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The Negative Aggravation of the Legal Provisions In the Iraqi Civil Code

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ABSTRACT.

The legal rules in Iraqi legislation suffer in many of its texts from defects in legislative drafting and good legal casting. This, in turn, poses obstacles for researchers when they study and analyze the legal texts and rules in Iraqi legislation, which leaves a situation of confusion when putting these texts into practice. In addition, this leaves a situation where there is a lack of clarity when putting these texts into practice. Therefore, this research intends to study and analyze the legal rules present in Iraqi legislation to diagnose the contradictory and repetitive texts and exceptions that dominate the original, as well as to identify the texts that are not justified to come up with practical solutions for this issue.

JEL Classification: K12,
K13, K20

Keywords: negative aggravation, legal provisions, Civil Code

Introduction

When it comes to researching and evaluating legal laws, scholars have a great deal of difficulty due to the complexity of legal texts. One example is the jurisprudential disagreement that might arise about whether the location is a cornerstone in the contract or the commitment. If Article 126 of the Iraqi Civil Code specifies a reference, then every obligation resulting from a contract must be included to be subject to the judgment of that article. And Article (127) if the obligation's goal cannot be fulfilled." In addition, Article 128 states that the committee's goal must be clear,..." The preceding passages make it abundantly evident that the legislator made the object a cornerstone of the duty and not a cornerstone of the contract. As a result, the object of the obligation is what he undertakes, which means that the cornerstone of the obligation is the object. Both the debtor and the debtor are compelled to contribute something, such as transferring ownership of the item that was sold or negotiating a right in kind on the item that was pledged to satisfy the obligation. As for the subject of the contract, it is the legal process intended to be achieved by mutual consent, which is realized from a number of obligations arising from the contract. As for the subject of the contract, it is the legal process intended to be achieved by mutual consent. The concept of a store that places explanations in one specific area This research attempts to study and analyze the legal rules in the Iraqi legislation and diagnose conflicting and repeated texts and exceptions that dominate the original and know the texts that are not justified to develop effective solutions to this problem.

1. First Requirement

1.1. The concept of exacerbation

I mean, the concept of exacerbation is a statement of what exacerbation is and its definition Subchapter I: The nature of the aggravation of legislative texts The legal rules in the Iraqi legislation suffer in many of its texts from defects in the legislative drafting and good legal casting, and this, in turn, formed obstacles in front of researchers when they study and analyze the texts and legal rules in the Iraqi legislation, which in turn left a state of confusion when putting these texts into practice.

1.2. Definition of exacerbation:

Definition of exacerbation in the language: increased gluttony and increased danger, increased and inflated,

Definition in the language of the law: The custom of jurisprudence is the aggravation of the increase in the number of laws issued each year or is the accumulation of texts over time and the lengthening of laws that are often displaced outside their field or lost in the chatter, and they contribute to making the law somewhat difficult and unstable ⁽¹⁾It can be defined as an increase, repetition, and contradiction, or a case of an exception that overshadows the original, or the inclusion of an unjustified provision in the legislation of a law that would lead to difficulty in analyzing its provisions and thus create confusion when applied².

We will discuss the content of the definition successively

1 For the increase and EJ in the case of the existence of two texts to treat the same case so that the amputation of any of them does not lead to a breach in the application of the law, for example, the text of Article (526) (the price is not an allowance for the sale and relates to the liability) and then usually the legislator in the text of the article that follows and stipulated that the price is estimated in cash and thus became Article (526) difficult to apply from a realistic point of view ³, As well as Article (779) of the Iraqi Civil Code, the lease contract ends at the end of the period specified in the contract without the need for a notice of eviction unless it is stipulated in the contract that the lease extends to another specific or indefinite period when the eviction is not notified at a certain date before the expiry of the lease period.

Article (780) of the same law states: "If the lease contract expires and the lessee remains a beneficiary of the leased property with the knowledge of the lessor and without objection from him, the lease shall be deemed to have been renewed under the first conditions, but for an indefinite period. It is noted that the legislator has mentioned two concepts for the continuation of the rental relationship, namely the extension of the agreement in the text of Article (779) and the implicit renewal according to Article (780). This matter is unnecessary because the text of Article (780) is sufficient for a unit to accommodate the concept of the continuation of the rental relationship, especially since the provisions of the lease contract in civil law are not of public

⁽¹⁾ Savatia .. SAVATIER ,Quoting Dr. Abdul Karim Saleh Abdul Karim and slave Allah Fadel Hamed, Inflation of legal rules, research published in the Journal of Tikrin University, 2014, p. 144

⁽²⁾ Dr. Tahseen Ahmed Samael - Exacerbation of negativity in the provisions of the Iraqi Civil Code and the mechanisms of its treatment, The Third International Conference For the judiciary Legal , 2015 , p 234

³ Article (527) In the case of an absolute sale, the price must be estimated With criticism ... etc.)

order. It should be noted that most Arab laws do not contain a text corresponding to article 779 of the Iraqi Civil Code.⁴ Second, as for the case of an exception that overshadows the original: for example, the Real Estate Lease Law No. (78) of 1979, amended by Law No. 56 of 2000, excluding real estate completed on 1/1/1998 from the provisions of the rent and legal extension, thus making the existence of the real estate rental law useless in legal life. Thirdly, about repetition: the legislator has made to tighten the ownership of classes in two different systems, the first is the ownership of the upper and lower, which he derived from Islamic jurisprudence in articles (1082-1086) of the Civil Code, and the second is the system of floors and apartments in the Real Estate Registration Law, which he derived from French law, and there is no doubt that this situation is not sound⁵ as the legislator should unify the ownership of floors and apartments in one legislation to avoid repetition

Fourth, we note that the conflict: it occurs between two different provisions in two different legal rules so that it makes the description opposite to the previous description (), for example, the text of ⁶ Article (68) of the Iraqi Civil Code number (the original rights in kind are the right of ownership, the right of disposal, the right of infertility, the rights of benefit, use and the right of long lease), as The legislator made the right of long lease of the rights in kind original, and the contradiction lies in the concept contrary to this right, which is the right of short lease, which is considered a personal right, this is the contradiction in which the legislator fell () ⁷ There is no doubt in the big difference between the right in kind and the personal right because the right in kind ⁸ direct authority on a particular thing in particular either the personal right entitles the creditor to claim the debtor to do an action or refrain from doing as the The right in rem entitles the owner of the right of preference without the personal right, as well as the text of Article (740) AD stipulates (if the lease contract is for a period of more than thirty years or it is for life etc) through the analysis of the aforementioned text, we find that the Iraqi legislator stipulated the possibility of holding the lease for a period of perpetuation, that is, the legislator granted the lease one of the characteristics of the right of ownership, which is perpetuation, and this position is the subject of criticism, so how can the lease contract, which is one of the term contracts, turn into a perpetual contract in which the benefit is separated from the ownership, and the ⁹ conflict may occur within the text of one article, for example, the text of Article (219), where it stipulated in the first paragraph (for the government, municipalities

⁽⁴⁾Javad Kazem Javad Simaism , The Role of Duration in the Lease Contract, Zain Human Rights Publications, 1st Edition, 2011, p. 73

⁽⁵⁾ Dr. Mohammed Taha Al-Bashir. Dr. Ghani Hassoun Taha , Rights in rem , Atak Book Industry '3rd Edition, 2009, p. 144

⁽⁶⁾ Abbas Ali Al-Ali The concept of contradiction and contradiction, quoting Improve Ahmed Samael , p. 253 , Ibid.

⁽⁷⁾ Improve Ahmed Samael . Ibid., same page

⁽⁸⁾ For more details see Dr. Muhammad Taha Al-Bashir, Dr. Ghani Hassoun Taha, same reference, p. 7

⁹ Dr. Jawad Kazem Javad Simaism . Turn around Duration In the lease contract, 1st floor, Zain Law Library 2011, p 26

and other institutions Responsible for the damage caused by their users Etc. As for the second paragraph, it indicates that the servant can get rid of responsibility if it is proven that he has taken the necessary care, and the face of the conflict lies in the fact that the issuance of an error from the server is a conclusive presumption of proof of negligence in the servant because the latter has the authority to direct and control the follower

Fifth, the texts are unjustified: For example, the text of Article (506) of the Iraqi Civil Code if the sale contract is defined as (an exchange of money for money), while it is understood from the text of Article (507) and beyond related to the sale contract that the purpose of the sale contract is to transfer ownership in exchange for the price, and this is what made the text of Article (506) an unjustified number in the Civil Code¹⁰ Sixth, confusing texts, for example, the text of Article (97), if it is indicated (that the actions between benefit and harm are held dependent on the guardian's leave) that the question that arises in this regard is there a separation between the beneficial and harmful behaviors? As well as the Real Estate Lease Law No. 87 of 1979, amended by Law No. 56 of 2000 in the first paragraph of Article III (extends under the law the rent covered by the provisions of this law as long as the tenant remains an occupant of the leased and continues to pay the rent) that special laws come in exceptional circumstances Specific cases are dealt with. Then after the disappearance of the exceptional circumstance, these laws remain in force and create a state of confusion when applying that the text of the above article makes the lessee take possession of the property of the lessor despite the will of the latter and whatever the circumstances, except for the legal reasons for abandonment. Therefore, we suggest to the Iraqi legislator to reformulate the text of the article to be in this way (if the lease period has expired and it is proven that there is an urgent need to extend it, it extends as much as necessary, provided that the tenant pays the same wage for it). In line with the provisions of Islamic jurisprudence, the extension of the lease contract in Islamic jurisprudence is based on necessity, and necessity is estimated as much, for example: If a lactating woman is hired and the lease period has expired, the breastfeeding woman may not refrain from renewing the lease and be forced to do so if the child does not wear the breast of another⁽¹¹⁾

⁽¹⁰⁾ Doctor Abdul karim Saleh Abdul karim and slave Allah Fadel Hamed, Inflation of Legal Rules, research published in Tikrin University Journal, 2014, p. 148

(¹¹ Zain al-Din Ibn Najim al-Hanafi, The Clear Sea Explanation of the Treasure of Minutes, Dar al-Maarifa, Beirut, undated, vol. 8, p. 26, quoted by Dr. Muhammad Ali Al-Samran, Jordanian Dar Al-Iftaa

2. Cons of exacerbation of texts

1- Difficulty for researchers in their study of the texts of laws :

The aggravation of legal texts raises great difficulties for researchers when studying and analyzing the legal rules, for example, the jurisprudential difference in whether the shop is a pillar in the contract or the obligation ⁰¹² if Article (126) of the Iraqi Civil Code provides a reference to each obligation arising from an added contract that is subject to its ruling. Article (127) if the object of the obligation is impossible....." Article 128 The object of the obligation shall be specified..." It is clear from the advanced texts that the legislator made the shop a pillar in the obligation and not a pillar in the contract, the place of obligation is what the debtor undertakes. The debtor is committed to either giving something, such as transferring ownership of the thing sold, or arranging a right in kind on something as a mortgage, either the place of the contract is the legal process intended to be achieved through mutual consent. This process is achieved for a number of 3. Conducting research and results from The quantitative component of the research placed a premium on data collection, processing, and analysis. In a survey conducted during the research, a nine-level Likert scale was used to assess respondents' perceptions and assessments of the dependent variable (transitional crisis), as well as the independent variables (heritage of socialism, geopolitics, nomenclature authorities, deficit of institutional changes, and neoliberal ideology). The dependent variable (transitional crisis) was quantified using a scale ranging from lowest (1) to most significant (5). The independent factors' negative influence on the dependent variable was quantified from a minimum of (1) to a maximum of (5). The study required respondents to complete 500 questions for each nation (Iraq, Syria, and Egypt), totaling 1,500 respondents. SPSS software was used to process the data collected for this investigation. Descriptive statistics were employed for data analysis, correlation analysis, and multi-correlation under the goal specified in the working hypothesis. A multiple linear regression model was used (using the least-squares approach), and a hierarchical multiple regression model was used. obligations arising from the contract 'It should be noted that the modern trend goes to merge the idea of the shop with the reason¹³ in one corner

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⁽¹²⁾ D. Abdul Majeed Al-Hakim, Explanation of the Iraqi Civil Code, Sources of Commitment, Baghdad Legal Library, 1977, p 180

¹³ Research published on the Internet accessed on 4/11/2019 at 8:25 PM
http://www.moqatel.com/openshare/Behoth/Ektesad8/-Ekood/sec04.doc_cvt.htm

¹⁴ Article 1128 of the amended French Civil Code went on to merge the idea of reason with the object in one corner when it asked that the content of the contract be legitimate and specific.

2-Confusion in the application and legal instability: The idea of legal stability means that the legal rules are certain and specific in their organization of the legal centers and to ensure the security of the results and e j of the first goals that the law seeks to achieve ⁰¹⁵ The essence of legal stability lies in the lack of surprise in the issuance of legislation ⁰¹⁶ , i.e., must The commitment of the legislative authorities to a degree of stability in legal relations to spread a kind of security and tranquility between the parties to the legal relations.

3- Loss of the rights of individuals due to their lack of understanding of legislation: The legal formulation must be clear and understandable by the addressees, i.e., they must understand the illiterate and the world or any group that differs in their scientific, economic, cultural and social skills, for example, Article (179) (stipulates that if the contracted party perishes by an act or by force majeure and he must return the compensation that he received to the owner).

The question in this regard is who is meant by the owner, so if the legislator means the owner, is that before or after the contract, in the sale, who is the owner of the thing, the seller or the buyer? On the one hand, and the other hand, if the property perishes in the hands of the lessee, it will perish on the lessor, even though it was not in his hand. Nevertheless, he is the owner of this¹⁷ text and other texts, which is incomprehensible even to legal scholars, so how is the case for the average person?

4- A large number of legislation in force, the number of Iraqi legislation in force reached the year 2004 about 27543 ⁰¹⁸ between laws, regulations, and instructions, and this large number indicates something indicates the confusion of the legislator and his instability and gluttony in the enactment of legislation.

3. Causes of legislative exacerbation and mechanisms for its treatment

3.1. Section I Causes of exacerbation

Several reasons aggravate legislative texts

1- Literal transmission of comparative laws: For example, when referring to the preparatory work of the Iraqi Civil Code in the introductory chapter of it, we find that many legal texts are a repetition of the texts of the Egyptian Civil Code.¹⁹

⁽¹⁵⁾ Research published on the Internet, stability is one of the purposes of the law Accessed on 29/10/2019 at 12:54 AM <http://www.publicationns.zu.edu.eg/Pages/PubShow.aspx?ID=14729&pubID=19>

⁽¹⁶⁾ Dr. Abd Al-Moneim Al-Badrawi, p. 168, quoting the previous source

¹⁷ Dr. Abdul Majeed Al-Hakim, previous source, p. 433

⁽¹⁸⁾ United Nations Development Program, quoting the same source

¹⁹

2- Diversity of sources of law: Among the main reasons for the aggravation of legislative texts is the dependence of Iraqi law on two sources, namely Islamic law and French civil law, in an unstudied manner, and there is no doubt that this situation is not sound, comparative law indeed contains advanced ideas that keep pace with the progress in social and economic life, but it must be taken in a way that does not lead to the aggravation of legal texts, for example, the legislator's organization of the provisions of The renewal that he derived from Roman jurisprudence and also his organization of the provisions of hawala ²⁰ () that he derived from Islamic jurisprudence, despite the lack of importance in distinguishing between them.

3.2.Improper legal wording

Legal drafting: It is equivalent to transforming the primary article that makes up the law into practical rules valid for actual application in a way that achieves the end that is revealed by its essence, and this is done by choosing the means and tools to ensure the honest translation of the content of the rule and give it the practical form in which it is suitable for application ⁽²¹⁾

An example of the defects of legal drafting is what was stated in Article (136). The authorization of the suspended contract is explicitly or indicative and is based on the time when the contract was made. Its validity is required (the presence of those who own it at the time of issuance of the contract) (we do not understand what is meant by the presence of those who own the license, as the words of the scholar Abdul Majeed Al-Hakim), is it meant that whoever owns the license at the time of the contract must remain alive until the leave If he dies, it is no longer possible to authorize the contract from others, but this result cannot be accepted. If the minor acts before the guardian permit it, this guardian dies, and the court appoints a guardian for the minor, is it not possible for the guardian to authorize the contract? Also, if the minor reaches the age and wants to authorize the contract, will he not be able to do so?) !

Legal drafting is an important element for understanding and absorbing legal texts, and the defects of the wording leading to the aggravation of legal texts are:

1. error in the language: for example, in the text of Article (185) of the promise to make it give to those who do a certain work obligation to give the make to those who did this work, we note that the word promise came undefined by thousands and the lam, although it is at the beginning of the speech if there is no other promise other. As well as the text of Article (793) of the Iraqi Civil Code (The tenant may, if he is an employee or employee or required to change the domicile, terminate the rent of a dwelling if this lease is for a fixed period,....." The text on

⁽²⁰⁾ Dr. Ammar Al-Fatlawi, lectures delivered to graduate students, University of Kufa / College of Law, other than It's nice. , 2019

⁽²¹⁾ Dr. Mohamed Hussein Mansouri, Theory of Law, Dr.R. University Publishing, 2009, p 276

its status is close to leading to the instability of financial transactions if the lessee can depart from the contract at any time he wants because the legislator has been right and used (F optional) instead of (F conjunction) before the word required and correct use (F conjunction) to achieve the goal desired by the legislator of the text²².

Article (392) of the Iraqi Civil Code also stipulates, "If the debt is current, the debtor may not force his creditor to accept some of it without others, even if it is subject to remuneration."

It is noted that the word (some) has been introduced by the legislator Elf and pain, while the word some does not enter thousands and pain because it is defined in addition to the word appreciation²³

2. typographical error or finger: the error that occurs due to omission and confusion of the fingers, for example, the text of Article (191) as it stipulated if a boy damaged distinctive or non-distinguished or the like of the money of another obligated to guarantee from his money two and if it is not possible to obtain compensation from the mother of the damage occurred from him whether a boy or crazy). We note that the legislator has mentioned crazy, and the right thing is (crazy) because it is based on a word erected, and it seems that it is a typographical error²⁴

3 Wandering and gossip: Wandering in the sense of shadows and loss, and chatter in the sense of a lot of talk without benefit. For example, the Iraqi legislator has allocated (47) articles to tighten tort liability, which articles (186 232) are unique to the Iraqi legislator without the rest of the contemporary legislation. As we mentioned earlier, the reason for this is that He tried to combine the provisions of positive law and the provisions of Islamic law in the Journal of Judicial Judgments in particular and the books of Islamic jurisprudence in general. For example, Articles (187, 186, 188, 189, and 190) in Article (186) stipulate that the destruction of one of the properties of others or the decrease in its value is a reason for the guarantee if the damage is the result of deliberate or error, then usually again in Article (187) and stated that the demolition of the property of others is a reason for compensation, and Article (188) decided that cutting down the trees of others is a reason for the guarantee, Article (189) If a person said to the people of the market this and I have sold him goods, I authorized him to trade and then Zhr after that the boy was born is not the people of the market to demand the price of the goods they sold to the boy and compensation for other damages, and decided

²² D. Javad Kazem Jawad Simaism , Former reference, p

²³ Dr. Abdul Majeed Al-Hakim, Judgments Altza M Atak Book Industry , Cairo , 2019 , p 413

²⁴ D. Abdul Majeed Al-Hakim, previous reference, p. 500

Article (190) if one of them destroyed the money of the other even though it is his money within what was destroyed²⁵

All of the above articles could have been summarized in Article (186), not to mention the poor wording of Article (189) because the issue of giving examples in the legal rule is unacceptable. After all, one of the characteristics of the legal rule is generality and abstraction, so the speech in the legal rule is not addressed to a person with a sample, but the lesson in it is the generality of the capacity²⁶ And also the right of pre-emption, as the legislator allocated to it (17) articles starting from (1128-1144), despite its lack of importance in legal life, especially after the issuance of the decision of the Revolutionary Command Council on 24/2/1978, where the right of pre-emption was limited to the partner in the residence house only, provided that he does not own a house of residence independently.

4. Treatment of aggravation of legal texts

The legal legislation does not have the character of sacredness. It is man-made, and, naturally, someone else comes to amend it or replace it, and the treatment of the aggravation of legal texts is through radical reform of the legal system, so we must, from time to time, restore order in a particular area threatened to be a mass of chaos^{()27} where States seek from time to time Others amend their laws that are not consistent with the new temporal changes and replace the old useless texts with new ones that achieve the purpose of reforming the legal system, and the aggravation of legal texts is treated either the issuance of a new civil law, which is unlikely at present, especially with circumstances such as ours, but a radical amendment can be made in the civil law Provided that specialized bodies shall be formed in the formulation and construction of legal rules to amend as follows :

4.1. First, reducing the sagging of legal rules

The legal rules in the Iraqi Civil Code suffer from sagging legal texts, there are not a few inflated rules, which in turn need to be streamlined and amputated for these texts, for example, the text of Article (162) if it stipulates (the creditor may transfer to others what he has of the right to a debtor, unless prevented by a provision in the law or the agreement of the contractors, The transfer is done without the need for the consent of the assignee) We note that the rule speaks regarding transferable rights, and if it moves and unthoughtfully to talk about the lack of need

²⁵ D. Hassan Ali Al-Dhanoon , The General Theory of Commitment, Al-Sanhouri Library, Baghdad, pp. 213-214

²⁶ Dr. Hammam Mohamed Mahmoud, Introduction to the Theory of Law, 1st Edition, Al-Halabi Human Rights Publications, 2010, p. 32

(1) Martez Mjeres , quoted by Dr. Nabil Zwain Reform in the theory of obligation in French civil law - research published on the Internet

for the consent of the assignee, and the legislator has shown in Article (364) that it is not permissible to transfer the right except to the extent that it is seizable and it was more appropriate for the legislator to put the text of this article with Article (362) instead of mentioning the phrase (lack of need for the consent of the assignee)²⁸ As well as the text of Article (357) stipulated (the assignee shall not return to the assignor unless he stipulates in the transfer the option) We note that the word (option) must not be crammed into the text or the text of Article (78) Iraqi civil stipulated (the contract between absentees has been made in the place and time when the offeror knows the acceptance unless there is an explicit or implicit agreement) if it is possible to dispense with the dissolution (explicit or implicit) Because there is no other type of agreement,

4.2.Second, limit as much as possible the exceptional legislation:

We also said that special legislation is legislated under exceptional circumstances, especially after the demise of these circumstances, the exceptional provisions remain applied and thus create a state of confusion or legal instability, such as the Real Estate Lease Law No. 87 of 1978 and its amendments, where the exceptional circumstance, which is the housing crisis, has passed. However, the law is still applied to the real estate built before 1/1/1998. The legislator must unify the legal rules in one legislation to avoid repetition. The same applies to the Minors Welfare Law and the Real Estate Registration Law²⁹.

4.3.Third:

Involving judges of the Court of Cassation in the amendment because they are the most in contact with the application of the law and the problems of society:

4.4.Fourth:

Reliance on Islamic Sharia, comparative law, and judicial applications, taking into account the repetition of texts As for Islamic law, it must be adopted in a way that does not contradict modern developments and the needs of society. As for comparative law, it is inevitable to rely on it, especially with the modern development of comparative laws. As for judicial applications: they can also be relied on because these applications are in direct contact with the citizen and thus closest to the needs of society

²⁸ Dr. Abdul Majeed Al-Hakim, Provisions of Commitment, previous reference, p 321

²⁹ Note the conflict between the text of Article (590) of the Iraqi Civil Code and the text of paragraph (g) section (a) of Article (20) of the Law on the Management of Minors' Funds No. (47) of 1969 as amended by Law No. (32) of 1972 with regard to the guardian's disposal of the minor's funds

Conclusions and Discussion

As a result of our research, we discovered that the Iraqi Civil Code contains many legal texts. The primary reason for this is that the Iraqi Civil Code relies on two sources that provide conflicting information: the French Civil Code, which quotes the Egyptian Civil Code, and Islamic Sharia, which combines these three sources in an unstudied manner. In addition, many exceptional laws supersede even the provisions of the Civil Code and reduce many of the texts to meaningless numbers. Some examples of these laws include the Law on the Care of Minors, the Real Estate Lease Law, and the Real Estate Registration Law, amongst others. Because of this, it is necessary for the intervention of the legislator to treat these exceptions in a manner that ensures they do not confuse them. The Iraqi Civil Code has not undergone any significant changes from the time it was first published to the present day; this is the primary reason why it does not keep up with the progression of current life in terms of comparable legislation. Therefore, we recommend issuing a new civil code or a radical amendment to the existing civil law that is commensurate with the changes introduced in social, economic, and political life. In addition, civil law should keep pace with temporal and spatial changes as much as possible by employing experts from specialists in law, politics, sociology, and economics. In addition, the judges of the Court of Cassation should be involved in contributing to the development of legal rules because they are the ones who have the most.

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