

Attendance And Absence According To The Iraqi Civil Procedure Law No. 83 Of 1969 And Its Amendments

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Abstract

The commitment of the adversaries to appear in court on time is an important reason for deciding the case as soon as possible. Thus, justice is served. The researcher has followed the comparative analytical approach and divided the research into two chapters. The first chapter addresses the concept of attendance and absence, while the second discusses the provisions of attendance and absence.

Keywords: attendance, absence, prosecutor, defendant

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Introduction

First: research subject

Attendance and absence in court at the scheduled time of their proceedings are important reasons for facilitating proceedings. Otherwise, if they are absent, the dispute is prolonged. The origin is that the adversaries themselves attend the court, but the law permits them to delegate others on their behalf in accordance with the law. The Iraqi legislature is concerned with regulating the rules of attendance and absence in the Code of Civil Procedure because of its importance in facilitating the proceedings of the case.

Second: the research problem

This issue raises several questions, which are the problem of the research

1. Is the plaintiff's or the defendant's absence at the same level?
2. Has the Iraqi legislator complied with regulating attendance and absence?
3. In the case of multiple parties to the lawsuit, what is the effect on applying the provisions of absence and attendance?

Third: the research importance

This issue is an important one in the Code of Civil Procedure because of its importance in the conduct of civil proceedings and therefore has important implications for the presence and absence of adversaries in connection with the issuance of a judgment and the dates of their appeal.

Forth: The research methodology

The researcher followed the analytical and comparative approach through analyzing the legal texts in the Iraqi Civil Procedure Law and comparing them with the Egyptian legislation, the Civil and Commercial Procedure Law, and stating the views of jurisprudence and the judiciary in this regard.

Chapter one

The concept of attendance and absence

There is no doubt that, after the proceedings have taken place, the adversaries are present in the court to give their statements and to defend from the obligations imposed on them. If the litigant fails to appear, this leads to a judgment in absentia, and likewise, the plaintiff's failure to appear in court

might expose him to considering the case as if it did not exist. Various legislations allow delegating a person to appear in the courts on behalf of the litigant. Attendance in the court is not personally by the litigant, but rather it is permissible to delegate the litigation to other persons, and therefore the litigant is considered present himself or his representative in the first session even if he is absent in one of the sessions, whether the litigant is a plaintiff or a defendant. To discuss this topic, we will divide this research into two requirements. The first requirement deals with the nature of attendance, and we will allocate the second requirement to explain the nature of the absence.

The first requirement

what is attendance?

In this requirement, we will deal with the definition of attendance, its importance, and the types of attendance.

Definition of attendance

Through referring to the laws of the civil procedure, subject to comparison, we note that they did not include a text that defines the meaning of litigants' presence after the civil lawsuit has been filed with the recognition that it is not the legislator's job to define some legal terms. As for the jurisprudence, the attendance was defined (as the presence of the litigants themselves or the presence of those who are legally acting on their behalf, such as attorneys and relatives who may be accepted in the case¹), and another opinion defined it as (the litigants' compliance with the court on the day and hour specified by the court to hear their lawsuit)²

On the other hand, attendance is defined as (the legal presence of the opponent at the specific hearing of the case or his legal representative and the purpose of the opponent's participation in the dispute³).

¹ Sadiq Haidar, Explanation of the Civil Procedure Law (a comparative study), House of Books and Documents, Baghdad, Iraq, 2011, p.83.

² Dr. Ahmed Al-Sayed Sawy, Mediator explaining the Civil and Commercial Procedure Law, amending Law No. 23 of 1992 and Law No. 81 of 1996, Arab Renaissance House 1997, p. 565.

³ Dr. Tariq Abdel Raouf Saleh Rizk, Code and Judiciary in the Kuwaiti Procedure Law, including new amendments

Through our definitions of the opponent's presence, we have emphasized that attendance is not inevitable and personal for the opponent, but is allowed to be legally represented by relatives and lawyers. Through the above, the researcher can define attendance as (all adversaries, plaintiffs, or legal representatives, are present before the court for the conduct of proceedings).

The importance of attendance

The obligation of adversaries to appear before the Court on the day and hour specified to facilitate the proceedings is important for the hearing and completion of the proceedings as soon as possible and the adjudication of the case. Besides, attendance is considered a requirement for the proper functioning of justice and the procedural equality of the adversaries.⁴

The presence of adversaries before a judge also affects the possibility of realizing the facet, which is an important guarantee of adversaries, in the presentation of their statements before a judge so that the judge may present his judgment, taking into account all the circumstances of the case, in accordance with the principle of confrontation, the presence of the litigants to hear their statements and express their defense is a duty of justice, which emphasizes that no one can be sentenced without being heard, nor can anyone who has not been heard or summoned be sentenced⁵.

The importance of the obligation to be present at the Court is also determined by the adversaries in asserting their seriousness in bringing the case and facilitating its proceedings and their desire to resolve the dispute as soon as the Court determines it. Besides, in the presence of the adversaries, the Court is informed in its consideration of important points that help to build a conviction about the truth⁶.

Types of attendance

to Law 36 of 2002, 1st Edition, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2009, p.8.

⁴ Dr. Nabil Ismail, Civil and Commercial Procedure Law, New University House, Alexandria, Egypt, 2008, p. 225.

⁵ Dr. Ahmed Al-Sayed Sawy, previous source, p. 565.

⁶ Mustafa Abdel Hamid Abbad, Principles of Judicial Organization, Civil and Commercial Trials, Book Two (The Case Theory, the Adversarial Theory, the Theory of Judgments) 1st Edition, 1997, p. 246.

Attendance is divided into:

1- personal attendance, i.e., the opponent's presence in person to the court on the day specified in the notification paper after being notified of this. This presence enables the opponent to defend themselves and protect their rights¹. The personal attendance of the litigant in the court sessions is compulsory if the court decides that and this is what was stipulated in Article 14 of the Iraqi Evidence Law No. 107 of 1979². Besides, the text of Article 106 of the Egyptian Evidence Law No. 25 of 1968, and the court must confirm the personal presence in the session minutes after making sure of the judicial notification procedures.³

Through the foregoing, the researcher considers that personal presence in the courts is important in the conduct of the proceedings and the defense of his right in the court.

2- The presence of the opponent's representative (the deputy)

It has already been stated that the adversaries themselves must appear in court on the date appointed for the hearing of the case so that the law permits other persons to be represented before the courts so that there is nothing to prevent a representative of the adversaries from appearing in court on behalf of the client⁴. Article 52, paragraph 1, of the Iraqi Code of Civil Procedure No. 83 of 1969 refers to attendance by themselves or by those who represent them as lawyers or their spouses, or relatives up to the fourth degree. Also, what Article 72 of the Egyptian Civil and Commercial Procedure Law No. 13 of 1968 referred to in this regard, however, the Egyptian legislator has made it necessary for the court to accept, on behalf of

adversaries, their spouses, relatives or in-laws to be admitted to the third degree⁵.

The power of attorney will require the availability of the elements of the contract, including consent location and reason, or the contract (an agreement between the litigant and his clients, who are originally from the lawyers to be represented in court⁶

Article 52 of the Iraqi Civil Procedure Law stipulates: (The power of attorney authorizes the agent to perform acts and procedures that preserve the right of his client, filing lawsuits and pleading therein until the judgment and reviewing the legal methods of appeal, the power of attorney did not stipulate otherwise, or the law did not require a special mandate)⁷, the power of attorney is required to preserve the rights of his client unless he is authorized to do so and under the authority of the power of attorney for the litigation. Likewise, the litigant attorney does not have the right to perform any act or procedure in which the law requires a special mandate, such as reconciliation and annulment of the lawsuit petition, unless the mandate is stipulated in the attorney document⁸.

The second requirement

what is absence?

On the specific day of the case, the court calls on the adversaries. If the adversaries fail to appear in the proceedings, the court must then apply the rules on absenteeism. The absence affects the normal functioning of the dispute. To examine this subject more closely, we will divide this requirement into two sections, dealing in section I with the definition of absenteeism and we devote section II to the manifestation of adversaries' absence.

¹ Dr. Esmat Abdul Majeed Bakr, *The Principles of Civil Procedure, Explanation of the Provisions of the Law of Procedure No. 83 of 1969*, Erbil, Iraq, 2013, p. 403.

² See: Article 14 of the Iraqi Evidence Law, and Articles (106, 113) of the Egyptian Evidence Law.

³ Dr. Sayed Ahmed Mahmoud, *The Principles of Litigation According to the Law of Procedure*, Dar Al-Nahda, Cairo, Egypt, p. 654.

⁴ Dr. Ezz El-Din Al-Danasouri and Hamid Akkaz, *Commentary on the Law of Procedures*, 2nd Edition, Egypt, 1982, p. 218.

⁵ See: Article 75, Article 1 of the Iraqi Civil Procedure Law, Article 72 of the Egyptian Civil Procedure Law.

⁶ Dr. Esmat Abdul Majeed Bakr, previous source, p. 404.

⁷ Corresponding to it within the meaning of Article 75 of the Egyptian Civil and Commercial Procedure Law.

⁸ Medhat Al-Mahmoud, *Explanation of the Iraqi Civil Procedure Law No. 83 of 1969 and its practical applications*, no printing year, p. 410.

Section one: Definition of absence

The absence of adversaries in civil proceedings is an important issue in judicial work during the proceedings, as this affects the judgment handed down in the proceedings in terms of the presence of the adversaries and absentia in the absence of the adversaries. In keeping with this importance, jurisprudence defines absence as (The opponent failed to appear in all specific hearings sessions before the Court)¹

Another view also defined it as (one or both of the adversaries failed to attend the session set for hearing the case)²

Another aspect of jurisprudence defined it as (Failure to appear from the opponent or his or her representative or physical absence, i.e. the opponent's person's absence from the session, as absence in the law may not be equal with actual absence).

For example, the opponent is considered present if he submits a warrant of his defense, even if he was absent from the session³.

Through our definitions of absenteeism, it emphasized that absence occurs if the opponent and his legal representative do not appear before the court for the proceedings to be heard. If they do not attend, the judgment is issued in absentia, and here what is meant is not to be present in all court sessions.

Through the above, the researcher can define absence as (the plaintiff, the defendant, and their legal representatives are absent from the hearing in question).

¹ Dr. Abbas Al-Aboudi, Explanation of the Civil Procedure Law for a Comparative Study Enhanced by Judicial Applications, Edition 1, House of Books and Documents, Baghdad, Iraq 2014, p. 266.

² Dr. Eid Muhammad Al-Qassas, Mediator in Explaining the Law of Civil and Commercial Procedure, Ed 2, 510, p. 294.

³ Dr. Amir Faraj Youssef, Explanation and Commentary on the UAE Civil Procedures Law to the latest new legislative amendments and provisions of jurisprudence and judiciary, Part 1, Modern University Office, 2014, p. 237.

Section two: The manifestation of adversaries' absence

The right of defense imposes that a person is not judged until after he submits his defense, as the issuance of the judgment and the settlement of the dispute submitted to the court or the absence of adversaries from the Court may take one of the following manifestations:

First: it is represented by the failure to present any defense or to submit any list, as well as failure to attend the proceedings. This absence can only be achieved by the defendant alone because the plaintiff has made his or her claims and defenders in the petition, and thus the plaintiff's absence can only be achieved in the second manifestation of absence.

Second: It's only a failure to attend, in the sense that the opponent offered his defense, but then he's absent from the trial, and this kind of absence can come from the adversaries' interests⁴.

Provisions of attendance and absence

The Iraqi Civil Procedure Law regulated the provisions for attendance and absence, and the legislator referred to three hypotheses related to attendance and absence. To examine this matter more precisely and meaningfully, we will divide this chapter into two requirements. In the first requirement, we will discuss the absence of all plaintiffs. The second requirement specifies the multiplicity of plaintiffs or defendants or the absence of some of them.

The absence of all plaintiffs

On the day appointed to the proceedings, the Court orders the presence of the adversaries and if they do not present for proceeding, the Court must apply the rules of absence. To take note of this matter, we have considered that this request should be divided into three sections. In the first section, we shall deal with the absence of the plaintiff and the defendant, in the second section, we will deal with the absence of the defendant and the presence of the plaintiff. Whereas in the third section we will discuss the

⁴ Helmy Muhammad Al-Hijaz, The Special Judicial Law According to the Provisions of the New Civil Procedures Law, Legislative Decree No. 90/83, amended by Legislative Decree No. 20/85, part 2, 3rd Edition, Beirut, Lebanon, 1996, p.204.

absence of the plaintiff and the presence of the defendant.

Chapter two

The implications of attendance and absence

The Iraqi Civil Procedure Law regulated the provisions for attendance and absence, and the Iraqi legislator referred to several hypotheses related to attendance and absence. To examine this matter more precisely and meaningfully, we will divide this chapter into two requirements. In the first requirement, we deal with the presence of the opponent in person or his deputy, the second requirement discusses the absence of adversaries.

The first requirement

The opponent's personal or deputy presence

On the day appointed for the proceedings, the court orders the presence of the opponent or his deputy for proceeding, and in order to discuss this matter, we will divide this requirement into two sections, section one deals with the presence of the opponent in person, and section two is devoted to the lawyer's attendance in the dispute.

Section one: the opponent's presence in person

There is no doubt that after informing the litigant of the notification paper that the case will be filed against him, the litigant must attend the court at the time specified in the notification paper, and if he does not attend, he will present himself to trial in absentia, and the absence of the plaintiff opens the way for the defendant to request that the lawsuit petition be annulled, or to request consideration of filing the lawsuit despite the plaintiff's absence, and the court must initially prove the presence or absence of either party in the session minutes after verifying the procedures for judicial notifications and the qualities of the litigants, then the case is considered.¹

Section two: Attendance of the representative in the dispute

It is defined as (A contract that will be committed to providing the elements of the contract from the availability of caution, solution, and reason. The

¹ Dr. Ismat Abdel Majid Bakr, previous source, p. 403.

power of attorney in the litigation is an agreement concluded between the litigant and his attorney, who is originally from the lawyers, to defend him in the judiciary, the Federal Court of Cassation has ruled that (representation does not mean power of attorney in the litigation, because it requires permission and appointment)²

Article 52, paragraph 1, of the Iraqi Code of Civil Procedure, provides that: (Power of attorney for litigation authorizes the representative to practice actions and procedures that preserve the right of his client, filing lawsuits and pleading until issuing the judgment and reviewing the legal methods of appeal, unless the power of attorney stipulates otherwise or the law does not require a special mandate)³, as for the Egyptian Civil and Commercial Procedure Law No. 13 of 1968 stipulating that (Power of attorney for litigation authorizes the agent to perform the actions and procedures necessary to file a lawsuit, follow it up or defend it, and take precautionary measures until a judgment is issued in the degree of litigation in which it is assigned, the announcement of this ruling and the collection of fees and expenses). We note that the Iraqi legislature did not require, in article 52 of the Code of Civil Procedure that provisional proceedings be taken until the judgment was handed down. It did not require the receipt of fees and expenses in the Code of Civil Procedure, rather stipulated attorney fees in Article 64 of the Iraqi Lawyers' Law, unlike the Egyptian Civil and Commercial Procedures Law Which provided for reservation procedures and payment of fees.

The second requirement

Absence of adversaries

We will divide this requirement into three sections, dealing in section I with the absence of the parties, section II with the presence of the plaintiff and the absence of the defendant, and section III with the presence of the defendant and the absence of the plaintiff respectively.

Section one: The absence of both parties

² Abbas Al-Aboudi, a previous source, p. 267, d. Esmat Abdel Majid, the same source, p. 405, and Federal Court of Cassation Decision No. 774 in 1969, p. 239.

³ Dr. Ismat Abdel-Majid, previous source, p. 411, and Medhat al-Mahmoud, a previous source, p. 87.

Article 54, paragraph 1, of the Iraqi Code of Civil Procedure, provides that: "The proceedings shall be left to review if the parties agree, or if they are not present despite their notification or notification to the plaintiff. If the proceedings remain for 10 days and the plaintiff or the defendant has not requested to proceed, the application shall be declared legally invalid."¹

Article 82 of the Egyptian Code of Civil and Commercial Procedure provides that: "If neither the plaintiff nor the defendant is present, the court shall rule on the case if it is valid for judgment, if 60 days have passed and none of the adversaries requested to proceed or the parties have not yet attended, Article 82 of the Egyptian Civil and Commercial Procedure Law stipulates that (if the plaintiff and the defendant did not attend, the court shall rule in the case if it is valid for a ruling in it, then if sixty days have elapsed and no litigant requested to walk in it or the parties did not attend after proceeding with it, it shall be considered null)."²

It is clear from the text of article 54/1 of the Iraqi Code of Civil Procedure that the proceedings are left for review if the parties agree to do so, or if they are not present despite their notification or the plaintiff's notification. If the proceedings remain 10 days and the plaintiff or the defendant does not request to proceed with it, the lawsuit's petition is considered null and void by law.³

With regard to the Egyptian Code of Civil and Commercial Procedure, there is a difference between the two cases: if the case is valid for judgment, the court must rule on the case and the court's discretion to do so. The second case is that the case is not valid for judgment. In this case, the court must withdraw the case, so the court's discretion here is limited.⁴

Section two: the attendance of the plaintiff and the absence of the defendant

Article 56/1 of the Iraqi Code of Civil Procedure provides that: "If the plaintiff is present and the

defendant does not attend despite his notification, the case shall be brought against him in absentia. The court shall render its judgment in the case to the extent that it deems fit to adjudicate it, if it is not in a position to adjudicate it, it shall postpone it until the means of proof have been completed."⁵

The Egyptian legislator organized this case in Article 84 of the Egyptian Procedure Law, noting that the defendant's absence in the session and the case had been announced to his person, the court ruled in the case. If it was not announced to his person, the court in other than urgent cases shall postpone hearing the case to the next session⁶. Article 56/1 of the Iraqi Code of Procedure establishes the validity of the notification to the defendant and the failure to attend the deadline for the pleading without a legitimate excuse to prosecute him in absentia.⁷

It is clear from the two previous texts that in the absence of the defendant, pleading procedures are carried out in absentia in Iraqi law, and as for Egyptian law, the case is considered in the next session.

Section three: the presence of the defendant and the absence of the plaintiff

Article 56, paragraph 2, of the Iraqi Code of Civil Procedure, provides that: "If the plaintiff fails to appear and the defendant attends, he may request that the application be revoked or that his defense be considered in absentia, and then the court shall decide what it deems in accordance with the law"⁸

Article 82/2 of the Egyptian Code of Civil and Commercial Procedure, which states: "The court shall rule on the case if the plaintiff, the plaintiffs or some of them are absent at the first hearing and the defendant is present."⁹

¹ See: Article 54/1 of the Iraqi Civil Procedure Law.

² See: the text of Article 82 of the Egyptian Civil and Commercial Procedure Law.

³ Dr. Abbas Al-Aboudi, a previous source, p. 267, d. Ismat Abdul Majeed Bakr, previous source, p. 432.

⁴ Dr. Abdul Basit Al-Jumaihi, Principles of Procedures in the New Procedure Law, Dar Al-Fikr Al-Arabi, 1974, p.303

⁵ See: the text of Article 56/1 of the Iraqi Civil Procedure Law.

⁶ See: the text of Article 84 of the Egyptian Civil and Commercial Procedure Law

⁷ See: Federal Court of Cassation Decision No. 41 Public Authority / Civil / 518, unpublished.

⁸ See: the text of Article 56/2 of the Iraqi Civil Procedure Law.

⁹ See the text of Article 82/2 of the Egyptian Civil and Commercial Procedure Law.

Through the two previous texts, the Iraqi legislator has the advantage of claiming either to request the annulment of the application or to request consideration in absentia. The court decides what it deems to be in accordance with the law.¹

As for the Egyptian legislature, the failure of the plaintiff(s) and the presence of the defendant does not affect the progress of the civil case.²

Conclusion

At the end of this research, we summarize the most important results and proposals that we have reached

First: the results

1. The obligation of the litigant to come to the court at the specified time to review their lawsuit is one of the most important reasons to facilitate the proceedings of the case as quickly as possible and to settle the case.
2. The attendance is either in person or the presence of the litigant's representative to appear before the court.
3. The litigants' attendance to the court is a right and a duty for litigants to express their defense in the lawsuit.
4. If all the parties to the case did not attend, the court's authority is limited to the discretionary power of the court in stating the valid case to first adjudicate it. Or it is not valid to be postponed until the proofs are completed.

Second: the proposals

1. We propose that the Iraqi Code of Civil Procedure should include a provision regulating the situation of multiple plaintiffs or defendants. We propose the following text (if the plaintiffs or defendants are multiple and some of them fail to attend the first hearing even though they have been informed, the lawsuit is postponed and the court informs them to attend at the next

session, and the judgment issued in the case after that is considered in presence of the person who fails to attend).

2. We propose that the Iraqi Code of Civil Procedure include a provision regulating the status of the plaintiff's presence before the end of the hearing and propose the following text (if the plaintiff is present before the end of the hearing, his case was heard and any procedural judgment was handed down.

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¹ Sadiq Haidar, previous source, p. 93, and Federal Court of Cassation Decision No. 426 / Civil / 82, 1982. Publication of the Journal of Judicial Legislation.

² Dr. Abd al-Wahhab Khairy Ali al-Ani, The Procedure System, A Comparative Study of Legislation and Jordanian Civil Law, 1st Edition, 2014, pg. 247.

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Second: the laws

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