

Theoretical Framework for judicial discretion within Qatari and Jordanian Civil Laws: Indications and Implications*

Dr. Abdelnaser Zeyad Hayajneh**

Associate professor of Law

The University of Jordan & Qatar University

Abstract

Judicial discretion is considered one of the most important topics in any legal jurisdiction; it has great significant in shaping the state legal system and achieving legislations' goals, mainly represented in fairness and stability of legal transactions. However, this topic receives poor attention from researchers; therefore it was important to tackle this issue in some detailed consideration to explore the status of judicial discretion in Jordanian and Qatari Civil laws to map out a theoretical framework for such discretion in comparison with some Arab Civil Laws.

This study will explore some indications on the relatively wide range of judicial discretion offered to judiciary in both Jordanian and Qatari Civil laws. In so doing, the study will highlight different civil law provisions in both legislations, and to mark some implications and results related to judicial discretion in Jordanian Civil Law and the Qatari Civil Law, and finally to explain the effects of this wide discretion leaves in the Jordan and Qatari Civil Laws and ultimately in the nature of the Jordanian and Qatari jurisdiction.

Keywords: Qatari Civil Law, Jordanian Civil Law, Judicial Discretion

*First draft of this paper was in Arabic and submitted to the College of Law Conference at Qatar University held 23 and 24 Nov 2014, conference title was Qatari Civil Law in its first decade.

**Dr. Abdelnaser Hayajneh is associate professor of civil law in Qatar University; he is now in leave from the University of Jordan where he is working as an associate professor of Law. His research interests cover wide range of topics related to civil law, comparative legal studies, human rights and Environmental law.

1.1. Introduction

This paper tackles a significant topic in Jordanian and Qatari Civil Laws, it attempts to explore the theoretical framework for judicial discretion in the Jordanian Civil Law no 43 of the year 1976, and the Qatari Civil Law no 22 of the year 2004 through highlighting some indications on the wide discretion entrusted to the judiciary and drawing some implications and results of such discretion. It is worth mentioning that judicial discretion receives poor attention and analysis from law scholars in both Jordan and Qatar, and the Arab States in general. This study is the first to be conducted in the State of Qatar, whereas some writings have been traced in Jordanian Jurisdiction, either in legal referred journals or public media.

Jordanian Civil Law is relatively an old civil code in comparison with the Qatari Civil Code which is the second Arab recent Civil Law¹. The Jordanian Civil Code was deeply influenced by Islamic jurisprudence, whereas Qatari Civil Code is based in the Egyptian Civil Code².

¹The most recent civil code in the Arab region is the Law of Civil Transactions of Oman no 29/2013, it entered into force in 2013, this code is available online in Arabic at: <http://omanlegal.org/law/omanlegal/omanlegal-1301.pdf>

²The Egyptian Civil Code was enacted in 1949, and it was influenced by the French Civil Code of 1804, Available online in English at <https://www.google.com/#q=french+civil+code+english+text>

It is worth mentioning that both Jordan and Qatar were subjected to the British mandate. However, this mandate was not long or heavy enough to affect Jordanian and Qatari legal system by the Anglo-American jurisdiction regarding the role of judicial authority in making the rule of law.

1.2. Hypotheses

In studying the judicial discretion under the Jordanian and Qatari Civil Laws, the paper set up two hypotheses,

- **First:** the relatively wide discretion offered to judiciary both in the Jordanian and Qatari Civil Laws.
- **Second:** the potential effects of this wide discretion on the nature of the Jordanian and Qatari legal system; having in mind that both Jordanian and Qatari jurisdictions are largely known to be civil law rather than common law jurisdictions.

1.3. Methodology

The study will apply Inductive and analytical approach through observing the main legal provisions that indicate the judicial discretion by horizontal scan for both Jordanian and Qatari Civil Codes, and then it will conduct content analyses for these provisions and compare them with their counterparts in some Arab Civil Codes.

2. Brief background about Jordanian and Qatari Civil Laws

The current Jordanian Civil Law has been enacted in 1976³; to replace the Ottoman Majallah of 1876 (Majallah al-Ahkām al-adliyyah)⁴, which was highly influenced by Islamic Law. The Majallah (the Civil Code of the Ottoman Empire) was regarded to be the first and the most important attempt to codify Islamic Jurisprudence.

Historically, most Arab countries ruled by the Ottomans and applied the Majallah as the code for civil and commercial transactions, until these countries have their own civil and/ or commercial codes.

The Majallah applied in trans-Jordan emirate 1921-1946 and it continues to be applicable in the Hashemite Kingdom of Jordan since 1946 to present. However, Jordan introduced its' national Civil Law in 1976, and this law entered into force in Jan 1st 1977, without any major amendments or review. It is worth mentioning in this regard that, Jordanian Courts shall apply the Majallah as long as it's' rules did not contradict the rules prescribed in the Jordanian Civil Code⁵.

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

As for the State of Qatar, before 2004 civil transactions were regulated by the Law no 16 of the year 1971 for civil matters, it only dealt with the theory of obligations, until the current Civil Law no 22 entered into force in 2004⁶. This Law contains of 1186 articles and is more comprehensive and organizes different topics usually included in civil codes. The Qatari Civil Law no 22 of the 2004 depends heavily on the Egyptian Civil Law no 131 of the year 1948.

³ Published in the Jordanian Official Gazette on page 2, issue no 2645 dated 1/8/1976

⁴ Majallah al-Ahkām al-adliyyah, Available online in Arabic at: <http://www.moj.ps/images/majallatalhkam.pdf>

⁵ Article 1448 of the Jordanian Civil Code reads as follows: "the rules of Majallah al-Ahkām al-adliyyah shall be repealed to the extent that it contradicts the rules of this code".

⁶ The Qatari Civil Law no 22 of the year 2004 was published in the Official Gazette issue no 11 in 8/8/2004 and come into force in 9/9/2004.

3.1. Definition of judicial discretion

Judicial discretion was defined as “the mental activity made by the judge to fully understand the facts presented before him, so as to decide the applicable legal rule on the dispute, it is basically the freedom offered to the judge to encounter the circumstances related to the enforcement of law”⁷. Other scholars defined judicial discretion as a space left to the judge by explicit or implicit legislative provisions to allow him to decide a case according to its own circumstances⁸.

To comment on these definitions, one can say that the judge’s function is not only to automatically apply legal rules, but also to ascertain and understand the facts of the case, then to decide the case in light of its facts and circumstances with the most appropriate legal rule. This basic fact shows the significance of the judicial profession. Moreover, legal rules may be vague; and the judge has to interpret the rule to decide the intention of the legislator before applying the rule.

3.2. Advantages of providing judges with discretion

The legislator opts to provide judges with discretion while applying the law for many reasons;

- **First:** Providing judges with discretion enhances judges’ sense of ethical responsibility to deliver justice.
- **Second:** widening judge’s discretion reflects legislator’s appreciation for the judiciary.
- **Third:** judicial discretion indicates legislator willingness to offer the judiciary the chance in making legal rules.
- **Fourth:** discretion allows the courts to approach the facts of each case and apply the law appropriately.

3.3. Disadvantages of providing judges with discretion

Allowing judges a wide discretion has some risks and disadvantages; these can be outlined as follows:

- **First:** giving the judiciary a wide discretion contradicts the separation of powers; which means that each power in the state has a certain function to perform; Parliament to enact legislations, Executive to enforce the law, and run public utilities, and Judiciary to settle disputes.
- **Second:** judicial discretion threatens the legal unity in the state by means of rulings, as a result of different understanding and application of law.
- **Third:** extensive judicial discretion threatens justice; through weakening the generality of legal rules.
- **Fourth:** judicial discretion could lead to misuse of power. Therefore, a doctrine of judge’s liability in case of malpractice, fatal error, negligence should be introduced, as well as giving the higher court the authority to overrule the lower courts’ decisions in cases where the courts misuse their discretion.

4.1. Judicial discretion under Jordanian and Qatari Civil Laws

Exploring Jordanian and Qatari Civil Laws reveals legislative willingness to provide the judiciary with discretion. However, this legislative trend slightly varies under Jordanian and Qatari Civil Law provisions. This trend reflects legislator’s respect for the judiciary function by leaving a certain margin for judges to decide the rule of law in many provisions which indicate this trend, these indications can be traced in certain doctrines under Jordanian and Qatari Civil Law;

- Official sources of legal rules

⁷ Nabeel, Amr, “Judge Discretion in Civil and Commercial matters”, 1984, Munsha’at Al Ma’aref, Alexandria, Egypt, 1st edition, p 91, see also, Deyab Aqel & Mohammad Al Omari, “Judge Discretion and its applications in Sharia Courts”, Amman, Jordan, *Derasat Journal, Law and Sharia*, V 35, Issue 2.

⁸ Abbas, Al Hussieny, “judicial discretion for judge”, Iraq, Karba’a University, available online at: <http://law.uokerbala.edu.iq/index.php/art/125-different-articles/265-the-discretion-of-the-judge>. See also, Sa’ad Al khurashi, “Judge Discretion in the Judicial Oath”, KSA, *Judicial Journal*, V 4, available online at: <http://adl.moj.gov.sa/Alqadaeya/attach/861.pdf>

- Concept of public order
- Flexible language of legal articles
- Certain rules related to civil securities
- Discretion under civil liability rules
- Judicial discretion in matters related to conflict of laws
- Legal rules related to Terminal Disease

These indications will be explored and discussed as follows;

4.2. Official sources of legal rules

Article 1 of the Qatari Civil Law no 22 of the year 2004 provides that “1- The statutory provisions shall apply, expressly or impliedly, to relevant issues dealt with by the provisions herein. 2- Where there is no statutory provision, the Judge shall rule according to the relevant provision of the Islamic Shariah, if any. Otherwise the Judge shall rule according to the customary practice. In the absence of such customary practices the Judge shall rule in accordance with the rules of justice”.

This article provides directions for judges in the application of civil law on disputes presented before them, according to the arrangement stipulated by the article, judge shall decide cases according to the provisions of civil law. In the event that the court finds that no provision of the civil code is applicable to case, it shall refer to Islamic *Shariah*. It is to be highlighted here that no specific instructions on how the court refers to Shariah; therefore, the court may refer to the Holy Qur’an, Prophet Mohammad legacy, or Islamic jurisprudence “*Mathaheb*”.

This provision provides the judge with wide discretion to choose the suitable solution from Islamic resources. And in case the judge cannot decide the case according to Islamic resources, he shall then refer to customs, and finally the court shall decide the case according to the rules of justice.

Although this article seems typical in its content, it is distinguish in comparison with its’ counterpart in the Jordanian Civil Law, which reads as follows “the provisions of this law shall apply to all case, and there shall be no diligence “*Ijtihad*” where the provision exists, if there is no provision applicable to the case, the judge shall decide the case according to Islamic jurisprudence “*Fiqh*” most compatible to the provisions of the law, in the absence of the of such *fiqh*, the judge shall decide the case according to Islamic *Shariah*, the customs, and lastly according to the rules of justice”. Moreover, the Jordanian legislator emphasizes that while ruling civil litigations according to these sources of rules, court shall be guided by judicial precedents and scholar’s writings.

Apparently the Qatari provision seems more flexible in providing judge with discretion than the Jordanian provision in main two points;

- It does not prohibit or even mention *Ijtihad*, leaving the general rule related to *Ijtihad* applicable, since the express prohibition of *Ijtihad* in the first article of the law implies a narrow trend toward judicial discretion.
- It refers the judge to Islamic *Shariah* in the absence of legal provision; while Jordanian provision refers judge to Islamic jurisprudence “*fiqh*”, and within this jurisprudence, the judge shall make reference for jurisprudence most compatible to the law.

These two points marks a wider judicial discretion offered to Qatari judiciary in deciding civil litigations; taking into account the importance of civil law in the state’s legal system, and the very fact that article one of the civil law decides in a compulsory wording the sources from which the judge shall have the rule of law.

It is to mentioned that historically, both Qatar and Jordan was under the British mandate, however this face did not result in making their legal system similar to Anglo-American system. Therefore, judicial

precedents have no official authority, though courts in Qatar and Jordan shall refer to precedents only for guidance.

4.3. The notion of public order

The Qatari legislator does not approach or define the notion of public order in any legal provision, nor determine matters or topics related to public order. Therefore, the whole task has been totally left for courts discretion to decide what public order is, and what matters are to be parts of the public order. Whereas, Jordanian legislator offer the judges some guidance by setting some examples on things and matters that are to be considered parts of the public order.

The concept of public order is one of the most crucial albeit vague notions in the law; it refers to fundamental values and considerations that are essential for the existence and welfare of the society, but this determination does not make the notion of public order any clear; since the degree of flexibility is somewhat high it determining what is essential and crucial for the existence, survival and welfare of a society; these essentials are to be measured in an objective bases by enlightened judges, and the judge shall be aware of the changing nature of these essentials from time to time and in different localities.

The term public order was mentioned many times throughout the Qatari and Jordanian Civil Laws. However the Jordanian approach towards what is related to public order was relatively clear; since Article 163/3 numbers some examples of matters related to public order i.e. Rules of legal capacity, inheritance, dispositions of real estate, matters related to Islamic *Waqf*, public domain, compulsory pricing, and laws for consumer protection in exceptional circumstances.

Apparently, Jordanian judge has an easier task to determine matters related to public order, however, they cannot exclude the above mentioned matter from being parts of public order, by contrast the Qatari judiciary seems free to determine such matters in lights of the circumstances and the facts of each case, the Qatari courts are guided and overwhelmed by the flexible definition and nature of public order. For example, the Qatari Court of Cassation considered certain matters related to public order such as basic rules and procedures of litigation, the right to legally challenge judicial decisions, whereas it excludes burden of proof, rules of evidence from being related to public order.

4.4. Flexible language used in many provisions

The legislator uses flexible and sometimes vague language in many provision within Qatari Civil Law, examples are to be found throughout the Civil Code, however, few examples will be provided here to indicate the wide judicial discretion offered to judiciary in settling down civil dispute.

Some examples are mentioned in the legal rules related to construction contract. Article 688 of the Qatari Civil Law reads as follows “1- Where, during the progress of the work, it appears that the contractor is performing the work in a *defective manner* or in breach of the contract; the employer may *notify* the contractor to *correct* the method of performance within such *reasonable time* as determined by the employer. Where such period expires without remedy of such breach, the employer may demand termination of the contract or obtain a license from the court to perform the work at the cost of the contractor if the nature of the work so permits. 2- The employer may demand termination of the contract without notice or time limit if the correction or remedy of the breach is *impossible*. 3- In any event, the court may reject the request for termination if *the defect in the method of performance has not decreased to a large extent the value of the work or its utility for the intended purpose*, without prejudice to the right to indemnity, as applicable”.

And also Article 692/1 which provides for “1- Where performance of the work requires a specific action within a specific time period by the employer but he fails to act within such time period, the contractor may demand the employer to act within such *reasonable time* as determined by the contractor”. Besides Article 694 which states that “1- The employer may reject taking over the work if any defect therein or

breach of the agreed conditions renders the work *unfit for its intended purpose*. 2- Where such defect or breach has not rendered the work unfit for its intended purpose, the employer may only demand a *reduction in the sum owed to the contractor to the extent consistent with the significance of such defect* or breach or, 3- where a remedy is available at *reasonable cost*, he may require the contractor to remedy such defect or breach within such *reasonable time* as determined by the employer”.

Three remarks can be noticed in the above mentioned provisions;

1- the legislator opted to use flexible words, terms, and expressions in these provisions, i.e. “defective manner”, “reasonable time”, “the defect in the method of performance has not decreased to a large extent the value of the work or its utility for the intended purpose”, “unfit for its intended purpose”, “reduction in the sum owed to the contractor to the extent consistent with the significance of such defect”, “reasonable cost”, “notify”.

2- The legislator provides the judge the right to reject the request for termination “rescind the contract”, notwithstanding the facts its’ justifications are available.

3- The legislator did not specify the form of notification, despite the major importance for this notification in determining the legal statues of the parties.

The above mentioned provisions indicate that the legislator direct the judge to be aware of all circumstances, facts and arguments surrounding the contract wherever parties invoked the application of these provisions, since the legislator believes that the competent court is a better situation to estimate the facts and render a suitable settlement according to the circumstances and the provisions of law. It is to be highlight in this regard that, approximately all provisions related to construction contract was almost formed in the same direction so as to offer the courts a wide discretion when reviewing litigations raised by such contractual relation.

As for construction contract under the Jordanian Civil Law regulated in articles 780- 804, the legislator seems more decisive in setting up the rules, with little discretion left to courts. The Jordanian legislator avoid using flexible terms or phrases while deciding the effects and rules of construction contract, it is only time the legislator used the terms like “defective manner” and “reasonable time” in article 785. Other articles were more decisive with clear and determined terms.

4.5. Judicial discretion under the doctrine of "Lien"

Lien is a civil security assigned by the judiciary according to the creditor request within certain requirements and within the courts’ discretion. Article 1116 of the Qatari Civil Law states that “Each creditor who obtains an enforceable judgment issued in the subject matter of the suit and which binds the debtor to something may in good faith obtain a lien on the property of his debtor as a security for the original debt and expenses. The creditor may not, after the death of the debtor, obtain a lien on any property of the estate”. Then Article 1120 of the Qatari Civil Law stipulated that “The creditor who wishes to obtain a lien on the property of his debtor shall file an application before the court of first instance in whose jurisdiction the properties for which the creditor wishes to obtain such lien are situated⁹.”

⁹According to the same article “Such application shall be accompanied by an official copy of the judgment or a certificate from the clerk’s office of the court, including the pronouncement of such judgment and the following information:

- The name of the creditor, his title, profession, and original domicile or chosen domicile as he may specify if his original domicile is not situated in the court’s jurisdiction
- The name of the debtor, his title, profession and domicile
- The date of the judgment and the court which issued it
- The amount of the debt

The chairman of the court shall record his order of lien at the bottom of the application. After an order of lien is issued, the amount of the debt and the value of the property as set out in the application shall be assessed on an approximate basis. The chairman of the court may, if necessary, limit the lien to certain property or to one part thereof, if he decides that such limitation is sufficient to secure the payment of the original debt and the expenses payable to the creditors¹⁰.

Lien stands as an indication for the wide judiciary discretion in civil law, since the law offers the competent court the right to decline creditor petition to assigned lien without specifying certain reason for this rejection¹¹.

As for the Jordanian Civil Law, it does not provide for lien, the only civil securities available for creditor who wishes to maximize or guarantee his rights are mortgage, surety – contractual securities-, and having right of privilege –specified by provisions of law.

4.6. Different provisions offered wide judicial discretion

Having scanned Qatari and Jordanian Civil Laws, one can noticed that many provisions within these laws offered the courts with relatively wide discretion, below are some examples:

4.6.1. Civil liability for minor

Article 200 of the Qatari Civil Code provides that “1- A person shall be liable for his illegal conducts if committed while he is conscious, 2- however, if damages occurs as a result of minor conducts, and there was person observing him, then the judge may award just compensation to the plaintiff taking into consideration the legal and financial status of the parties”¹².

In this Article, the legislator leaves the authority of awarding damage to the judge, when the defendant is a minor, this compensation may not amount to the full compensation¹³, and rather, it is just compensation, which might be less than the actual damage suffered by the plaintiff. However, the Jordanian Civil Code provides for the same rule regardless the legal capacity of the defendant, being him minor or mature. The same rule contained in Article 256 in the Jordanian Civil Code will apply in all case of tort¹⁴, and the plaintiff shall be illegible for full compensation.

4.6.2. Compensation for damage occurred in the state of emergency

According to article 206 of the Qatari Civil Code which has the same wording of article 168 of the Egyptian Civil Code, “anyone causes damage to another so as to avoid bigger and imminent damage to him or others shall be liable for appropriate compensation determined by the judge”. In this article the legislator went beyond the general rule in tortious liability which indicates full compensation as a rule for any damage caused by the wrongful conducts of the defendant.

As for the Jordanian Civil Code, the general rules apply to all cases of tort regardless of the fact that the defendant commits tort in normal or emergency circumstances¹⁵.

-
- Where the debt stated in the judgment is not defined, the chairman of the court shall assess and determine the amount for which the lien shall be ordered
 - The exact description and location of the properties, together with the papers confirming the value thereof”

¹⁰ Article 1121 of the Qatari Civil Law no 22/2004

¹¹ Article 1124 reads as follows “Where the chairman of the court rejects the application for lien filed by the creditor, whether at the first instance or after the grievance filed by the debtor, the creditor may file grievance against such rejection before the court of first instance”.

¹² Article 163/2 of the Egyptian Civil Code has the same rule.

¹³ Full Compensation is a term refers to the fact that compensation shall equalize the damages resulted from the wrongful conduct, or that the plaintiff shall be compensated for the whole damage and nothing but the damage.

¹⁴ Article 282 of the Emirate Civil Transactions Act no 5/ 1985 provides for the same rule of civil liability.

¹⁵ The full compensation rule applies also under the Emirate Civil Transactions Act.

4.7. Judicial discretion in matters related to conflict of laws

The legislator entrusted judge with wide discretion in some matters related to conflict of law; this discretion appears in three important cases;

First: the case of Statelessness and Dual citizenship

When the national rule of private international law indicates that the law of the person's nationality shall apply in certain matter brought before the national court, and the person has dual citizenship or stateless, the Qatari judge shall decide the applicable law on his own discretion. Article 35/1 of the Qatari Civil Law provides that "In the case of persons of unknown nationality or of a person of simultaneous plural nationality, the law to be applied shall be decided by a judge", the same rule is adopted by the Jordanian Civil Law on Article 26. This rule provides judge with discretion to decide the applicable law, scholars and judiciary widely apply the criteria of de facto nationality, which assumes that person in fact will be attached to certain nationality, and that this de facto nationality is to be considered as his real nationality in the a private law context¹⁶.

Second: Public order as a mean to exclude the applicable foreign law

Article 38 of the Qatari Civil Law provides that "The provisions of a foreign law applicable by virtue of the preceding Articles shall not be applied if they conflict with the public order or morals in Qatar. In such event, the Qatari law shall apply"¹⁷. This article provides judge with wide discretion to decide what public order means in private international law context to exclude the foreign law to protect the fundamental values of the national legal system.

The Qatari legislator did not provide for a certain definition for public order nor provide examples of what matters are regarded elements of public order; whereas Jordanian legislator in Article 163/3 of the Civil Law provides some examples of matter related to public order i.e. rules related to legal capacity, inheritance, real estate registrar, etc.

Third: application of the general principles of private international law

Article 34 of the Qatari Civil Law states that "The principles of private international law shall apply in the case of a conflict of laws for which no provision is made in the preceding Articles"¹⁸. This article refers national judges to the universal principles of private international law. Therefore, the judge shall decide on his own discretion what rule is regarded a universal principle of private international law; given the fact that principles of private international law are not clear or codified, and the judge shall exercise wide discretion in determining these principles¹⁹.

4.8. Legal rules related to Terminal Disease

The Jordanian Civil Law provides for a certain definition for terminal disease in Article 543/1 which approximately reads as follows "Terminal illness is a disease that cannot be cured or adequately treated and prevent the patient from running his ordinary business or life, and that result in the death of the patient within one year" however, some legislators determine this period by less than one year²⁰. The Qatari Civil Law does not provide any legal definition for terminal disease. Although, this trend leaves

¹⁶ The Omani Civil Transactions Law, provides for a different rule, when Article.. states that "the Omani Law shall apply in the case of stateless or dual citizenship persons "

¹⁷ Article 29 of the Jordanian Civil Law provides for the same rule.

¹⁸ Article 25 of the Jordanian Civil Law provides for the same rule.

¹⁹ For more about judicial discretion in private international law, see Khair alddien al Ameen "Judicial discretion in private international law", 2008, Babel University Journal of humanities, Vol 15, issue 2, available online at: <http://www.iasj.net/iasj?func=fulltext&aId=35131>

²⁰ Six months as specified by some legislators

wide discretion to court to decide what disease is considered terminal, but the specification of certain condition on the disease that could be considered terminal seems better due to the crucial legal effects entails²¹. Qatari Courts must decide on their discretion what is terminal disease and specify certain conditions to such disease by referring to Islamic jurisprudence, comparative jurisdictions.

5.1. Civil law and Anglo-American jurisdictions: brief facts, and classification

States are divided into main categories as per for the nature of their legal system, the main classification is civil law jurisdiction and Anglo- American jurisdiction, below are some brief facts and figures related to these jurisdictions;

- *There are approximately 150 States adopt the civil law jurisdiction, whereas around 75 states follow the Anglo- American jurisdiction²².*
- *In Anglo- American jurisdiction the role of the judge is significantly wider than the role of judge in Civil law jurisdiction.*
- *Judicial precedents are obligatory and must be followed in the Anglo- American jurisdiction, whereas it has no binding effect in civil law jurisdiction, and courts may refer to judicial ruling only for guidance.*

However, there has been noticeable rapprochement between the civil law and Anglo-American jurisdictions; this rapprochement was the result of different elements i. e.

- Globalization and admixture among people and states due to the advancement of transportation and telecommunications.
- There is a trend in the Anglo- American states towards codification of legal rules and.
- There is a trend in the civil law states to offer judiciary a wide discretion while applying the law.

5.2. Judicial precedents in Qatar and Jordan

In light of the above mentioned sources of legal rules in Qatar and Jordan, one can conclude that: in theory, judicial precedents have no binging effect in Qatar and Jordan. However, the Jordanian legislator made reference to judicial precedents when Article 2/4 of the Jordanian Civil Law emphasizes that while ruling civil litigations according the sources of rules - mentioned in the same article- , courts shall be guided by judicial precedents and scholar's writings. Even in Qatar, courts may refer to judicial and/ or scholar's writings for guidance.

In practice, and according to some scholars²³, courts in both Qatar and Jordan take into consideration judicial precedents, and attempt to make their ruling in conformity with these precedents to avoid their ruling being challenged or overrule the court of appeal or the court of cassation "the highest Court in the Qatari and Jordanian jurisdictions".

²¹ Some legislations deals with Terminal Disease from totally deferent perspective, it tackles the issue of terminal illness and dying with dignity without making any reference to its definition, or impact on the patient legal capacity to conclude contract and legal dispositions. See for example the Irish Civil Code, available online at: http://one-ireland.org/code_civil/article_0000.htm

²² See the official website to the CIA at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>, and <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-musulman.php>

²³ See Mohammad Hatim Albayat, "Basics about Qatari Judicial System: past and present", Damascus University Journal for economic and legal sciences, 2009, Vol 25, issue 1, available online at: <http://www.damascusuniversity.edu.sy/mag/law/images/stories/57-108.pdf>

Some scholars affirmed this trend adopted by the Qatari courts by saying that the lower courts follow the court of cassation rulings as if it is legal rules²⁴. And generally, French legal system is considered the origin of civil law "Latin" jurisdiction, which deny any obligatory effect for precedents, given the fact that Article 5 of the French Civil Code stated that "Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions"²⁵, and that Article 4 of the same code stipulates that judge shall decide cases brought before him even in the absence of legal legislative provision, and if the judge refrain from deciding the case he shall be charged for committing denial of justice.²⁶

In this context, it is worth mentioning the argument made by famous American Jurist and Judge Richard Posner when he stated "The judicial role is also different in a career judiciary – the system in the Continental European countries, Japan, and indeed most countries in the world in which a judge begins his judicial career right after law school and progresses, as in the normal civil service, to more and more responsible judicial positions. In fact, judges in those systems are civil servants. Their advancement depends on their satisfying their superiors' expectations, and the result is the kind of disciplined, docile, and modest decision making characteristic of civil servants. In our judiciaries, and particularly in the federal court system with its lateral entry into positions that carry lifetime tenure, the role played by the judge is bound to be different and freer, especially given the individualism that is so characteristic of Americans. Similarly, elected judges exhibit less political independence than non-elected ones"²⁷.

However, some writers still argue that: "Under the contemporary pressure of globalization, modern civil law and common law systems show several signs of convergence. Many of the differences that used to exist between the civil law and common law systems are now much less visible due to the changes which have occurred both in common law and civil law. In the common law, regulatory law has achieved a greater importance leaving less room for the courts, while in the civil law the role of the courts in the creation of law has greatly increased, As a result of these processes going to opposite directions, many of the differences between common law and civil law look now more like nuances rather than major differences"²⁸.

6.1. Results

After exploring main indications within Qatari and Jordanian Civil Laws that offer judiciary certain degree of discretion or wide range discretionary authority, the study finds that;

- It is obvious that the Qatari legislator offers courts with relatively wider discretion than the Jordanian legislator do.
- Judicial discretionary authority - whether in Jordan and Qatar- offers the court with a needed flexibility while applying the law to each and every fact. This flexibility should be used in a rational manner so as to achieve justice without compromising the reason, fairness and case facts and realities.

²⁴ Maggdi Abdelsalam "Realistic vision for the Civil Law within Qatari Court of Cassation Rulings", a paper submitted to the Qatar University college of Law conference, "The Qatari Civil Law in its first decade" 23 and 24 November 2014.

²⁵ French Civil Code in English, Available online at: <https://www.google.com/#q=french+civil+code+english+text>

²⁶ Article 4 of the French Civil Code reads as follows "A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice"

²⁷ Richard Posner, "The Role of the Judge in the Twenty-First Century", 2006, Boston University Review, Vol. 86:1049, pp 1049-1068, available online at: <https://www.bu.edu/law/central/jd/organizations/journals/bulr/volume86n5/documents/POSNERv.2.pdf>

²⁸ Caslav Pejovic, "Civil Law and Common Law: two different paths leading to the same goal", Victoria University of Wellington Law Review, v.32, no.3, August 2001, p.817-841, Available online at: http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf

- The practical importance of judicial precedents apart from being legally binding leaves space for court to understand, *interpret*, and apply provisions of law according to what it consider just and appropriate.
- The non-binding effect for judicial precedents keeps the Qatari and Jordanian legal system as civil law jurisdiction.

6.2. Implications for the breadth of judicial discretionary authority and recommendations

While it will be exaggeration to conclude that Qatari and Jordanian legal systems are moving toward being Anglo-American jurisdictions; it is still true to assume that, the breadth of judicial discretionary authority in Qatar and relatively in Jordan stands as an indication for the rapprochement between the civil law and Anglo-American jurisdictions.

Below are some recommendations that the study provides to enhance the debate over this issue and to be considered by the decision-makers while reviewing the civil law in both Qatar and Jordan;

- It is of great importance that the Qatari and Jordanian judiciary realizes and exercise its' wide discretionary authority in a rational manner with standards so as to build a unique legal and judicial heritage in the Arab region.
- Enhancing the training programs offered for judges and candidates for judicial positions, and sends them off to study, training for states with Anglo-American and civil law jurisdiction.
- It may be appropriate to think of having all civil courts consist of panel of judges rather than one single judge to avoid misuse and or arbitrariness of discretionary authority.
- Expansion of jurisdiction set for the court of cassation so as to include courts' competence to monitor the judges' exercise of their discretionary authority.
- Provide a legal system for a suit quarreling judges to avoid any potential default, arbitrariness or abuse of discretionary authority.
- Develop and organize the subject of expertise admitted by a court of law by stipulating strict criteria on one who commissioned an expert.

References

- Richard Posner, "The Role of the Judge in the Twenty-First Century", 2006, Boston University Review, Vol. 86:1049, pp 1049-1068, available online at: <https://www.bu.edu/law/central/jd/organizations/journals/bulr/volume86n5/documents/POSNERv.2.pdf>
- Caslav Pejovic, "Civil Law and Common Law: two different paths leading to the same goal", Victoria University of Wellington Law Review, v.32, no.3, August 2001, p.817-841, Available online at: http://www.victoria.ac.nz/law/NZACL/PDFS/Vol_6_2000/Pejovic.pdf
- Nabeel, Amr, "Judge Discretion in Civil and Commercial matters", 1984, Munsha'at Al Ma'aref, Alexandria, Egypt, 1st edition.
- Deyab Aqel & Mohammad Al Omari, "Judge Discretion and its applications in Sharia Courts", Amman, Jordan, Derasat Journal, Law and Sharia, V 35, Issue 2.
- Abbas, Al Hussieny, "judicial discretion for judge", Iraq, Karba'a University, available online at: <http://law.uokerbala.edu.iq/index.php/art/125-different-articles/265-the-discretion-of-the-judge>
- Sa'ad Al khurashi, "Judge Discretion in the Judicial Oath", KSA, Judicial Journal, V 4, available online at: <http://adl.moj.gov.sa/Alqadaeya/attach/861.pdf>
- Khair alddien al Ameen "Judicial discretion in private international law", 2008, Babel University Journal of humanities, Vol 15, issue 2, available online at: <http://www.iasj.net/iasj?func=fulltext&aId=35131>

- Mohammad Hatim Albayat, “Basics about Qatari Judicial System: past and present”, Damascus University Journal for economic and legal sciences, 2009, Vol 25, issue 1, available online at: <http://www.damascusuniversity.edu.sy/mag/law/images/stories/57-108.pdf>
- Maggdi Abdelsalam “Realistic vision for the Civil Law within Qatari Court of Cassation Rulings”, a paper submitted to the Qatar University college of Law conference, “The Qatari Civil Law in its first decade” 23 and 24 November 2014.
- Majallah al-Ahkām al-adliyyah, Available online in Arabic at: <http://www.moj.ps/images/majallatalhkam.pdf>
- Law of Civil Transactions of Oman no 29/2013, available online in Arabic at: <http://omanlegal.org/law/omanlegal/omanlegal-1301.pdf>
- French Civil Code of 1804, Available online in English at <https://www.google.com/#q=french+civil+code+english+text>
- The Omani Civil Transactions Law no 29 / 2013, available online at: <http://omanlegal.org/law/omanlegal/omanlegal-1301.pdf>
- French Civil Code in English, Available online at: <https://www.google.com/#q=french+civil+code+english+text>
- The Irish Civil Code, available online at: http://one-ireland.org/code_civil/article_0000.htm

Brief biography

Dr. Abdelnaser Zeyad Hayajneh is an associate professor at Law School in the University of Jordan and currently working as an associate professor in college of Law/ at Qatar University. He graduated from Newcastle University with a PhD in Civil and Environmental Law.

Dr. Abdelnaser Hayajneh is the author of three published books. He also published many articles in the field of Civil Law and Environmental Law, Islamic Legal Literature, and Human Rights

- Environmental Law: General Theory with explanation of Environmental Legislations (book)
- Legal Terminology: Learn, Proceed and have Fun (book)
- Environmental Law: Environmental Legislations in the United Arab Emirates”. (Book)
- Evaluating the efficiency of the Jordanian legal Rules related to Joint Ownership (Article)
- Statutory Legislation in the Holy Qur’an: Sorat Yusuf as a Model (Article)
- The Awarding of Punitive Damage under the Jordanian Civil Law: Is it Possible? (Article)
- New Rules in the Jordanian Amending Landlords and Tenants Act No 17 / 2009 (Article)
- Special Judicature, Again and Again: Does Jordan need to establish special Environmental Court? (Article)
- Vanishing Borders: Can Human Rights be a subject of Private Law? Exploring Human Rights under Jordanian Civil Law (Article)
- Just Compensation as a condition for the legality of Expropriation under the Jordanian Expropriation Law (Article)
- Legal Surgery: the Need to Review Jordanian Civil Law (Article)
- Legal Protection for the Environment in Jordan and the United Arab Emirates: Comparative Outline (Article)
- Evaluating the Legal Rules Governing *Terminal Disease* under Jordanian Civil Law and the Qatari Civil Law: New Approaches (Article)

- The Status of Environmental Rights in the Constitutions of the Gulf Corporation Council Countries (Article)