

The Right to be Represented in Court by a Lawyer to the Judiciary in the Iranian LAW and Supranational Trial

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Abstract

Advocacy is one of the most sensitive and momentous jobs in society. Due to the complexity of legal issues and the lack of complete knowledge of the community about the law, having the right to be represented in court by a lawyer is one of the inalienable rights of individuals in a community. The lack of support for lawyers may reduce the desire of talented people to practice law and on the other hand, the lack of administrative power to prevent any breach of duties by lawyers endangers the rights of individuals in society. For this reason, the Legislature of Iran has enacted laws associated with these protections, duties, and administrative power, and some duties are provided for lawyers by the principles of supranational trial. These are moral, scientific, and practical duties. In this article, we examine this in Iranian law and the principles of supranational trial.

Key-words: Advocate, Right, Supranational, Trial.

1. Introduction

Advocacy is an important and sacred responsibility to the extent that God Almighty, in the verses of the Holy Quran (Al-Imran / 173; Hood / 12; Yusuf / 66; Qasas / 28, Zumar / 62) has described himself as an advocate. In Jurisprudential sources, an advocate has the fiduciary capacity and this shows the good faith and support of the legislator for advocates, and the administrative power to prevent any breach of legal or contractual obligations by advocates or failure to respect the

interests of advocates converts the fiduciary capacity to suretyship capacity. Advocacy is one of the special types of attorneyship playing an important role in clarifying the truth in litigation. The legislature protects the rights of advocates, and in return for these rights, assigns duties and responsibilities to them. In the laws of Iran, the law of advocacy has described these duties. In the Western World, rules and norms have been adopted under the title of "Supranational Rules of Procedure" aiming to develop legal commonalities. Such supranational rules and norms will lead to the unification of laws in different countries in the long run if the countries generally accept them and since the laws of different countries are examined, the strengths of those laws can have a significant impact on the weaknesses of the laws of other countries.

In this article, we intend to examine these commonalities regarding the right to be represented in court by a lawyer in Iranian law and supranational civil procedure. This research has been conducted using the library method.

1. Concepts

An attorney is a person who is designated to act on behalf of another person (Amid, 1978, page 1236 – Jafari Langroudi, 2004, page 754). In Arabic, an attorney is a guardian or trustee or is defined as entrustment of work to another (Mostafavi, 1982, volume 13, page 192). In Jurisprudential sources, an attorney is a person who is appointed as a deputy (Najafi, 1984, volume 27, page 347 – Shahid Sani, 1990, volume 4, page 367). Article 656 of the Civil Code of Iran considers power of attorney as a contract in which a person delegates powers to another to do something. This delegation is possible for some rights and even in some duties such as Hajj (Langroudi, 2018, page 106). The logical relation between representation and advocacy is generality and peculiarity in some respect (Seyed Mostafa Mohaghegh Damad, Jalil Ghanavati, Seyed Hassan Vahdati Shobeiri, Ebrahim Abdipour Fard, 2014, volume 2, page 206). This contract has been considered by some jurists as a promissory contract (Shahidi, 2011, page 83 – Adl, 2010, page 354), but others have considered it a kind of permissive contracts (Emami, 2007, volume 2, page 293 – Katouzian, 2010, volume 4, page 111 – Shahbazi, 2006, page 107), And some jurists think that after it has been considered as a permission contract, it is called a promissory-permissive contract due to the effects of permissive contracts (Katouzian). Some, contrary to the explicitness of the Civil Code, consider advocacy as a unilateral legal act. An example of this is advocacy in absentia which means an attorney does not make an attorneyship but accepts it (Langroudi, 2008, page 152). However, the Iranian Civil Code defines power of attorney as a contract that needs acceptance of some acts and does not require a

specific word (Haeri, Shahbagh, 2019, page 593 – Kashani, 2015, page 186). In principle, advocacy requires special formalities and is a form of permissive contract. Therefore, according to Article 32 of the Law on Advocacy, the conclusion of an advocacy contract between an advocate and a client is subject to the conclusion of a power of attorney agreement that they exchange between themselves and submit the second copy to the court with the advocacy contract attached (Abhari, Barzegar, 2018, page 40).

Right, that is, the power given to a person by law or permissions provided by the law to allow individuals to change some of them on their own (Langroudi, 2004, page 216). "Right" has been defined as a kind of power for man over something else (Mohaghegh Damad, 2020, page 20). Some have divided rights into three categories: Political Rights, such as the right to get a share in the legislature; General Rights, such as the right to liberty, the right to be presented in court; Special Rights, such as the right of ownership and the right of pre-emption (Katouzian, 2004, page 255-256).

The legislator of Iran has stated in Article 35 of the Constitution of Iran, in the third chapter, under the title of the rights of the nation: Parties to a dispute have the right to be represented in all courts and if they cannot afford a lawyer, one will be appointed for them. This article shows the importance of a lawyer in Iranian courts because not everyone is aware of the rules and laws. The importance of this issue has been so great so that the legislator has made arrangements to appoint a public defender or assistant attorney to represent people who cannot afford a lawyer in courts and this was not provided in the former constitution of Iran (Madani, 1991, p. 105). From the legislator's point of view, the word "courts" means all judicial authorities, not just a special kind of court, and includes various stages of proceedings, from the preliminary investigation stage to the sentencing stage (Hashemi, 2013, p. 338). Individuals can usually waive their right to have a lawyer in the hearing. This shows that this right is one of the rights of people in the division of rights in Islam because the right of God cannot be waived (Langroudi, 2018, p.6).

2. Lawyer to the Judiciary

Advocacy in the judiciary in Iran has not a very long history and during the dictatorship (late Qajar dynasty) some people defended the rights of others as lawyers before Sharia courts or the Court of Justice and these people were not subject to principles and rules. At the time of the constitutionalism, despite the enactment of the Establishment Act of Courts of Justice, the conditions for the implementation of the law were not provided; therefore, advocacy couldn't be implemented under the law (Matin Daftari, 2009, v. 1, p. 165).

The Bar Association of Iran was established for the first time in 1930, which was affiliated with one of the departments of justice and the Minister of Justice was also the president of the association and some Judicial Assistance Branches were founded in the association (Madani, 2009, v. 1, p. 514). After years of efforts and struggles, the Bar Association became independent in March 1953, based on a legal bill (Bahrami, 2009, p. 120). In addition to the Bar Association, which is responsible to select, train and supervise lawyers within the framework of the law, in implementation of Article 187 of the Third Economic, Social and Cultural Development Plan of the Islamic Republic of Iran, ratified on 15/04/2000, the judiciary was allowed to accredit law graduates to apply for a license to establish legal advisory institutions (Shams, 2005, v. 1, p. 236). Although this law has been valid until the end of 2004, the judiciary continues to implement this article (Beheshti – Mardani, 2015, p. 239).

The right to counsel, because of its importance, has been emphasized in Article 35 of the Constitution of Iran and it has also been addressed in international law, such as Clause 2 below Article 11 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10/12/1948, Article 99 of the Geneva Convention relative to the Treatment of Prisoners of War (adopted on 12/08/1949 by the Geneva Political Conference), Article 93 of the rules adopted by the United Nations Conference on the Standard Minimum Rules for the Treatment of Prisoners to Fight against Crime (Geneva 1955), Paragraph D of Clause 4 of Article 14-1 as well as the International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations on 16/12/1966), and Iran entered to the latter in 1975, by law (Ghahramani – Yousefi Mahaleh, 2004, p. 428-429).

3. Rights and Obligations of Lawyers

Although Article 52 of the Code of Civil Procedure of Iran states that lawyers are litigants, in Clause 2 of Article 295 of the same code, the litigants are considered to be other than lawyers (Mohammadi, 2020, p. 27). If we do not consider a lawyer to be one of the litigants, the lawyer still has some common obligations with the litigants by law and also has common goals with their client(s) in litigation. The law protects lawyers. Since lawyers are responsible for defending people, they should have legal protection themselves (Vahedi, 2008, p. 149). One of these protections is legal immunity. In Note 3 of the single article of the Expediency Council regarding the selection of a lawyer by a litigant, approved in October 1991, it is stated that: "A lawyer, in the position of a defendant, shall enjoy the immunity which is for those working in the judicial system". Of course, according to

Circular No. 8691/78/1 dated 28/11/1999 of the Chief Justice of Iran, the meaning of the phrase "in the position of a defendant" is that a lawyer shall enjoy the immunity only in court and while on duty. Besides, according to Article 17 of the Bar Association Independence Bill, the suspension or prohibition of lawyers can be done only after the issuance of a final ruling by the disciplinary court (Yousefzadeh, 2015, p. 224). In Iran, according to current laws and regulations, being represented by a lawyer in courts is not mandatory (Eftekhar Jahromi – Alsan, 2017, v. 1, p. 201).

Lawyers also have obligations which include:

Good performance and legal assistance, making progress scientifically and practically, attending hearings on time unless there is a justifiable excuse announced to the court, In case of summoning in two sessions at the same time, the priority is to appear at criminal courts, and in other courts, the priority is to appear in the court that the notice of which has been sent earlier and he lawyer is obliged to submit the notice of the simultaneous hearing, attached to the bill, to the other court, otherwise she/he is considered absent. If the lawyer has the right of substitution, she/he must authorize another person to appear at the second court. According to opinion No. 797 / 7-8 / 19/1380 of the Legal Department, "The absence of lawyers during the trial without a justifiable excuse is a violation, even if they have sent a bill" (Quoted by the president, Research Department, 2005, v. 1, p. 100). Lawyers are obliged to keep the clients' secrets. Lawyers are required to accept legal assistance and public advocacy. Lawyers are obliged to enter into written power of attorney contracts and advocacy fee contracts, and in case of receiving additional money from clients in the name of court fees, etc., they will be subject to disciplinary punishment. They will also be considered fraudsters if they resort to trickery to obtain the said money. Lawyers should not abuse their resignations. If it proves that a lawyer betrays his/her client or colludes with the other litigant, he will be sentenced to the severe punishment of disbarment. Performing duties as soon as possible in case of the service of judgment or warning or informing the client and payment of fees are other duties of lawyers. Lawyers should remind the client of the legal effects of the lack of progress of the trial (Articles 25-43 of the Attorneyship Act).

The conclusion drawn from all above is that advocacy is based on honesty, integrity, trustworthiness, competence and accuracy in practice, and case of any violation of these, lawyers shall be subject to disciplinary or criminal penalties. These norms are also accepted in other countries, including Canada (Nouri, 2006, p. 11-61).

The lawyers' and litigants' responsibilities in the administration of justice are addressed in the eleventh principle of the Supranational Civil Procedure Code. The Rules and Principles of Supranational Civil Procedure were first developed by the American Law Institute in Washington,

D.C. and the International Institute for the Unification of Private in Rome, to formulate common, acceptable and fair rules. In 2004, two institutes enacted the Supranational Civil Procedure Principles, based on a draft prepared by Storner, Tarof, Jidi, and Hazard. They also published the rules of the civil procedure without approval. Principles are very general rules that take into account the required measures for a fair trial and also provide detailed rules and regulations on the other hand (Ghomami – Mohseni, 2011, p. 13-15).

In Clause 1 of the Eleventh Principle of the Supranational Civil Procedure Code, the legislature requires litigants and lawyers to act in an honest manner and in Clause 5 of the said principle, the legislature has committed lawyers to fulfill their obligations according to the Civil Procedure (Ghomami – Mohseni, Ibid. p. 104). The principles of professional ethics for lawyers vary among the states, but all countries must recognize the independence of lawyers in defending the interests of their clients and protecting their client's confidential information obtained for advocacy (Pourostad, 2013, p. 92).

As mentioned above, principles of the Supranational Civil Procedure Code address generalities and leave more details to the rules. From these two clauses of the eleventh principle, it can be understood that this principle emphasizes the honesty and integrity of lawyers and their commitment to perform their duties properly, and this important issue can be identified in the laws of different countries such as the Islamic Republic of Iran and Canada. However, in many cases, law and ethics do not have a single context (Katouzian, 2016, v. 1, p. 434), but in this case, the adoption of relevant laws, in addition to protecting rights, also has moral origins.

The judicial precedent of Iran, in the written judgment no. 9 dated 24/04/1994 issued by the branch no. 1 of the Iranian High Disciplinary Court of Judges, and in the written judgment no. 18 dated 09/06/1994 issued by the same branch, emphasized this issue that lawyers must have a clean record and under Article 32 of the By-Laws of the Bar Association, at the beginning of the work, they must present a police clearance certificate or, in the case of persons having a criminal record, their confidential employment file (Karimzadeh, 1999, p. 822-824).

2. Conclusion

Advocacy is an important profession. The importance of this profession in defending the rights of litigants is so great that in Article 35 of the Constitution of Iran, the right to be represented by a lawyer has been recognized as a principle.

For this reason, the legislature granted legal protections to lawyers, including fiduciary capacity and legal immunity, and in return for these protections, gave them a series of responsibilities along with administrative power. Some of these responsibilities, mentioned in the Iranian Advocacy Act, include honesty, integrity, trustworthiness, competence and accuracy in practice. These principles have been adopted in some other countries, including Canada. In recent years, academic institutes in the United States and Europe, are preparing uniform principles and rules, having something in common with the Supranational Civil Procedure, and under the same heading, have enacted the principles of procedure under the said title and in the annex have published the rules without approval. By comparing clauses related to these principles to domestic laws of Iran, it can be said that these principles of Supranational Civil Procedure fully conform to the domestic laws of Iran and domestic laws and are more comprehensive than supranational principles. For this reason, further explanations of supranational principles are provided in the "Supranational Rules" section.

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