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The Legality of a Party's Call for Their Opponent's Testimony in Civil Lawsuits

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Abstract--- *This study examines the legality of a party's call to be made aware of their opponent's testimony, whether their opponent be the plaintiff(s) or defendant(s). This study addresses the lack of a legal or juristic text that determines the legality of this matter and investigates the existence of contradicting and baseless legal judgements issued by the Court of Cassation. We found that it is illegal for a party to call for their opponent's testimony as it may cancel out any primary means of evidence, such as a conclusive oath, judicial statement, or the outcome of a cross-examination. It may also allow adversaries to manipulate the legal organisation of a means of evidence by using it to avoid negative legal consequences that may occur. The study's recommendations included having a straightforward text issued by the legislator specifying that opponents are not permitted to testify, and considering that text as part of the general system.*

Keywords--- *Court of Cassation, legal judgements, plaintiff, Civil Lawsuits.*

I. INTRODUCTION

If an opponent or a group of opponents submits evidence that is based on the general rule of evidence, which states that an individual's legally-protected rights are void when there are no means to prove the grounds for the enactment of these rights, the provision of these rights are therefore restricted to the legal maxims imposed by the legislator. This principle applies to all means of evidence outlined by varying bodies of legislation, including testimonies.

Scenarios that are clearly identified and adressed by the law should not cause any confusion in most cases, but there are a number of scenarios that are ultimately not organised or simply continue to go unaddressed by the national legislator – whether in a negative or positive connotation – and bound to be problematic. The situation is further complicated when one searches the legislation for direction on the legality of a specific scenario only to find that it is also unorganised. One of these unorganised and unaddressed scenarios is when a party calls for their opponent's testimony. It might seem impossible that the law doesn't address such a matter at first, as it is common for an opponent to have witnesses that are willing to testify in their favour. For example, it is unlikely for a leaseholder to call for the landlord's testimony in a lawsuit that the leaseholder filed against the landlord regarding the payment of rent, or for a creditor to call for the debtor's testimony regarding the debtors liability for the debt, or for a victim to call for the perpetrator's testimony to prove the extent of the inflicted harm. In each of these examples, the idea of dispute alone is enough to deem such a matter impossible. If calling for an opponent's testimony is not possible, as neither party will trust the other to provide testimony that will work in their favour, this impossibility is relative and not absolute. Here we must note that the opponent who is calling for their adversary's testimony can be either the plaintiff, the defendant, or a litigant, made according to a party's request, and according to a court order or to the request of a co-defendant or a co-plaintiff. The term opponent in this study

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does not include a person that joins the lawsuit without receiving any request or disputing any claims. An example of such a person is one that possesses a document vital to the issuing of a sentence. Therefore, the court should allow them to join the lawsuit in order to compel them to present said document. The term opponent also does not include opponents in a criminal lawsuit. This study consists of three chapters. The first chapter addresses the judiciary's position towards a party's call for their opponent's testimony. The second chapter reviews the evaluation of that call. The third chapter discusses the authority held by an appointed judge in approving a party's call for their opponent's testimony.

II. Chapter One

Judiciary's Position towards a Party's Call for Their Opponent's Testimony

By referring back to legal texts that organise the provision of evidence by testimony, we find that the legislator does not negatively or positively organise this matter. This also applies to legal jurisprudence. There is no current juristic reference that addresses the legality of this matter. As for the judiciary, the Court of Cassation permits a party to call for their opponent's testimony in some of its judgements. This chapter discusses the Court of Cassation's judgement regarding this matter and its justifications as follows:

First: A Party's Call for Their Opponent's Testimony:

Some of the Court of Cassation's juridical judgements lean towards supporting a party's right to call for their opponent's testimony, whether the party calling for an opponent's testimony be the plaintiff or the defendant. The Court of Cassation justifies this judgement by claiming that the right of a party to call for their opponent's testimony falls under the reliance on conscience rule and what is impermissible in Article (80) of the Civil Law is hearing the plaintiff's own testimony, or a testimony that is advantageous for the witness, or the testimony of a witness who will be held liable (Court of Cassation Law of 2004).

In another judgement, the Court of Cassation specified, "The Court of Appeals, as decided during the session held on October 31, 2013, permits the personal testimony of the individual making the appeal to be made when asked for. In the session held on June 5, 2014, the Court of Appeals decided to not permit the plaintiff to give testimony as one of the witnesses called on by the defendant, as it is illegal to hear the plaintiff's testimony as a witness in a lawsuit. This prevents the proper supervision of the court's good conduct. For that reason, we find it necessary to invalidate the latter decision." (Court of Cassation Law of 2015).

With this judgement, the Court of Cassation violated the Court of Appeal's decision to exclude plaintiffs' testimonies when called for by the defendant as the Court of Appeal ruled that the exclusion of the plaintiff's testimony is illegal. The Court of Cessation's judgement shown above necessitates the violation of the Court of Appeal's decision as the Court of Appeal did not refer to the legal texts that do not permit it to hear the plaintiff's testimony. This means that the Court of Cessation believes that there are no legal grounds for not hearing a plaintiff's testimony in favour of the defendant's in response to a request made by the latter.

The Court of Cessation's previous judgements permit a party's right to call for their opponent's testimony without giving a legal justification for this direction, except for the reliance on conscience rule.

a) The Right to Provide Proof by Testimony is Granted to Opponents by Law

Article (57) of the Civil Procedure Law stipulates, "The plaintiff must submit an original copy of their statement of claim and a copy for each defendant to the Registry along with the following attachments:

c) A list of the witnesses, their full addresses, and the events they to testify about. The plaintiff may attach an affidavit for any of the witnesses, provided that it is verified by oath before the Notary."

Article (59) of the same law stipulates, "The defendant must submit the original copy of their plea and a copy for each plaintiff to the Registry within thirty days from the day following the receipt of the service of process. The required attachments are as: …c) A list of witnesses, their full addresses, and the events they wish to testify about."

With these texts, the Jordanian legislator necessitates the provision of a list of witnesses to be called for by both the plaintiff and defendant, and the events they wish to testify about, without restricting them with any conditions that prevent either party from calling upon the other to provide a testimony.

The lack of restrictions in these texts does not imply that opponents are granted the right to call upon one another to provide testimonies. The texts above simply shows the attachments that should be included in statements of claims and pleas without further indications. The main idea that can be deduced from these texts is that the Jordanian legislator has limited a party's right to call for witnesses to the opponents, but did not grant the court the same right.

b) The law permits opponents to testify

By referring to the Testimony Law, the persons prohibited from testifying are:

1. Those who lack the legal capacity to testify

Article (32) of the Testimony Law stipulates, "The court will hear the testimony of any human so long as they are not mentally deranged or a juvenile who does not understand what an oath is. The court may hear the testimony of a juvenile who does not understand what an oath is for reasoning purposes only."

2. "Public employees, users, and those assigned with public services may not testify by giving classified information that they have learned during their service to the court, even after they have left their positions. Even then, the concerned authority may permit them to testify according to the court's order or at the request of one of the opponents." (Testimony Law of 1952) The law also prohibits any person from testifying based on information or the contents of official documents related to the state's affairs, unless they were legally published publicly, or the concerned authority permitted their public disclosure. (Testimony Law of 1952)

3. "Lawyers, agents, doctors, or any individual with a similar profession who learned of private and classified events or information due to the nature of their professions are prohibited from disclosing the private or classified information even after the end of their service, unless that information was stated with criminal intents. In that case, they must testify with these events or information whenever requested, without violating the laws of their professions." (Testimony Law of 1952)

4. "Married couples are prohibited from disclosing any information that either individual relayed to the other during their marriage without the disclosing individual's consent, even in the case of their divorce, unless one individuals sued the other or either individual is being prosecuted for committing a crime against the other." (Testimony Law of 1952)

It is necessary to cite these texts in order to justify a party's right to call for their opponent's testimony. In the Testimony Law, the legislator clearly determined a list of individuals that are prohibited from testifying, and it did not identify the opponent of either party involved in a litigation case as being included in this list. If opponents were prohibited from testifying, the legislator would have included them in the list of individuals prohibited from testifying. Therefore, opponents are not prohibited from testifying. However, opponents cannot be considered prohibited from testifying based on the claim that their testimony might contribute to a ruling that favours their interested, as this prohibition is meant to protect the opponent's witnesses and not the opponent themselves.

Article (80) of the Civil Law stipulates, "Each testimony that serves the witness' best interests is rejected." It is understood that each testimony that serves the witness' best interest will be rejected, but does that apply to an opponent's testimony? The Court of Cassation denied that it does by pointing out that the caveat in Article (80) of the Civil Law is intended to apply to the plaintiff's testimony or any testimony that serves the witness' best interests. (Court of Cassation Law of 2004)

This judgment made by the Court of Cassation is not lawfully sound, as it is a clear example of how a witness that is looking to serve their best interests can also be an opponent who is testifying in a lawsuit, even in the event that the other litigating party called upon them to provide their testimony. The Court of Cassation rectified this matter with a later statement, "…A plaintiff's call for the testimony of the second defendant, who signed the promissory note as a surety, to prove that the promissory note – the substance of the claim – was written as a guarantee is unproductive. It is a violation of

Article (80) of the Civil Law, which considered the witness as being part of the lawsuit. The Court of Appeal's rejection of that testimony is legal." (Court of Cassation Law of 2019)

III. Chapter Two

Self-Evaluation of a Party's Call for Their Opponent's Testimony

Stating that a party has the right to call upon their opponent to provide testimony is based in the lack of a clear legal text that prohibits this event, and that the law grants any party then absolute right to call upon any witness of their choice as there is a lack of legal text or precedence that limits this right. The fact that the law does not prohibit an opponent from testifying or a party's right to call for their opponent's testimony falls under the reliance on conscience rule is all but a baseless justification that cannot be used as the foundation for a general principle that permits a party to call for their opponent's testimony.

First: Granting a party the right to call for their opponent's testimony is bound to undermine the legal means of proof, such as the conclusive oath and cross-examination, as follows:

a) The Conclusive Oath

The conclusive oath is defined in Article (53) of the Testimony Law as being, "[a]n oath performed by one of the parties involved in a case to answer the claims of their opponent." The conclusive oath is only performed by a party when there is a lack of evidence that supports their claim and relies on their and their opponent's conscience. Therefore, performing a conclusive oath entails taking a risk, for it is not in the best interest of a party to resort to that means, unless the party is unable to provide evidence supporting their claims. Performing the conclusive oath warrants the renunciation of all other evidence, as stipulated in Article (61) of the Testimony Law, "Performing the oath warrants the renunciation of all other evidence regarding all events…"

Each party is responsible for providing evidence of the transpiration of a certain event. Therefore, any party should be capable of performing a conclusive oath if it does not possess any other proof. (Talabeh, 2004; Abdulsattar, 2007)

Accordingly, a party must rely on their opponent's conscience when performing a conclusive oath and not call upon their opponent to also testify to the initial party's claims. Resorting to any other means is bound to undermine the legal value of the conclusive oath, including permitting a party to replace their conclusive oath with their opponent's testimony. Permitting a party to call for their opponent's testimony might allow them to exploit the provisions of the conclusive oath, as the performance of the conclusive oath must entail the renunciation of all other evidence. By performing a conclusive oath, a party surrenders their right to use any other means of proof, which would be voided in the even that they maintain their right to call for their opponent's testimony and do so in the event that the testimony will take place after the party performs the conclusive oath. Moreover, granting a party the right to call for their opponent's testimony in such cases is bound to reduce the conclusive oath to an alternate means for the opponent's testimony in the case that it does not benefit the requesting party.

b) Cross-Examination

One of the means of proof that allows a party to cross-examine their opponent is asking the opponent a number of questions related to the content of the claim. The opponent's answer may include a clear or implied affirmation of the validity of their claims. The court may resort to this means in order to attain further clarification that could help the court understand the substance of the claim. The opponent's answers could also be used as evidence of the events in question. Even though cross-examination is a highly-important means of uncovering evidence, the Jordanian legislator does not organise its use in the Testimony Law, as the organisation of one type of cross-examination in the Civil Procedural Law,

which covers the matter of cross-examination performed the court, is sufficient as stipulated in Article (76/2) of this law, "The court may cross-examine opponents during trial on matters that it deems necessary."

The purpose of the legislator's organisation of the aforementioned cross-examination methods is to deliver justice by granting a party or the court the right to question the opponent about the events they claim they are able to provide evidence about, as the cross-examination process may lead to a confession. Evidence by testimony is also practiced by questioning the witness, whose answers affect the claims of one of the opponents. Therefore, granting a party the right to call for their opponent's testimony is bound to undermine cross-examination as a legal means of evidence. Cross-examination may be deemed unnecessary in the event that a party is granted the right to call for their opponent's testimony as it is bound to allow for the exploitation of cross-examination, as cross-examination, whether carried out by the court or based on a party's request, is done without directing a conclusive oath to the cross-examined opponent.

The legislator should therefore issue a clear text in the Testimony Law specifying the two types of cross-examination as a means of evidence.

Second: Granting a party the right to call for their opponent's testimony is bound to undermine primary concepts and features.

Granting a party the right to call for their opponent's testimony is bound to undermine the primary features of the means of proof, including testimonies and statements of truth. A testimony is defined as a human's statement in a judiciary council affirming a second person's claim against a third, (Marqas, 1998) provided that the witness has personally and sensuously observed the events they are testifying to, that is to say they that have personally seen or heard these events as they transpired. (Sharafaddin, 1994)

A statement of truth is defined as a party or their representative's confession – in the event that a representative is permitted to confess on a party's behalf – before the judiciary about the truth of events they are accused of during the procedures of the lawsuit. (Testimony Law of 1952)

Accordingly, a testimony is a statement made by an individual who is not part of the lawsuit, as a party's statements during the procedures of a lawsuit are considered statements of truth and not testimonies. Therefore, a testimony differs from a statement of truth as the former is an individual's statement affirming a second individual's claim against a third, while the latter is an individual's statement affirming their claims against another. (Ibrahim, 1928)

Therefore, granting a party the right to call for their opponent's testimony contradicts the main features that define the concept of a testimony, including the fact that a testimony is a statement made by a person who is not part of the lawsuit, and that it does not result in any commitments to be made by the witness but rather to one of the parties involved in the lawsuit. Granting that right also contradicts the nature and features of the statement of truth, which is made by one of the lawsuit's parties, either the plaintiff or defendant, and if a statement was made by a person other than one of the parties involved in the lawsuit, it will not be considered as a statement of truth.

If a party is permitted to be a witness in a lawsuit based on the request of their opponent, the statement that party will make will be considered as a statement of truth. Therefore, when the judge issues their verdict, will they base it on said party's testimony or statement of truth?

For these reasons, the Court of Cassation's judgements, which have been referred to in the paper's first chapter, are insufficient. A party should not be permitted to call for their opponent's testimony, whether that party is the plaintiff, defendant, co-plaintiff, or co-defendant. The term opponent here does not include litigants who join the lawsuit without receiving any requests and without being prosecuted. For example, a person who joins the lawsuit based on the court's order to submit a document that is necessary to issuing a verdict would not be considered an opponent in these terms. The term also excludes opponents in criminal lawsuits, and opponents that call upon themselves to provide testimony as is prohibited in Article (80) of the Civil Law. The term also excludes guardians who are part of a lawsuit that involves a minor, considering that a guardian's submission of a lawsuit does not make them an opponent, for the actual opponent remains the person under whose name the lawsuit was submitted, which may include minors, the mentally deranged, and those of equivalent status. However, not considering a guardian as an opponent in a lawsuit does not grant a party the right

to call for the guardian's testimony against the minor or the guardian, as stipulated in Article (37) of the Testimony Law and Article (80) of the Civil Law that were referred to previously.

It is legally known that the judicial person enjoys an independent legal personality, and yet they cannot represent themselves and must always be represented by a natural person. Is it permissible for a party to call for the testimony of the judicial person's representative in their lawsuit against the judicial person? The answer is favourable as the judicial person's representative is not part of the lawsuit that the judicial person is engaged in, therefore they are considered as an outside party.

IV. Chapter Three

The Authority Held by an Appointed Judge in Approving a Party's Call for Their Opponent's Testimony

The appointed judge holds discretionary authority in permitting the call for certain witnesses to testify and is not forced to adhere to the Court of Cessation's control. The judge has the authority to reject a party's call for a witness if the witness is prohibited to testify by law, does not possess the legal capacity to testify, if a claim cannot be proven with testimony, or if the judge finds that the conditions of the lawsuit are clear and does not require further evidence. The judge also has the authority to decide whether the events that may be proven by testimony are related to the subject of claim and that the testimony can be a beneficial and productive addition to the case. If it is found that a party's call for their opponent's testimony is illegal for the reasons that have been previously addressed, does the appointed judge's discretionary authority over the means of evidence by testimony also extend to rejecting a party's call for their opponent's testimony of their own accord, or must the opponent be the one to object to the call?

Answering that question would also require answering another question. What is the relationship between the rules of evidence and the general system? The answer provides significant. If these rules are related to the general system, then they cannot be violated. Therefore, the court has the authority to reject a party's call for their opponent's testimony of its own accord. However, if these rules are not related to the general system, then the court does not hold the authority to reject a party's call for their opponent's testimony of its own accord, and the matter would then require the objection of the opponent being called to testify.

To clarify the relationship between the rules of evidence and the general system, one must compare procedural rules to substantive rules. With procedural rules, the jurisprudence agrees (al-Abouda, 2007; Sultan, 2005; al-Qudah, 2006; Sharafaddin, 1994; Qasem, 2003; Faraj, 2003; Abu al-Souod, 1985) that they are related to the general system as they organise the submission of evidence before the judge. It also states that the procedures must be followed before the court. Therefore, procedural rules organise the procedures to be carried out before the judge. These rules must be followed by both the lawsuit's parties and the judge presiding over the lawsuit.

The jurisprudence (Eid, 1992; Abu al-Souod, 1985; Qasem, 2003) sees substantial rules as being the rules related to the general system, such as the rules related to a judge's authority over submitted proof, and the rules that grant a judge the authority to direct a supplementary oath in certain cases. This also applies to rules that count an official document as evidence against all, unless a party makes an official claim stating that the official document is a forgery, and counts regular or non-official documents as evidence that may be viably used against others. Additionally, these rules are related to the primary insurance of all individuals' right to defend themselves, the rules organising the confrontation clause, and the rules restricting the freedom of evidence. These rules ensure the delivery of justice, the stability of procedures, and determine the means of evidence.

Any other substantive rules that organise other matters are not related to the general system but are related to the interests and rights of individuals which can be conclusively agreed upon. The same goes for the rules that determine the burden of proof, and the rules that permit evidence by testimony in commercial matters, in cases where the civil disposal value does not exceed 100 JODs, or if obtaining a written evidence was not possible even if the disposal value exceeds that amount. Therefore, these rules may be violated in advance (Testimony Law of 1952) and the court is prohibited from deciding on these matters of its own accord. They are also prohibited from following these rules when standing before the Court of Cassation for the first time.

If the aforementioned standard is adopted, prohibiting the testimony of a party based on their opponent's request may be considered to be one of the substantive rules related to the general system as it deals with the means of evidence, according to the justifications presented to support the illegality of a party's call for their opponent's testimony. This points to the conclusion that if an opponent is called to testify and does not object, that would not affect the illegality of hearing their testimony. Therefore, the court should prohibit that testimony of its own accord.

V. Conclusion

This study discusses the legality of a party's call for their opponent's testimony to prove all or some of the events they claim transpired, whether the call was made by the plaintiff or the defendant. It was found that the Jordanian legislator did not address the legality of this matter with a clear text, as is the case for the legal jurisprudence. There are no legal references that address this matter, even indirectly. There are only a few preceding juridical judgements that leaned towards permitting a party's call for their opponent's testimony in a civil lawsuit. It would be incorrect to claim that there is a judicial agreement or valid precedent to direct this matter, especially as previous judgments were not based on legal evidence that permits a party's call for their opponent's testimony.

In evaluating the Court of Cessation's judgements and the resulting conclusions, it is logical to posit that a party's call for their opponent's testimony should be prohibited as this call contradicts the legal organisation of testimonies and juridical judgements, both in terms of its concepts and features. Permitting such calls would undermine legal means of evidence, such as the conclusive oath and cross-examination, thus allowing opponents who do not wish to use these means to manipulate and evade the provisions set by the legislator. Preventing such manipulation can only be done by granting the court the authority to prohibit a party's call for their opponent's testimony of its own accord, without the need for that opponent's objection.

Based on these conclusions, the legislator may benefit from considering the following recommendations:

1. Issue a clear text in the Testimony Law that prohibits a party's call for their opponent's testimony by adding the opponent to the list of persons who are prohibited from testify in a civil lawsuit.

2. Grant the court the authority to prohibit a party's call for their opponent's testimony of its own accord in a manner that does not leave room for juristic controversy about this matter's relationship with the general system.

3. Reorganise cross-examination as a means of proof by stipulating that cross-examination can be carried out based on parties' requests and not only by the court's order.

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