

زوال ولاية القاضي واثرها في الحكم القضائي
المدنى

**The Elimination of the Judge's Mandate and its Effect on
the Civil Judiciary**

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الملخص

ان وظيفة القضاء هو حماية النظام القانوني وحماية الحقوق والماكل القانونية، وذلك بطلب مقدم إليه من أصحاب العلاقة، وعن طريق إصدار قرارات وإحکام تزيل حالة التجهيل الذي يكشف الحق او المركز القانوني المراد حمايته، حيث يترتب على صدوره اكتسابه حجية الأمر المقصري فيه، والتي تمنع من إعادة عرض النزاع مجدداً بين نفس الخصوم ولذات الموضوع والسبب .

ولكي يكتسب الحكم القضائي حجية الأمر الم قضي فيه، يجب صدوره من قاضي في حدود ولايته القضائية، وان يصدر كذلك بشكل المقرر قانوناً، فإذا زالت او انفت الولاية القضائية عن القاضي ولأي سبب فيترتب على ذلك نتائج وأثار مهمة، ولما كان قانون المرافعات المدنية العراقي لم يعالج هذا الموضوع لذلك نحاول في هذا البحث الوصول الى أفضل السبل القانونية لمعالجة الموضوع أعلاه .

الكلمات المفتاحية (قاضي، محكمة، ولاية، حكم، زوال، قضاء)

ABSTRACT

The function of the judiciary is to protect the law system and the law rights and centers by a request applied to it by the concerned persons, and by issuing decisions and verdicts that remove the state of ignoring which surrounds the right or the law center wanted to be protected in which it gets the binding force of the thing judged owing to its issue which prevents the review of the dispute among the same fellows for the same subject and cause.

For the judicial verdict to get the binding force of the sentences, it must be issued by a judge in limits of his judicial sponsorship, and a legally decided form. So, If the judicial sponsorship removed from the judge, for any reason, there will be important results that we will deal with in this study.

And since the Iraqi Law of civil pleadings did not address this issue, we will try in this study to find the best legal ways to address the above topic.

Keywords (judge, court, state, judgment, demise, judiciary)

Introduction

The function of the judiciary is to protect the law system and the rights and law centers by a request submitted by the concerned persons, and by issuing decisions and verdicts that remove the state of ignoring which surrounds the right or the law center wanted to be protected in which it gets the binding force of the thing judged owing to its issue that prevents the review of the dispute among the same fellows for the same subject and cause.

So, the judicial verdict is considered as the most important stage of the case because it is the main aim that the fellows try to get it to grant their law rights and centers. Therefore, the law of the civil pleadings is interested with the rules in terms of their procedures, organization and the stages of their issues. For the judicial verdict to get the binding force of the thing sentences, it must be issued from a judge in limits of his judicial sponsorship. Also it must be issued in the legally decided form. So, if the judicial sponsorship removed from the judge for any reason, there will be important results that we will deal with them in this study.

Problem of the Study

The main problem of the study is represented by the fact that the civil case consists of some judicial procedures initiating with building up a lawsuit till the issue of the decisive verdict in it. For the judicial verdict to get the binding force of the thing judged, it must be issued from a judge in limits of his judicial sponsorship. So, if this sponsorship is removed from the judge during the period between the building up of the lawsuit and the issue of the verdict in it, important results and signs will arise. Since the active the Iraqi civil Law of Pleadings has not dealt with this subject, we have chosen it as a subject for our study.

Plan of the Study

This study is divided into two requests. So, in the first request, we talk about what meant by the judge's sponsorship and the cases of its removal. In the second request, we deal with the consequences of the removal of the judge's sponsorship, and we have finished the study with some conclusions and suggested recommends

THEFIRST REQUEST

What Meant by the Judge's Sponsorship and the Cases of Its Removal

Article (29) of the Pleading Civil Law, No.(83) for (1969) provides that: the sponsorship of the civil courts goes on all the persons, natural and artificial, including the government and it specializes in settlement in disputes except those that have been excluded by a special version and it came in the principle in the third item.

For that, the sponsorship of the judiciary creates the judicial protection for everyone wants, and on any person either natural or public artificial or special including the government. The validity of the judicial verdict must issue from a court formed legally. The formation of the government must subject to a decision issued from the Higher Judicial Council specifying the judges obliged to work in the different courts. The judge cannot exert his work without issuing a decision obligating him to work in this court, or his verdict will be null absolutely related to the general system because the verdict has issued from a judge whom has not granted the judicial sponsorship to settle in the case or the cases that he issues or contributes to issuing a verdict through them⁽¹⁾.

So, we will divide this request into the following types:

⁽¹⁾Dr. Mohammed Saeed Abdu-Al-Rahman, The Judicial Verdict, Al-Halabi Legal Publications, Beirut, f1,2011. P.34 .

The First Type: What Meant by the Sponsorship of the Judge and How to Get It

The Second Type: The Cases of the Judge Sponsorship Removal.

THE FIRST TYPE

What Meant by the Sponsorship of the Judge and How to Get It

Linguistically, sponsorship means nearness and the verb sponsor means to take responsibility regarding something, and the noun welaya , in genitive, as Arabic word, refers to authority⁽¹⁾.

Idiomatically, it is the power that is granted to the judge to settle in disputes among the individuals according to the law⁽²⁾.

For the judicial verdict to be valid, it must be issued from a court formed legally and from judges having judicial sponsorship.

Because of the important role that the judges play and the responsibility that they bear, the legislations in choosing the judges differ from one country to another according to the difference in the political, social, regional and economic circumstances for each country. The ways of choosing can be classified into:

1. In common choosing: according to this way, the choosing of the judges is done by the judicial corporation itself. This way is followed in Belgium⁽³⁾.
2. Public election: according to this way, the choosing of the judges is done through the election, as in the U S A , Swiss and United Russia⁽⁴⁾.
3. The choosing of judges done by the designation by the government. In this way, the judges are designated by the Executive Authority, as in France and Egypt. In Iraq, the Higher Judicial Council nominates the qualified for designation from the graduates of the Judicial

⁽¹⁾ Mohammad Bin Abi-Bakr Bin Abdu-Al-Qader Al-Razi, Mukhtar Al-Sahah, House of Al-Resala, Kuwait, 1983. P.737

⁽²⁾ Adam Wahaib Al-Nadawi, The Civil Pleadings, Al-A'atek for Producing Books, Cairo, 2009.P.76 .

⁽³⁾The previous reference.P.39 .

⁽⁴⁾Dr. Abbas Al-Aboodi, Explanation of the Rules of Pleading Law, Mosul University, 2000. P.56 .

Institute⁽¹⁾ and then sends the names list of nominees to the presidency of the republic to issue a republic decree concerning that⁽²⁾.

THE SECOND TYPE

Cases of the Removal of Judge's Sponsorship

For the judicial verdict to be valid, it must be issued from a court formed legally, in addition to that, it must be issued from a judge having judicial sponsorship. But this sponsorship may face obstacles or cases lead to its removal either in an absolute and final way or in a temporarily and relative way.

So, we will deal with this subject in two paragraphs:

First: The Temporary or Relative Removal for the Judge's Sponsorship.

Some obstacles or circumstances that lead to the removal of the sponsorship temporarily may occur in the judge's sponsorship when looking at the civil case. He will remain a judge, but with the change of the spatial specialty for exerting his sponsorship or limiting this exertion so he cannot

look at the cases shown to him. The obstacles or circumstances that lead to the removal of the sponsorship temporarily are the change of the spatial or qualitative specialty, or the invalidity of the judge for judiciary or preventing him to settle in some cases or preventing him temporarily to look at the cases as a whole⁽³⁾, so we will talk about these cases as the following:

1. The Change of the Spatial Specialty of the Judge:

The change of the spatial specialty of the judge may happen by transferring him to another court whether the transference is inside the appeals area or outside it. So, he must be transferred from the province or the city or the district he works in into another province. But this transference must subject to some conditions, so the judge with the fourth rank cannot be transferred to any place except the towns and districts. Also the judge cannot be transferred before he spends three years in one place. The judge with the fourth or third or second rank also cannot stay without transference for more than five years⁽⁴⁾.

⁽¹⁾ The seventh article of the amended law of judicial institute No. 33 for 1976.

⁽²⁾ The article 3- sixth of the law of higher judicial council No. 45 for 2017.

⁽³⁾ The article 59 of the judicial organization law .

⁽⁴⁾ The article 50 of the judicial organization law .

It is worth noting that the transference is either by a request from the judge or from the head of the Appeals Court and by issuing a decision from the Higher Judicial Council.

2.The Change of the Qualitative Specialty for the Judge

The judge can be transferred from one court to another in the same appeals area. As we noted before, one or more courts of first instance must be established in the center of each province or town. It can be established in districts by a statement issued from the head of the Higher Judiciary. Usually, when the Court of First Instance forms, some establishments also form with it like the Court of Personal Status, the Court of Investigation, the Court of Misdemeanors in addition to any court needs to be formed. So, it is possible to transfer the judge from the Court of First Instance into the Court of Personal Status in the same town or district, in this case, the spatial specialty has not changed, but the change has occurred in the qualitative specialty, i.e. his judicial sponsorship concerning the court of first instance has removed and has got a new sponsorship in the Court of Personal Status⁽¹⁾.

3.The Invalidity of the Judge for Judiciary⁽²⁾

When the judge exerts his work as a judge, the case shown to him can have some circumstances and confusions that may affect his psychology and then affect the verdict of the case. To protect the judge from himself and from the people and to protect the people from him, the legislator put some legal versions that solve this problem and they obliged the judge not to look at the case in certain cases. The law also allows for any party of the case to get the request of the judge's answer for the case in certain situations⁽³⁾.

4.The Temporary Removal for the Judge's Sponsorship Concerning Looking at All Cases

The judge's sponsorship may be removed from looking at the cases temporarily through building up the disciplinary case against him. If the committee of the judges' affairs in the higher judicial council during looking at the case found that the act belonging to the judge is a felony or a misdemeanor, it will decide to send him to the special court and sends all

⁽¹⁾ The article 18 of the judicial organization law provides that: the head of the executive court supervises the courts and their works in his area and distributes work among its judges and he can authorize one of his deputies for what he sees that it is of his power.

⁽²⁾ These states dealt with the articles 93, 94, 95, 96 of the civil pleadings.

⁽³⁾ Dr. Amina Al-Namr, The Pleadings Law, House of University Culture, Cairo, 1982.

the papers after the head of the Higher Judicial Council suspends the judge according to the Law of the Discipline of State Employees⁽¹⁾.

Secondly: The Absolute or Final Removal for the Judge's Sponsorship

The judge may face some situations or circumstances that lead to the removal of judicial sponsorship in a final and absolute form so he will not remain as a judge⁽²⁾. The cases that cause the removal of the judge's sponsorship in a final form is the death, the end of the service, retirement, the transference to a civil employment outside the town. There are some states that the judge is not allowed to look at some cases in a final form also, so we will show these states briefly:

1. The Death

The personality of the human begins when he is born and ends with his death. So, it is natural to remove the judge's sponsorship when he dies⁽³⁾.

2. The End of the Service

If a judge having punishment against a verdict and issued from a special court because of an action does not fit the honor of the judicial employment, or if a committee of the judges' affairs states his invalidity to continue in the judicial service, so the committee decides to end the judge's service⁽⁴⁾. Then, the Higher Judicial Council takes his decision to suspend the judge till the republic decree issues. In this case, the judge's sponsorship removes in a final form begins from the date of the decision regarding the suspension of the Civil Retirement Law.

3. The Retirement and Resignation

a. Retirement: The judge's sponsorship removes when he retires after completing the age of sixty three, and he can retire before that according to his request according to the rules of the Civil Retirement Law⁽⁵⁾.

b. Resignation: The judge can resign from his employment by a written request to his reference (The Higher Judicial Council) and this reference must take its decision during a

⁽¹⁾The article 61 of the amended judicial organization law No. 160 for 1979.

⁽²⁾ Dr. Ramadhan Ibrahim Alam, The Nonexistent Judicial Verdict, Al-Wafaa Library, Alexandria, 2013. P.90 .

⁽³⁾ The article 34-1 of the amended Iraqi civil law no. 40 for 1951.

⁽⁴⁾The article 58-thirdly of the amended judicial organization law no. 160 for 1979.

⁽⁵⁾The article 42-firstly of the amended judicial organization law no. 160 for 1979.

period does not exceed thirty days. The judge is regarded untied when the period of time ends unless the order of acceptance issues after that⁽¹⁾. Therefore, the judge's sponsorship removes if there is a decision issued from the Higher Judicial Council or after the end of the thirty days that are legally specified.

4. The Transference to a Civil Employment outside the Town

The judges sponsorship ends when he is transferred to another civil employment outside the town in which the higher council can transfer the services of the judge with the fourth class to a civil employment according to a decision confirming that he is not qualified for judgment. A decision of the suspension of the judge is issued till the issue of the republic decree for his transference to a civil employment with the knowledge of that his sponsorship ends from the date of the issue of the suspension decision⁽²⁾.

5. Preventing the Judge from Looking at Some Cases

There are some situations in which the judge is forbidden to settle in some cases and then his sponsorship removes even it is still valid compared with the others. So, the judge who is not Muslim cannot run the court of the personal status, or contribute to the corporations related to the personal status for the Muslims. So, the prevention includes all the cases concerned with the personal status for the Muslims. The judge who is not Muslim will not take any sponsorship in these cases⁽³⁾.

THE SECOND REQUEST

The Affection of the Removal of the Judge's Sponsorship

The issuing judicial verdict or the verdict which will issue in the cases shown to it owing to the removal of the judge's sponsorship has important legal signs. These signs differ whether the removal of the sponsorship is before the pleading end or after the pleading end and before issuing the verdict in it. so, we will divide the request into the following types:

The First Type: The removal of the judge's sponsorship during the pleading and before its end

⁽¹⁾ The article 35 of the amended civil service law no. 24 for 1960.

⁽²⁾ The article 59 – firstly of the judicial organization law.

⁽³⁾ The article 28-secondly of the amended judicial organization law provides that : the judge who is a Muslim of the court of first instance is considered a judge for the court of the personal status if there is no judge for it.

The Second Type: The removal of the judge's sponsorship after the pleading end

THE FIRST TYPE

The Removal of the Judge's Sponsorship during the Pleading and before its End

The judge's sponsorship concerning looking at the case may be removed during the pleading and before the court decision . Here a question will arise about the procedures taken by the judge, if they are cancelled or nullified, or stay in consideration for the judge who succeeds him. The affair differs whether these procedures are concerned with the public system or not.

We will try in this type to shed light on these procedures and on how the judge's sponsorship affects them through the following paragraphs:

Firstly: The Affection of the Removal on the Procedures Concerned with the Public System

During the show of the case in front of the court and for the verdict to be issued, the judge must take some procedures obligated by the law. These procedures are various and many .For example, building up a secret pleading in circumstances that the court cannot make the session secret⁽¹⁾.The other procedure is that the court does not ask the fellow who was incapable of proving his lawsuit to make his fellow take an oath or not⁽²⁾. Also one of these cases is when the judge takes a procedure without informing the other parties which deprives them from the right of the sacred defense⁽³⁾, or forming the court of appeals consists of two judges instead of three, or violating the legal rules concerned with the session system. The question that is arisen:Are these procedures that the ancestor judge did in consideration for the successor judge?

To answer this question, we want to state firstly that the Pleading Civil Law has not talked about this subject. Secondly, there are two states that must be differentiated, the first one is if the procedures done by the ancestor judge suit the law, the successor judge can depend on these procedures and does not cancel or restore them. the second one is if the ancestor judge

⁽¹⁾ The article 61-firstly of the civil pleading law .

⁽²⁾ The article of 118 of conformation law .

⁽³⁾ Mohammad Ahmed A'abdeen, Voiding of Verdicts, Al-Ma'aref Institution, Alexandria,2013. P.83 .

(228)..... **The elimination of the Judge's**
commits a contravention, the successor judge must restore the procedures because of their nullity⁽¹⁾.

Secondly: The Affection of the Removal on the Procedures not Concerned with the Public System

They are the procedures decided for the service of the fellows, so the court does not talk about them spontaneously unless the fellows want that. There are many examples of these procedures in the civil pleading law. For example, the articles (46) and (50) of the law referred about the data that must be found in the case request or the codes or the photos of documents, also the rules which are concerned with the spatial specialty⁽²⁾.

The question here is about the commitment of the successor judge concerning the procedures done by the ancestor judge. Since the Pleading Law has not solved this case, so we see that the successor judge can acknowledge these procedures and does not restore them since they are not concerned with the public system, and there is no affection on the path of the case since just the fellows have the right to make a contestation for these procedures⁽³⁾.

THE SECOND TYPE

The Removal of the Judge's Sponsorship after the Pleading End

The judge's sponsorship may remove from looking at the case after the court to end the pleading, so does this situation affect the verdict which will issue in the case?

Article (156) of the Pleading Civil Law provides that if the case is ready to issue the verdict, the court decides to end the pleading, and then it issues its verdict in the same day, or determine the utterance of the verdict in another time not exceeding fifteen days from the date of valuation of the pleading end.

Here, another stage begins, it is the stage of consultation among the judges. It is noticed that the Pleading Civil Law has not talked about the consultation directly, but it suffices in the reference to the fact that the verdicts are issued by the agreement of opinions or by the majority⁽⁴⁾. It also has not dealt with the state of the removal of the sponsorship of one of the judges and its affection on the verdict that will issue in the case.

⁽¹⁾ The article 203/3 of the civil pleading law .

⁽²⁾ The article 74 of the civil pleading law .

⁽³⁾ Dr. Esmat Abd Al-Majeed Bakr, The Proceedings of Civil Pleadings, Jiha University, Erbil, 2013. P.145 .

⁽⁴⁾ The article 158 of the civil pleading law.

This stage is considered as one of the important stages concerning issuing the verdict in which the verdict cannot be issued when the sponsorship of one of the judges is removed. So, the corporation must be completed by another judge and opening the door of pleading again so that the pleading can happen in front of the who judge who took the place of the judge whose sponsorship removed for any reason. Then the amending of the pleading will be recited and the parties of the case or their agents ratify on it, and then the court decide the pleading end and issues its verdict⁽¹⁾.

It is worth mentioning that the Iraqi Law of the Code of Criminal Proceedings dealt with the article 161 the state of the change of the judge and the procedures that must be followed in this side, so we will suggest adding an item to the law of the Iraqi civil pleading to solve this situation.

CONCLUSIONS

After finishing the study, we have got the following results and recommends:

FIRSTLY: THE RESULTS

1. We got through the study what meant by the judicial sponsorship and the states of getting this sponsorship and its conditions.
2. The removal of the judges sponsorship may be temporarily or relative, or final or absolute.
3. The removal of the judges sponsorship during the pleading and before its end, and its affection on the procedures concerned with the public system and the procedures not concerned with the public system.
4. The affections because of the removal of the judges sponsorship after the pleading end.

SECONDLY: THE RECOMMENDATIONS

1. We recommend to add an article to the second book / the first section (the verdicts) the first chapter – public verdicts and as follows:

'Only the judges who took part in the consultation can take part in the consultation or the verdict will be null'.

2. Adding an item to the first book / the fourth section – the system case are as follows:

'If a judge looked at the case and another judge took his place before issuing the verdict in it, the successor judge can depend in his verdict on the procedures the ancestor judge did or restore these procedures himself'.

⁽¹⁾ Dr. Ahmed Abu-Al-wafa , Verdicts Theory in the Pleading Law, Al-Mma'aref Institution, Alexandria, 2010. P.79

3.Adding a paragraph to article(157) to be as follows:

'When a judge takes the place of another judge and before uttering the verdict, the door of the pleading must be opened and then itsamending must be recited and the parties of the case or their agents ratify the case and then the court decides to end the pleading and issues its verdict'.

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