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The role of the oath in judicial proceedings

By

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Abstract

Civil legal legislation has enacted procedures that must be followed in civil disputes, including the oath, but the matter is different in criminal and administrative procedures. The procedures for which we did not find specific legislation, and one of the most important of these procedures is the provisions of the oath in those judicial procedures that are necessary due to their importance in proof, and may resolve the dispute between the litigants, so it was called a decisive oath. Therefore, we have to take the position of the Iraqi legislator in such cases. Thus, the Iraqi legislator indicated in State Council Law No. 65 of 1979 amended in the eleventh paragraph of Article 7 of it to the application of procedural laws, including Evidence Law No. 107 of 1979, as amended in what was not mentioned in a text It is clear that this paragraph did not require the consistency of the aforementioned rules of evidence with the nature of administrative or penal disputes. The same applies to the Iraqi State Employees Discipline Law No. 14 of 1991, as amended, as it did not refer to the application of the provisions of a specific law in administrative investigation procedures, and here it is necessary to refer to other branches of law, such as the application of the Civil Procedures Law No. 83 of 1979, as well as the Code of Trial Procedures Criminal No. 23 of 1981. The question that arises is: What is the role of the oath in administrative and criminal judicial procedures? Is it considered a means of proof before the administrative and criminal courts? Is the oath directed to witnesses or parties to the dispute in the administrative and criminal courts? As is the case in civil disputes for which special legislation and laws have been established. Therefore, we will discuss the role of the oath in civil, administrative and criminal judicial procedures as follows:
Section one: The concept of oath and its types in civil law.
Section Two: Oath in Administrative and Criminal Law.

Section One

The concept of swearing oath and its types in civil law

The oath is one of the oldest methods adopted in proof, as human societies and different nations have come to adopt the principle (evidence for the plaintiff and oath for the one who denies), without borrowing it from each other, because when the opponent lacks evidence that the law allows to prove what he claims, against Denying his opponent, he has only one way to resort to, which is to appeal to the conscience of this opponent by directing the decisive oath to him asking him to swear it to resolve the dispute, since justice requires permission for the opponent to invoke the responsibility of his opponent whose legal position is stronger than his position, perhaps he will grant him The evidence that he lost or failed to take, so the decisive

oath is not evidence provided by the opponent to prove his claim or pay it, but rather it is a precautionary method that the plaintiff resorts to when he lacks other evidence to prove (Rasul, 2017, p. 15)

Accordingly, the definition of the oath requires that we shed light on its concept, and its types, and we will deal with that as follows:

First: The concept of the oath and its legal nature

The oath is considered one of the proofs of proof, not only in the man-made systems, but in Islamic Sharia as well. The religious and the worldly because of the resultant reward or punishment in the hereafter, and a separation of disputes and the preservation of the rights of its people in this world, and we will discuss the definition of the oath as follows:

1. Definition of oath.

A- The oath in language: the oath is applied to the right hand, and to the force, as evidenced by the Almighty's saying: (And if you were to say some sayings to us, we would have taken from it the oath), meaning swearing, and the oath is singular and plural of oaths (Maalouf, 1956, p. 1030), as in the Almighty's saying: No God will take you to task for vainglory in your oaths, but He will punish you for what you have held oaths).

B- The oath in terminology: swearing by God, and the swearing by God is called an oath because one of the two sides of the story is strengthened by it. Swearing, swearing, swearing, and swearing are synonymous words, and this means that swearing is used to refer to swearing by God Almighty and excluding anyone else (Al-Suri, 1983, p. 1043.). And Ibn Hajar Al-Asqalani defined it as (emphasizing something by mentioning the name of God or the attribute of God), and Al-Jurjani defined it as (strengthening one of the two ends of the story by mentioning God Almighty or by commenting on the condition or penalty.

C- Oath in legal jurisprudence: the oath as defined by legal scholars as an oath issued by one of the two litigants on the validity or invalidity of the defendant, and defined by the Journal of Judicial Provisions in Article (1743) as (the swearing of one of the two litigants in His name Almighty by saying God or God once from without repetition) or it is the opponent's martyrdom of God for what he says or was said in the matter of clarifying the meaning of the oath, if its forms or expressions differ, but it gives the same meaning of the saying (Sultan, p. 193(

And the decisive oath is an oath by God issued by one of the two opponents to the validity of what the other opponent claims (Al-Nadawi, 1976, p. 350).

The litigant resorts to it when he is unable to prove with the evidence permitted by the law, and the litigant denies the claimed right, so he has no choice but to invoke the conscience of his opponent. The decisive oath is for him and this oath was called decisive because it ends the dispute and settles the case, and it has absolute power in proof, regardless of the value of the claimed right (Amin, 1987, p. 109).

2. The legal nature of the oath

The jurists did not agree on defining the nature of the oath, and there are several opinions in this regard, which can be summarized as follows:

1- The oath is a contract or reconciliation, given that directing the oath is an agreement between the two opponents, and in this agreement a kind of reconciliation, and this view is

answered that the decisive oath is not a contract, as the contract requires the free compatibility of two wills in connection with this directive or not being linked to it. The law has to take a position on three: either swearing, or refuting, or renouncing, which is also not from reconciliation in anything, because reconciliation presupposes the waiver of each of the disputing parties from one side of his claims (Abu Al-Wafa, 2003, p. 341).

2-Directing the oath is a waiver of the claimed right that is contingent upon a condition, which is its fulfillment, and the one who appeals to it can return it to his opponent (Nashat, 1979, p. 77).

This opinion is criticized on the grounds that although this adaptation is sufficient to explain the ruling of the case in which it takes place before taking the oath, it does not explain the ruling in the case of violating the oath or the case of returning the oath, and this opinion is not in line with the legal logic because from the face of the oath he does not have this right at all. And for which he took the oath, rather the matter depends on the position of the one to whom the oath was directed, for if he swore by them then it is not possible to imagine the right of the one who took the oath. The Alliance (Jassim, 1990, p. 32).

3- The oath is a legal act issued by one side, that is, it is the will of the opponent who directs the oath to appeal to the conscience of his opponent, and this appeal is considered a legal act that is carried out by his own will alone, as it produces its effect by simply directing the oath (Al-Sanhouri, 2000, p. 518).

Among those who hold this opinion is that it does not correspond to reality, because the law is the one that gives those who lack evidence the right to invoke the debt of an opponent. Justice is not in a felony (Jassim, p. 32).

4- The oath is one of the legal means of proof that the litigant resorts to, and the right of appeal has been established by the law for the other litigant, as it allowed him to return the oath and invoke the responsibility of the one who directed it to him (Al-Nadawi, p. 350).

After reviewing the foregoing views on the legal nature of the decisive oath, we find that the latter opinion is more appropriate to accept, because it is a system in which the requirements of justice were inspired. The legislator left the choice to the opponent who lacks evidence to direct the decisive oath to the other opponent, leaving this to the opponent's conscience and religious feeling, It also allowed the litigant to whom the oath was directed to return it instead of paying it or relinquishing it, and this leads to ensuring the stability of administrative matters.

Second: Types of Right

The oath is divided into two parts according to the place of its performance:

1-Judicial oath

It is performed before the judiciary, and this oath was organized by the legislator in the Evidence Law (Al-Sanhouri, p. 216), and the original oath is to be in the court before the judge, but if an acceptable excuse arises for the opponent to attend himself, the court may move to him or delegate one of its judges to it, as Article 15 of the Law of Evidence: circle to do so)

The judicial oath is divided into.

A- decisive oath: the definitive oath, which is the one by which the litigation is discontinued and the final judgment is attached to it, and it is only at the request of the

opponent, or it is the one that one of the two litigants directs to the other as conclusive evidence in the case, as stipulated in Article 114 of the Iraqi Evidence Code: First (for each The two litigants, with the permission of the court, may direct the decisive oath to the other litigant. The decisive oath is the right of the litigant to direct it or return it to his opponent whenever he wants, at any time and in any of the stages of the trial, and it was called by this name only because by its directive, the case is settled and the dispute is terminated, as stated in the decision of the Court of Cassation in Iraq No. 1171, M2, 2002 T. 1605 in 22/6/2002; As well as the decision of the Court of Cassation in Iraq No. 2436, Sh, 86 on May 21, 1987 (Al-Bahi, 1965, p. 67.)

This means that the decisive oath is directed to one of the two opponents, and the court does not have the right to direct it except with the permission of the plaintiff, as it is usually directed to the defendant and not to the plaintiff, and it is directed before the issuance of the judgment and not after it.

B - Supplementary oath: It is directed by the court on its own to one of the two opponents in confirmation of the evidence he presented, i.e., in support of the evidence presented to the court to find the truth, and search for it when the documents adhered to are not sufficient for proof. It is also known as the supplementary oath, as stipulated in Article (120). From the Iraqi Evidence Law: (The court may, on its own, direct the complementary oath to the opponent who does not have complete evidence, to then adopt its judgment on the merits of the case or the value of what it has ruled). Likewise, Article (121) of the same law stipulates: (It is a condition that the complementary oath be directed to the case that there be no complete evidence in the case, or that the case is not devoid of any evidence.(

The complementary oath is a complementary way to form the judge's belief, so it is not directed if the case is a complete argument for proof, nor to take the place of non-existent evidence. Rather, this oath was prescribed to fill the deficiency in the set of evidence presented to the court. The judge directs it to the plaintiff or defendant as a supplement to the evidence of the first in what he claims, or in support of To defend the defendant, that is, the law did not require that the complementary oath be given except that the case be devoid of any evidence and that there be a principle of proof that makes the claim close to possibility, even if it is not sufficient by itself to form a complete evidence, so the judge completes it with the complementary oath (Faraj 1983, p. 183). The complementary oath may be appealed and may not be returned, unlike the decisive oath that may be returned and may not be appealed as stipulated in Article (123) of the Iraqi Evidence Law:

2- A non-judicial oath

And it is the one whose oath is agreed upon, not before the judge, but rather in front of specific people chosen by the two parties. Its value is contracted by the agreement of the two parties. For this reason, the legislator has remained silent about its organization, and the general rules in contracts are applied in it (Faraj, 1955, p. 420).

The Court of Cassation has ruled that (the oath is the martyrdom of God Almighty for telling the truth, and it may be judicial that leads before the judiciary or non-judicial swearing in other than the Judicial Council with the agreement of the two parties, and then the latter is considered a type of contract that is subject in its proof to the general rules, but her oath is a reality Materially proven by evidence and presumptions, as it is performed orally in front of the agreed upon oath in front of them, and when it is sworn by someone who is qualified for it, it has all the effects of the judicial oath, including the resolution of the dispute and its validity in the face of the one who directed it to his opponent)

Examples of non-judicial oaths are those taken by those who occupy positions such as ministers and judges, and the oath that stakeholders agree that one of them should take it outside the Council of Judges in order to settle the dispute. The subject of the oath has exceeded the quorum of proof by evidence. As for taking the oath itself, it is a material fact that can be proven by all means of proof (Mansour, p. 216.(

second section

The oath in the administrative and criminal courts
First: The oath in the administrative judiciary.

Clarifying the role of the oath in the administrative judiciary requires that we address its role in administrative disputes and in administrative investigation, as follows:

1- Oath in administrative disputes.

As we explained that the oath is divided into a judicial oath and a non-judicial oath, and the judicial oath is divided into a decisive oath and a complementary oath, and these are the characteristics of the oath in civil proof, and the question that can be raised here, does proof before the administrative judiciary have the same characteristics as proof in private law?

It seems that there is a dearth of legislation that dealt with the rules of evidence in the administrative judiciary for the oath as a means of proof, but some legislations stipulated the application of the rules of evidence in the private law to administrative disputes, and not to prejudice the privacy of the administrative case, because the parties to the conflict in the civil lawsuit differed from him in The administrative lawsuit, in the administrative lawsuit, there is no equivalence in its parties, as it combines the administration as a party with authority and influence, which is in the position of the defendant and is more accessible in the lawsuit. He is the plaintiff, and the burden of proof falls on him.

Since the decisive oath is a means of proof in private law, it is not so in administrative law, for the following reasons:

A. Due to the difference in the nature of civil disputes from the nature of the administrative lawsuit and administrative disputes, the oath that is directed to the representative of the administration may not relate to the person to whom the oath is directed.
B. The oath can only be directed to the person who has the right to dispose of the right in dispute, and the representative of the administration does not have the right to dispose of the right in dispute.
C. Because one of the parties to the administrative case is the administration represented by its representative before the administrative court, which is often far from the legal work of the administration, the party to the administrative dispute.
D. Directing the decisive oath to the representative of the administration does not achieve the meaning of the oath with a legitimate connotation, as the representative of the administration is only a legal representative and is not one of those who makes the administrative decision the basis of the dispute.

In view of these reasons, is it possible to direct the decisive oath to the administrative body that issued the administrative decision in question? This leads to the difficulty of directing the oath to the legal person who has been given a legal personality by law for the purpose of achieving a specific goal or goal, and the oath is linked to the conscience and religion of the natural person, who would take the oath and not the legal person (Al-Jarrah, 2010.).

If the decisive oath cannot be directed to the legal person, can the oath be directed to the opponent of the administration? The principle of equality before the law between the two parties to the case leads to the exclusion of the possibility of directing the oath to the opponent of the administration, so what is not permissible for the plaintiff, the defendant may not also, the administration is not allowed to direct the oath to its opponent at a time when he is deprived of directing it to the administration, the oath that is directed to the representative of the administration It is not related to his person who would take the oath, because he does not have the right to dispose of the right and the oath is over the one who has the right to dispose of the right in dispute (Al-Husseini, 2016).

As for the complementary oath, it is excluded from the circle of evidence before the administrative judiciary for the same reasons that the decisive oath was excluded from the administration, because it is far from the nature of the objective procedures related to the natural and religious feelings of the natural person. The means of investigation and not the means of settling the dispute as in the decisive oath, and in this sense they do not contradict the principle of equality before the law due to the different nature of the litigants and their special circumstances imposed by the nature of each of the parties to the dispute.

2- The right in the administrative investigation stag

The oath at this stage is usually directed to the employee referred to the investigation or the witness in the administrative investigation. We deal with the oath at this stage as follows:

A- employee's oath

The administrative investigation is a legal procedure carried out by a competent administrative authority with the aim of reaching the fact that the employee committed the violation that deserves the penalty for committing it after verifying its evidence. Thus, the State Employees Discipline Law No. 14 of 1990 referred to the formation of an investigative committee to investigate the violating employee referred to it (Al-Ani. 2015, pg. 377).

Since the investigative committee is trying to reach the truth through the multiple means of evidence available when they are consistent with the nature of administrative law, and one of these means is the oath, can the committee direct the oath to the employee referred for investigation?

In order to answer this question, we must refer to the Iraqi State Employees Discipline Law, but this law did not regulate the investigation procedures in detail and accurately, and in this case we must refer to the Code of Criminal Procedure because it represents the general rule that must be referred to when investigation procedures are inadequate Administrative investigation committees work, and this is what the administrative investigation committees do based on the legal principle according to which the special text, if it does not regulate a specific case, becomes the general text. This is why the administrative investigation committees resort to the text of the Code of Criminal Procedure No. 23 of 1971 in Article 126, paragraph A, which It states: (The accused shall not take an oath unless he is in a position to testify against other accused), and therefore the oath may not be directed to the employee referred to the investigation because he is accused and the accused does not take the oath.

B - Oath of witness in the administrative investigation

The witness is that person who was created by chance in front of a certain incident that he was not a party to. The dispute that arises from this incident will have a role for the witness's testimony in settling this dispute before the judiciary. Thus, Article Ten, Paragraph Two of the State Employees Discipline Law stipulates that witnesses must be heard and discussed orally.

And transcribe their statements in writing, but it did not indicate the possibility of swearing the oath of witnesses by the Administrative Investigation Committee, and it did not provide for a reference to the Code of Criminal Procedure in the absence of a text.

But it is necessary to refer to the general rule where there is no rule in administrative law, and the general rule is the application of the Code of Criminal Procedure in addition to the Law of Evidence in a manner consistent with the nature of administrative law, so the investigative committee can swear an oath before giving testimony. To testify in proof, and make the witness care about his words and keep him away from lying.

The General Disciplinary Council indicated in its decision No. 995/249/95 of 12/20/1995 that the investigative committee should refer to the legal oath of swearing a witness to the text of Article 60 of the Code of Criminal Procedure, which requires the witness to take the legal oath before giving his testimony.

Second: Oath in the criminal judiciary

To know the provisions of the oath in the Penal Code, it is necessary to refer to the Code of Criminal Procedure, which is considered a part of the Penal Code. It has indicated in several places the oath procedures, which we will explain as follows:

1- The oath of the accused in the criminal case

Article (126, paragraph A) of the Code of Criminal Procedure No. 23 of 1971, as amended, stipulates: (The accused shall not take the oath unless he is in the position of testifying against other accused), so that his obligation to take the oath is not to compel him to confess, which is an order It is not approved by the law, or it is a reason for false oath, which is a punishable crime (Al-Shawi, p. 144.), and it is clear that the accused does not take the oath at any stage of the criminal case.

2- The oath of the witness in the criminal case

Article (60, paragraph B) of the Iraqi Code of Criminal Procedure stipulates: (A witness who has completed fifteen years of age before giving his testimony shall take an oath to testify to the truth. The witness must give his statement, and if he refuses, he will be criminally responsible for his refusal (Harba, p. 120), and the testimony is of great importance in criminal procedures, and is considered one of the moral evidence on which he depends in deciding the fate of the accused, it may eliminate an innocent or exonerate a guilty person who deserves punishment (Al-Shawi, p. 96.)

3- The oath of the expert in the criminal case

The experts are divided into two parts, some of them are experts registered in the experts' list, and those who have taken the oath before practicing their work for the first time to perform their expertise honestly and faithfully, do not swear the oath the next times, but only swear once, and the other section are not registered in the experts' list, so the experts among them swear An oath every time he is assigned to a case (Harba, p. 127.)

The assignment of the expert is to express an opinion on matters related to the crime being investigated.

Conclusion

First: the results

Through the research, several results emerged, the most important of which are

1- The oath may be directed to the litigant in the civil lawsuit, and the lawsuit is decided by the decisive oath or the evidence is made by the complementary oath.
2- The oath may not be directed to the administrative authority, as it is the defendant (the accused), and it may not be directed to the plaintiff on the basis of the principle of equality between the litigants.
3- In the procedures of criminal trials, the accused shall not take an oath, and the witness and the expert shall take the oath. The witness is sworn in the administrative case.

suggestions

We suggest that the provisions of the oath be organized in a law relating to each section of the judiciary to control its procedures and not to refer to the provisions of other laws.

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