [5]-[7].

The applied constitution of Jordan is the one introduced on the 1st of January 1952 with its amendments of 2011 [8].

As an immediate observation on the Jordanian constitution, most laws are exclusively enacted by the legislative authority. Such laws must adhere to the constitution and international law. It must be noted that the competent authority that issues these legal rules in Jordan is the legislative authority which is entrusted to the Parliament which consists of the House of Representatives and the House of Senates. It must be noted also that any legal rule issued by the Parliament must be endorsed by his Majesty, then it must be published in the official gazette before it becomes a law. Legislation becomes executable and applicable to individuals if and only if it has been published and the individuals are informed of its existence. This represents a main principle of the administration of justice which is transparency. Since it is impractical to inform each citizen of new laws, the state assumes that every object on its territory, whether citizens, residents or foreigners are informed of its laws upon their publication in the "Official Gazette".

Although the Jordanian Constitution does not provide explicit provisions regarding the supremacy of international conventions over national laws, Jordanian courts have systematically adhered to this notion. The Jordanian Court of Cassation has issued several rulings granting international treaties a higher status than Jordanian laws and legislations [9]-[13]. Having said that, article 33(2) of the Jordanian Constitution provides that treaties and agreements, which involve financial commitments to the Treasury or affect the public or private rights of Jordanians, shall not be valid unless approved by the National Assembly [8]. Unfortunately, the Covenant has not been ratified by the Parliament until now on the premises that such approval might have detrimental impact upon the Jordanians' legal statuses. In effect, this non-

ratification entitles courts in Jordan to apply imprisonment for debt rules enshrined in article 22 of the JEL with complete disregard to the Covenant terms of reference of debtors' imprisonment.

Even if the Jordanian Parliament approves the Covenant as demonstrated by current Parliamentary debate, the author argues that any potential consecutive amendment to the execution law in Jordan should acknowledge that civil obligations are not confined to merely contractual obligations. Instead, tortuous obligations under the Jordanian law should be equally excluded from debtors' imprisonment provisions. It must be borne in mind that the terms "civil obligations" and "contractual obligations" are often used interchangeably in Jordan and other Arab countries. This might have serious legal implications in construing and interpreting the wording of articles and legal provisions and ensuing obligations and liabilities thereof.

Readers should keep in mind that there is presently very little legislation, case law, or academic commentary dealing directly with constitutionality of debtors' imprisonment in Jordan. The current Jordanian law largely ignores the specific requirements and needs of this important issue. Noticeably, the case law in this area is rather limited. This reflects, to a large extent, the scarcity of litigation in Jordan with regards to constitutionality of debtors' imprisonment. On the other hand, it is worth noting that decisions of courts in Jordan do not possess legal binding authority as they are merely persuasive in nature. Judicial precedents in Jordan are supplementary source of law. As a civil legal system, the judicial decisions are considered as an ancillary source of law. This means that the provisions of the law shall apply by court in all disputes. If the court does not find an applicable provision, then it has to apply the customary rules, then courts in Jordan are bound to apply natural law or "principles of fairness". In effect, the doctrine of precedent is not applied whereby the lower courts are not enforced to follow the judgments of the higher courts on questions of law. Accordingly, this article is predominantly theoretical in nature whereby the missing element is the application of law through cases [4].

III. SHORTCOMINGS OF THE JEL

As mentioned before, the Jordanian law on obligations was not built on the rationale that creditors are supposed or required to conduct a thorough investigation on debtors' ability to repay their debts. However, it must be borne in mind that by extending the logic, one can argue that if a certain creditor was lenient and/or compassionate towards his/her debtors, this would be a base to shift the rectification of such leniency towards the state. In effect, this establishes a legal obligation on the state to use its coercive powers in compelling debtors to perform their obligations towards their creditors. It is conceived that this is not and should not be the role of the state. Moreover, logic dictates that legal relationships between creditors and debtors imply that the financial patrimony of the debtor is responsible to rectify any potential losses that might be encountered by the creditor. Any confinement on debtors' freedom is not and should not be within this formula. This

conforms to a large extent with specific performance (compulsory execution) requirement set out in article 355 of the JCC, which states that the debtor shall be obliged to perform his obligation specifically whenever that is possible. The article reads as follows: "The debtor shall after being served with a warning be obliged to perform his obligation specifically whenever that is possible. But if specific performance shall be onerous to the debtor, the court may on the application of the debtor limit the right of the creditor to the payment of monetary compensation if that does not inflict serious damage on him" [14]. Also, article 356 of the JCC reads as follows: "if the object of the right shall be work and its nature or the provisions of the agreement prescribe that the debtor shall perform it personally, the creditor may reject its performance by another. And if the debtor shall not perform the work, the creditor may secure permission from the court to perform it at the expense of the debtor, or may perform it without permission if necessity requires". Moreover, article 360 of the JCC provides that if the debtor insists on refusing execution, the court shall fix the amount of the damages with which it obliges the debtor while taking into consideration the damage suffered by the creditor and the obstinacy of the debtor. More precisely, article 360 reads as follows: "if specific performance is completed or the debtor insists on refusing execution the Court shall fix the amount of the damages with which it obliges the debtor while taking into consideration the damage suffered by the creditor and the obstinacy of the debtor". Besides, according to article 967 of the JCC, a guarantor as a joint undertaker of a certain debt might be compelled to fulfill an obligation when due. More specifically, article 967 reads as follows: "the guarantor shall fulfill his obligation when due. And if his obligation is conditional it shall be necessary when the condition materializes that the stipulation and the description materialize simultaneously. The creditor may claim against the debtor or guarantor or claim against them jointly. And if there shall be a guarantor for the guarantor the creditor may claim against the one he chooses. But his claim against either of them shall not forfeit his right to claim against the other".

Upon reading article 967 of the JCC, it might be argued that this is unfair and unjust for the guarantor since the creditor may claim against the debtor or guarantor or claim against them jointly. And if there shall be a guarantor for the guarantor the creditor may claim against the one he chooses. The same argument might apply equally to general successors under the Jordanian law. Article 206 of the JCC states that the effect of the contract shall attach to the two contracting parties and the general successors without prejudice to the rules of succession unless it is ascertained from the contract, the nature of the transaction or the provisions of the law that the said effect shall not attach to the general successors. Arguably, according to article 206 of the JCC, the effect of an obligation might attach to the general successors. Furthermore, article 23 of the JEL sets out certain exceptions for the applicability of the law in a rather discriminatory fashion. Among others, public servants and insolvent debtors, whom applies to the court of First Instance either for insolvency or protective

arrangements from bankruptcy, are normally excluded.

And finally, the vague definition of Judges' discretionary powers in article 22 of the JEL has consistently lead Jordanian courts to resort to liberal interpretation of the wording of the article by providing preferential treatment to creditors at the expense of debtors in the form of an imprisonment order due to their disparity of bargaining power. In order to combat this, the author argues that the principle of debtors' good faith should be a cornerstone in exercising such discretionary power. Particularly attention should be paid to cases where the debtor is abstaining although he/she is capable of performance. Imprisonment for debt should not be issued indiscriminately.

Acting in good faith could include reasonable disclosure of facts by debtors which may materially affect performance of their obligation. In actual fact, lack of disclosure could amount to negligent or fraudulent misrepresentation by debtors which unquestionably entails an imprisonment sentence. Unfortunately, article 22 of the JEL puts more emphasis on the existence of debt *per se*, as an excuse for issuing an imprisonment order, rather on potential capability of performing this debt by the debtor.

IV. CONCLUSION

Debtors' imprisonment is a rather vague term. Jordan lacks regulatory provisions for this important issue. Nevertheless, such practice is indirectly exercised in Jordan without giving a special legal attention to its implications legally and otherwise. Consequently, this research reviews the suitability of the Jordanian legal system in providing sufficient protection in the context of debtors' imprisonment. The author argues that there are serious obstacles in this aspect.

As far as the author is aware, the issue of debtors' imprisonment in Jordan has not been researched comprehensively in a theoretical and institutional fashion before from technical and legal standpoints. This article represents a first attempt to examine the issues arising in this difficult and important subject and the findings of this research can serve as a prototype for other Arab and developing countries worldwide. In this context, it is worth mentioning that an authenticated English translation of the JCC is available on file with the author. It is imperative to note that as with any work in English, all quoted extras have been translated from Arabic and should be treated with appropriate caution. Indeed, debtors' imprisonment is a controversial issue in Jordan and elsewhere. This controversy is manifested by article 11 of the International Covenant on Civil and Political Rights which provides unequivocally that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. By contrast, article 22 of the JEL entitles creditors in a civil obligation to request the competent court to issue a decree of imprisonment to the non-fulfilling debtor whereby the court has large discretionary power either to approve or deny such motion. Unfortunately, the Jordanian courts appear to be sympathetic to creditors.

This paper concludes that the applicability of article 22 of the JEL is ought to be in conformity with the spirit of article 11

of the International Covenant on Civil and Political Rights, and more importantly, Jordanian judges are requested to pay more attention to the notion of good faith in their perception of the aforementioned article.

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