



The problems and challenges of determining the defendant and the legal approach to it in Iran's civil procedure

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Abstract: According to the civil procedure law, in all cases, the defendant is not the only defendant, i.e. the person or persons against whom the claimant has a claim, but in many cases, in addition to them, other people must also be the defendant, as the law The procedural rules have mentioned some of its cases, such as the need for both sides of the main lawsuit to be defendants, third-party claims and third-party objections. It seems that the law of civil procedure in the field of "defendant" or the rules related to how to determine it, as well as in the context of a specific and definite definition of the defendant, the nature and legal bases of determining the defendant in the field of formal defects and presenting the principles of documents in the first session of the proceedings It is facing challenges. Law professors have paid attention to this problem in their books by proposing judicial opinions in determining the defendant, which ultimately led to the issuance of a verdict or the issuance of an order to dismiss the lawsuit, but a single procedure has not been established and here they have tried to Investigate the nature and foundations of the law that exist on the way to its acceptance and examine and eliminate it.

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Introduction

Rights can be imagined in the context of society and social phenomena. Today, with the progress of human science and technology in various fields, every day we encounter a new phenomenon that, as legal issues, it is necessary to discuss and regularize them, and for any action, it may cause differences between people in the society. Individuals, as petitioners and claimants of rights that have been violated, should go to the court for grievances and stand in front of the person who is the defendant, that is, the person against whom the lawsuit is filed in the court And in the meantime, the level of the plaintiff's claim should be communicated to him so that he can defend himself by knowing the type of lawsuit, and the plaintiff also requests a lawsuit by presenting his reasons to the court, and the court, by examining and making a judicial decision about the issues between the parties to the lawsuit, He will comment on judicial matters, whether on the subject or on the jurisdiction according to the laws of the country, and based on this, it will be tried to examine the issues related to the challenges in the determination of the defendant.

1- The concept of hearing

The hearing is not defined in the law. In the definition of a hearing, it is said that "a hearing is a legal situation that is based on the presence of a judge and the

provision of grounds for hearing, filing and hearing a lawsuit." Jafari Langroudi 1378, 214: 1).

In another definition of the hearing, it is said that if the judge of the judicial authority attends the litigants or their lawyers by setting a time and inviting them in advance to deal with the lawsuit or matter raised by the plaintiff or the claims and arguments of the litigants, a hearing is held. (Shams 1383, 138: 2).

Using the mentioned definitions, it can be said: the hearing is a situation that is between the two stages of submitting a petition and serving it on the one hand and announcing the end of the proceedings on the other hand, and in this stage the judge will present all the statements, claims, defenses and arguments listens to the parties and takes any action to clarify the judicial uncertainty and prepares to issue a decision after this stage.

The term hearing is used in many articles of the civil procedure law. The hearing may be held in court or outside the court, which is considered a hearing.

It is necessary to explain that the time of filing a lawsuit is different from the time of starting a lawsuit and it should not be assumed that the time of filing a lawsuit is the same as the time of starting a lawsuit, and this means that the time of filing a lawsuit is the same as the time of filing a lawsuit, but the beginning of a lawsuit is a time The case will be registered and completed in

the court office and will be classified and then the judge will issue an order to determine the hearing time. Therefore, according to the previous issue, it is clear that when determining the time to file a lawsuit, you should pay attention to the time of filing the petition in the court office, not when the competent authority refers the petition.

It should be noted that the initiation of proceedings is subject to the submission of a complete petition, in case of defects, until the petition is corrected, it cannot be considered as a complete petition and initiation of proceedings.

The question that arises here is whether the terms of proceedings and proceedings are really different from each other or do they have the same meaning? Some law professors infer that the proceedings begin with the submission of the petition, but the proceedings take place after the submission of the petition. Therefore, the concept of proceedings should include proceedings, this opinion is not without reflection (Jaafari Langroudi 1376, 368: 5).

2- The concept of the reader

In the dictionary, the invited means those who gather with a previous invitation. In the jurisprudential texts, the word "defendant" is used and no definition of it has been made. It is enough that in the definition of the claimant, the opposite party is referred to as the defendant (defendant) or the one who denies the claim of the claimant has been introduced as the "plaintiff". In other words, they have defined the defendant in the position of the answer he gave to the plaintiff's claim.

"And the plaintiff's answer against him, but his confession is his denial, his silence" means that the defendant (defendant) is the one whose action in response to the claimant does not fall outside of three situations, either he confesses or denies, or he chooses to remain silent (Shahid I 1417, 78: 2).

Knowing the concept of the defendant and its rulings, contrary to the opinion of some jurists (Kirimi 1386, 13), depends on the examination of the concept of the defendant; What's more, the word "defendant" has not been removed from the literature and legal texts in general, and it is still used as a synonym for the concept of "reader" in some cases. Therefore, it is necessary to study the phrase of the defendant to better understand the concept of the defendant.

3 - The concept of counterclaim

From the lexical point of view, the word plaintiff is the noun of the object of the lawsuit. In expressing the meaning of the litigants, the Imami jurists have mainly focused their studies on the word claimant; with the argument that when the concept of the claimant is known, the definition of the counter claimant will also be known by itself; As a result, there is no need to

present an independent discussion in this field. For example, Shaykh Baha'i in the comprehensive book of Abbasi, after defining the claimant, immediately writes: "And the claimant is against him".

Also, some other jurists, after a long explanation and elaboration that they have dedicated to the famous definitions of the claimant, in the end, introduced the claimant in less than two lines. According to these jurists, according to the opinions that were presented in the context of the definition of the claimant, whatever meaning we accept for the claimant is the claimant against it.

For example, if we consider the claimant to be someone whose word is contrary to appearance, the plaintiff will be someone whose word is in agreement with appearance. If we consider the claimant to be someone who seeks to prove something against the litigant, then the claimant is the litigant. If we leave the definition of the claimant to custom, the counter claimant is also the person who negates the claim of the claimant. However, this way of thinking of the jurists can be criticized in some ways. In fact, if we define the claimant as a claimant and as opposed to a negator, then with the definition of a claimant, the meaning of a negator is also clear and there is no need to repeat the discussion. However, if we put the claimant against the counter-claimant, which is synonymous with the claimant and the defendant in constitutional law, these two legal natures are not subject to the same rulings, and as a result, by defining one of them, the concept of legal establishment of the other cannot be obtained.

However, regardless of the opinions of Imamiyyah jurists, it is necessary to provide a definition of claimant and counterclaimant. Mr. Dr. Seyed Hassan Emami considers the claimant to be someone whose claim is contrary to appearance; For the reason that: "[the plaintiff] wants to disrupt the apparent situation that is in favor of his side by proving his claim and turn it to his advantage; It means to prove with evidence that the defendant's situation is not in accordance with the truth and that the truth is in his favor. (Emami 1371, 6:18)

Therefore, in order to get the meaning of this concept, one must refer to custom, and custom is the claimant against the person against whom proof of a right is demanded. The brief definitions that the Imamiyyah jurists have made of this word are based on customary examples, and as we have seen, the majority of them have turned to custom to prove their opinion. In addition, many jurists have not provided any definition of the defendant and assigned the recognition of this legal nature to custom. (Sangalji 1369, 134)

4- The defendant in the civil procedure law

In relation to the legislator's meaning of the word "defendant" in the A.D.M. Law, as it was said, this law did not provide a definition of the defendant, but in

general, it tasked the plaintiff to provide the name and other characteristics of the defendant or the defendants in their claim. specify the relevant column in the petition (Paragraph 2, Article 51 of the Civil Code). Of course, in some cases, the civil procedure law has told the petitioner which person or persons he should make a party to his claim (such as the third-party claims of articles 131 and 137 of the Civil Code).

On the other hand, the same law has given the right to those whom the petitioner names as defendants in the petition, if they do not consider themselves to be a party to the petitioner's claim, by objecting to the petitioner's action, under the title of objecting to the lack of consideration of the claim (Paragraph 4, Article 84 of Q.A. d.m) request the court to remove them from the lawsuit and file the case by issuing an order rejecting the lawsuit (regarding the aforementioned defendant).

According to paragraph 2 of article 53 and also article 54 of the ADM Law, if the petitioner has not written the details of the defendant in the petition to the extent required by the law, the petition is considered incomplete in this sense and the court office is obliged to warn the petitioner within 10 days from the date of notification to correct the defects in the petition and complete the details of the readers. Failure of the petitioner to act within the stipulated time will be the reason for the court office to issue an order rejecting the petition and filing the case file. In the practice of the courts, after setting the hearing time and in the hearings, they control this point and then, if they do not consider the determination of the defendant or the plaintiffs to be correct, they immediately announce the end of the hearing and proceed to issue an order rejecting or not hearing the claim.

In these cases, the courts often refer to Article 2 of Q.A.D.M. and paragraph 4 of article 84 of the said law. According to Article 2 of the Civil Code, the petitioner was obliged to present his claim according to the law (correctly) so that the court is also obliged to consider it. It is also stated in paragraph 4 of Article 84 of the Civil Code that if the defendant does not consider the plaintiff's claim against him, he can object to it, and the court is obliged to issue an order rejecting the plaintiff's claim if there is an objection.

As mentioned earlier, even higher authorities than the primary court, such as the Provincial Court of Appeal or the Supreme Court of the country, have acted in the same way as the primary court in dealing with this case, and if the defendant or defendants specified in the primary petition by the petitioner do not consider it correct without prior notice This point is for the petitioner to file a preliminary claim or to announce it to the court whose decision has been appealed or appealed, and to present a proposal to remedy the defect, mainly in relation to the violation of the disputed verdict (which was issued in favor of the petitioner) and issuing an

order to reject the petition. Or they start a preliminary claim. (Shams 1383, 180: 2)

5- Shaped reader

The defendant is a person who has been brought against him in the initial stage of the lawsuit and has been introduced by the petitioner as a party to the lawsuit. As we said about the petitioner, the respondent in this sense is actually a party to the proceedings; However, it may not be considered a party to the dispute. This defendant is, in fact, a formal defendant, and whoever mentions his name and details in the petition, he is the defendant. The respondent, in this sense, may not exist externally.

For example, to file a lawsuit against someone who has died; However, the deceased is also a plaintiff. In fact, according to Articles 51 and 53 of the Civil Procedure Law, the introduction of at least one defendant and the inclusion of his name and other details are sufficient for the completeness of the petition, and the court office is neither obligated nor able to ensure that the defendant is alive.

We will see that even if the petitioner states in the petition that the respondent is deceased, if he has complied with paragraph (2) of Article 51 of the Civil Procedure Law, the court office cannot consider it as a defect in the petition; Because what was necessary has been observed and commenting on this issue is within the jurisdiction of the court and is beyond the authority of the court office. (Shams 1383, 101: 2)

6- Real reader

In a special sense, the defendant is the person who is the possessor of the demand or the subject of the dispute, or is somehow related to it; As a result, he is the real party to the dispute. So, the defendant in this sense is the real or correct defendant of the lawsuit. In fact, this rule that governs objective claims that the defendant is the person who has the desired object in his possession, in principle and considering the basics of this rule, also rules in other claims and can be extended to them; Because, in personal lawsuits also, with a little tolerance, the defendant is the one who is in possession of the claim, and for this reason, these two types of lawsuits are similar; However, the type of possession in objective claims is different from personal claims (Matin Daftari 1378, 324: 1), for example, religion is in dhimma and in possession of the debtor. As a result, the defendant is the debtor. In other words, possession is either material or immaterial, and the demand of any lawsuit is proportional to its nature in the possession of the persons against whom a lawsuit should be filed. In fact, in order to identify the real defendant of the lawsuit, it is necessary to determine the claim and then identify its possessor: The defendant of the lawsuit is the one who owns the demand and the subject of the lawsuit.

Logically, this analysis is defensible and aligned with the basics of civil litigation. In fact, the purpose of the legal establishment of the lawsuit is to take (in general sense) the demand from the defendant and deliver it (in general sense) to the plaintiff after proving the lawsuit. Therefore, it is natural to achieve this goal, a lawsuit should be filed against someone who is in charge of the lawsuit.

The logic of the judgments of the courts is, generally, the obligation of the defendant to return the request to the petitioner, and as a result, it is impossible to oblige someone who does not have control over the subject of the lawsuit. We emphasize that possession of desire is a function of the type of desire. Therefore, of course, seizing a desire that is certain is different from seizing a desire that is related to religion. The first is material and tangible; But, the second is intangible and abstract.

The difference in the desire, of course, makes the amount and quality of possession different; But it does not change the leaven and essence of possession, which is the dependence of the subject of the lawsuit on the decision and influence of the defendant. We must emphasize that we mean to capture the general meaning of this phrase; In such a way that any connection with the desire is considered to mean possession of the desire.

Of course, a lawsuit may have several readers (Articles 60 and 304 of the Islamic Civil Code), all of which are not equal in terms of importance, and their value is therefore different; But, in any case, at the same time, always, the main reader or readers are the ones whose desire is in their possession; Other readers are also related to the fight; That is, the element that is taken in the definition of the reader. For example, we said that religion is in debt and possession; Therefore, the defendant in the debt claim lawsuit owes the same debt. However, in the case of the claim of the joint debt, even though the guarantor is not the possessor of the claim "in a special sense"; But related is "possessor in the general sense" and is responsible for payment and is also in control of it. As a result, according to the legal relationship resulting from the guarantee contract, this person is also considered the defendant.

7- The rights of the defendant in the first hearing

The defendant has rights in the first session of the proceedings, such as protesting the requested price, obtaining security from foreign nationals, raising objections, etc., which will be examined below.

7-1- Objection to the price of demand

Among the rights that are envisaged for the defendant of the lawsuit is the objection to the price demanded. One of the points that must be stated in the petition is the determination of the demand and its price. Article 51 of the Civil Procedure Law stipulates, "The

petition must be written in Persian on specially printed sheets and contain the following points... 3- Determining the demand and its price unless it is not possible to determine the price or it is not a financial demand. ..." Determining the price of the demand is effective in the type of competent authority handling the lawsuit, the ability to appeal, and practically the ability to appeal the decision and the cost of the proceedings.

Financial litigation: If the demand is usually for money, or if it is not something that is specifically intended from the point of view of the claimant, the expectation of receiving the property is in between the demand, then the dispute is financial. Such as lawsuits for proof of ownership, delivery of goods and demand for price.

Non-financial lawsuit: It is a lawsuit whose demand is neither property nor the expectation of receiving the property is included in the demand, such as divorce and parentage disputes. According to paragraph 3 of article 51, there is no need to determine the requested price in non-financial lawsuits.

Determining the asking price for property. Of course, financial claims are also divided into two categories:

In some of these lawsuits, the demand and the price are the same, such as a demand for a check or promissory note. In some other cases, the demand and price are different. For example, if the demand of the lawsuit is the delivery of an apartment unit or a car, the price of which should be determined in addition to the demand.

Objection to the price of the demand is valid when the demand and its price are different, and only in lawsuits related to the demand for money, the objection to the price of the demand has no meaning. (Mohajiri 1381, 211: 1)

7-2- Objection to the requested price within the stipulated time

Paragraph 4, Article 62 of the Civil Procedure Law stipulates: "In claims regarding property, the demand is the amount that the plaintiff specified in the petition and the defendant did not object to it until the first hearing, unless the law has determined otherwise." The phrase "until the first hearing" raises the question of whether it is possible to object to the price of the request in the first hearing. It is certain that the defendant can file an objection to the requested price from the time the second version of the petition and its appendices are served and before the first session of the hearing is held.

The wording until the first hearing is ambiguous and it is not clear whether it is possible to object to the requested price during the first hearing. Some jurists believe that there is a right to protest until the first hearing is held, and after it is held, there will be no such right. They consider the deadline for objection to be

heard until the court has not entered into the proceedings on the merits of the lawsuit. Some other jurists have set the period "until the first hearing" until the time of the defendant's first defense. The procedure of the courts, as far as the writer has dealt with it, is that during the first session of the proceedings, the defendant is allowed to protest at the price of the request.

The legal department has decided in the advisory opinion number 7/4532-21/1/62: according to the contents of paragraph 4 of article 87 of the law of civil procedure and article 27 of the legal bill of public courts, objection to the price of demand should be made at the beginning of the hearing and When there is a dispute in the asking price and the court determines the impact of the objection on the jurisdiction of the court or whether it can be appealed before starting the proceedings, the court takes action in determining the asking price, and the objection that is made in the second or third sessions can be heard and reviewed. It will not be. (Rahimi 1381, 145:1)

8- Necessity to determine the defendant

Our goal in this topic is to focus on the importance of determining the defendant of the lawsuit and to examine the concept of consideration of the lawsuit. These topics are necessary and important to understand the criteria for determining the real defendant of a lawsuit. Determining the defendant in a lawsuit is one of the most important and sensitive issues in filing a petition (Shams 2013, 31:2). In fact, regardless of whose side the petition should be presented to the court,

It is one of the plaintiff's duties, and if he makes a mistake in this regard, his case will not be heard in court. Therefore, although the court is subject to the title of the request and must make an affirmative or negative comment about everything the petitioner wants; However, the petitioner is not free to demand his request from whom, and he must register his petition against someone who is legally recognized as a litigant (Safian 1389, 43). In other words, in the case of multiple readers, all of them must be recognized as parties to the lawsuit, and simply filing a lawsuit against several people does not expose the plaintiff's claim to substantive hearing. Lawyers refer to a golden rule in the case of multiple readers, according to which adding It is better for readers than reducing their number. (Riyazi 2012, 357)

This rule is only practical; However, it does not help the court, and the judge should disregard this rule made by the lawyers and find out the correct litigants. Apart from this, even though the petitioner from among the actual plaintiffs, under certain conditions, can file a lawsuit against only one or more defendants and does not necessarily have to demand the lawsuit from all plaintiffs; However, this authority, which is mostly tactical, does not negate the plaintiff's duty to file a lawsuit against the correct defendant.

As mentioned above, the real defendant is the one who dominates the demand of the lawsuit; In addition, according to the rule of the real party of the dispute, the defendant is necessarily the one who has an interest in the demand and outcome of the dispute. In fact, the interest of the parties is an important criterion for distinguishing litigants, including the defendant. This feature, as a rule, must be established in all claims. However, while maintaining the beneficiary element, there are other criteria for distinguishing the defendant in the lawsuit, which are of high importance in their own way, and of course, some of them are not repeated in all lawsuits.

According to some jurists, someone can be a party to a lawsuit who has the special characteristics of a claimant, and there are persons with this characteristic whose confession is effective in the lawsuit, and these persons, in case of denying the lawsuit, are recognized parties and may be legally prosecuted. argued (Sadrazadeh Afshar 1389, 331).

As we mentioned earlier, a lawsuit is a request to prove a right against another, and it has a partial nature in both infinitive and product meanings. As some professors have stated, it is not possible to file a lawsuit without the exact identification of the litigant. (Abul Hamad 1370, 554).

In fact, although the creation of a lawsuit is dependent on the will of one person, that is, the plaintiff; However, the fight is related to two or more people. Therefore, every lawsuit must have at least one addressee, who is the defendant or counter-claimant. Therefore, to file a lawsuit, it is necessary to introduce at least one defendant, and to enter into the nature of the lawsuit and hear it, it is necessary to pay attention to the said defendant.

According to the rules of civil procedure, one of the conditions for filing a lawsuit is the determination of the defendant, and jurists agree on this matter (Mardani and others 1373, 68), according to paragraph (2) of Article 51 of the Code of Civil Procedure, one of the conditions of the petition is to mention the name and characteristics of the defendant. and there is no doubt that the requirement of a civil lawsuit is to determine the defendant.

If the petitioner has registered his petition without specifying the defendant and mentioning its details, his petition will not be processed. In fact, according to paragraph (2) of Article 53 of the Code of Civil Procedure, the failure to determine the defendant is one of the reasons for sequestration of the petition (Metin Daftari 1378, 318: 1), according to Article 54 of the Code of Civil Procedure, in this case, the director of the court office is required to Notify the petitioner in detail.

9- Determining the defendant based on voluntary relationships

Voluntary relationships, that is, a relationship that is established by the agreement of the parties. which itself is divided into two types. Either it is a two-way agreement (Aqd), or it is one-way (Iqaa). In these two cases, it is easy to find the legal relationship and as a result to find the defendant (Mortazavi 1392, 138).

10- Determining the respondent by legal requirements

A relationship that is not voluntary. This type of relationship also has two origins, either it is created by the law, such as the payment of the obligation to pay child support by the father or vice versa, or it originates from the present act and abandonment that the respondent does. In this case, it is a bit difficult to find the answer. However, in a case where one person commits a harmful act or omission, it is easy to identify the defendant, but when several people are responsible for the damage, it is different according to the circumstances and characteristics of the act. (Madani 1392, 118)

The first assumption is that if everyone is in charge, then everyone is responsible and is considered as the recipient, even if one is the principal and the other is the agent, but they have a role in committing the act together, and the act is attributed to both of them.

The second assumption is that there are many people as the steward and the causer, in which case only the steward is responsible and the responsibility is not directed to the causer. For example, someone causes the destruction of another wall by the command of another. In this example, only the destroyer is responsible and not the owner. There is an exception in this assumption, and that is when the cause of the misdemeanor is from the steward, in which case the causer is responsible.

The third assumption is that all are causes. Here there is a lot of ambiguity to recognize the reader, for example. An accident occurred near the city and caused injuries to the passengers of the cars, and after the injured were taken to the hospital, due to the absence of a specialist doctor at work and the breakdown of the hospital ambulance, they were sent to the center by a private ambulance. Due to the deterioration of the condition of the injured, the driver It is illegal to drive at high speed and overtaking, and due to the unfavorable road conditions during overtaking and to avoid collision with the oncoming car, the driver deviated from his path and this action causes more damage to the injured, who after being transferred to the hospital, The injured die. (Mortazavi 1392, 139)

It can be seen that in this example, the first accident caused injury, the absence of a doctor in the hospital, the lack of an ambulance, overtaking and the high speed of the ambulance driver are all the causes of the death of the injured. Are everyone responsible and the defendant? To answer this question, it is important to

examine the type of effective means. Devices are generally divided into two categories:

Transverse devices are those devices that cause damage and losses together and at the same time. All of them are responsible regardless of the extent and severity of their actions and their impact. Longitudinal cause is when the causes cause damage in a hierarchical manner, i.e. sequentially, consecutively. (Nikbakht 1382, 74). In this case, different opinions have been expressed, and it seems that all of them are the cause of the claim. But only the main cause is responsible for compensation, and the recognition of this responsibility and the imposition of it on one or all of the readers is with the court, which may issue a verdict based on the circumstances of the case and the use of expert theory. Therefore, the appointment of the defendant is not a clerical action, so that the court office is in the position of objecting to the petitioner. (Shams 1383, 139: 1)

11 - Designation of the defendant in the lawsuit to attract a third party

A third-party lawsuit is a lawsuit that is filed by each of the litigants on behalf of a person who is not involved in the lawsuit and is considered a third party. "Any of the litigants who consider it necessary to bring in a third party, can state their reasons and reasons by the end of the first session of the trial and within three days after the session, by submitting a petition to the court, they can request to bring him in. Therefore, if in the appeal stage, a third party is brought against someone who was also possible to be brought in the first stage, the court cannot reject the third party petition on this pretext. In a third-party claim, the claimant is called the interested third party and the defendant is called the third party. According to the above, the third party claim may be brought either by the plaintiff or by the defendant. It is also possible to attract a third party in order to claim an independent right, or its purpose is to strengthen the possibility of winning the main lawsuit or to facilitate the proof of its claim. (Sadrzadeh Afshar 1389, 106)

Therefore, when the petitioner is bringing a lawsuit to attract a third party, he can pursue two goals from filing a lawsuit; One is that he wants to complete a lawsuit whose request is to convict the defendant of the main lawsuit along with the third party, which means that he wants to convict the main defendant and also wants to convict the third party. For example, in commercial document lawsuits, a person first files a lawsuit against the issuer of the commercial document, but when he realizes that he cannot collect his demand from him, the endorser of that commercial document brings the commercial document to the proceedings and gets their joint conviction from the court. Will.

Second, he intends to facilitate the proof of his claim by attracting a third party. This situation happens

when the plaintiff realizes that it is not possible to proceed with the lawsuit without the intervention of a third party, which is prescribed in Article 135 of the Civil Procedure Law.

Like the case where the owner transfers the same leased item to another, and the transferee (new owner) requests to vacate it after the lease period expires. Here, the tenant claims through a counterclaim that according to the Landlord and Tenant Relations Law approved in 2016, he paid 5 million Rials of goodwill to the previous owner in a separate contract, therefore, by filing a third-party lawsuit against the previous owner to prove He makes his claim (Shams 1383, 108:2).

The claimant can also bring a third party to the proceedings during the claim. In this case, he must submit the appeal petition along with the objection petition to the court office. On the other hand, the respondent has the right to state his reasons and reasons in the first hearing of the objection and within three days to submit a petition to the court. (Vahidi 1382, 67: 1)

A third-party lawsuit is filed by submitting a petition; According to the ruling of Article 48 of the Civil Procedure Law and Articles 135 and 136 of this law, regardless of the purpose of its filing, this lawsuit requires the submission of a petition and, accordingly, all the legal formalities mentioned in Articles 48 to 60 of the Civil Procedure Law. The third-party petition and its copy and attachments must be prepared for the number of litigants plus one copy.

The proceedings regarding the involvement of a third party will be the same as the original petition. If, from the time of submission of the petition to the hearing, the time set for sending the petition and its annexes to the litigants is not enough, the court will change the time of the hearing and notify the litigants. (Bazghir 1389, 139)

12- guaranteeing the implementation of the correct determination of the defendant in court decisions

If the petitioner does not file his lawsuit against the defendant or real plaintiffs, the court cannot decide on the merits of the lawsuit; Therefore, he has to withdraw the case from the court by issuing an order. In spite of this, sometimes, determining whether or not to pay attention to the claim requires entering into the nature of the claim. In this assumption, if the court does not find the lawsuit to be favorable to the plaintiff, it will announce its decision in the form of a verdict. In this topic, we are dealing with the decision of the court in case of failure to determine the real defendant or defendants of the lawsuit and the possibility of suing them.

12-1 - Dismissal of the lawsuit

The decision to reject the lawsuit is considered as one of the final decisions of the lawsuit. The most

important cases of issuing an order to reject a lawsuit are related to the objections of paragraphs (3) to (11) of Article 84 of the Civil Procedure Law. In fact, if the court recognizes any of the aforementioned objections, it will proceed to issue an order rejecting the lawsuit based on Article 89 of this law. In our discussion, the failure to pay attention to the lawsuit against the defendant, which has various examples, is one of the cases of issuing an order to reject the lawsuit.

12-2- Ignoring the lawsuit

In paragraph (4) of Article 84 of the Civil Procedure Law, the legislator has considered failure to pay attention to the defendant as one of the defects. Therefore, if the lawsuit does not concern the defendant, he can object to this matter, and in any case, if there is an objection, it will not be time for substantive proceedings. Despite this, as we explained in detail in the past, the phrase "not considering the lawsuit" is a general title, and clarifying the meaning of this abstract concept depends on the statement of its examples.

In fact, the lack of some legal conditions in the defendant prevents him from paying attention to the lawsuit; As a result, it is the explanation of these cases that gives the meaning of the student to the phrase "attention" and "not paying attention" to the lawsuit. Therefore, filing a lawsuit against non-genuine; The legal inability of the defendant; Filing a lawsuit against a non-possessor of the object of demand and filing a lawsuit against a non-existent defendant are cases of not paying attention to the defendant.

13 - Lawsuit against non-genuine

As mentioned, the lawsuit must be filed against the principal; Because, the demand of the lawsuit is in possession of the original, and the legal relationship of the origin of the lawsuit is created exclusively between the plaintiff and the original defendant. Therefore, if the claimant files his lawsuit against the representative of the original instead of the original, such a lawsuit will not have a substantive hearing due to the non-original defendant's lack of attention.

Since the rights and obligations arising from a legal relationship are assigned to the original, the party to the dispute is also original, and the lawsuit does not pay attention to those who are considered to be only representatives of the original.

Instead of further explanation, we review the decision No. 682 dated 10/24/1373 of the first branch of a Tehran legal court, which contains the desired decision. In this decision, it is stated: "The request of the petitioner requires the respondent to prepare an official document regarding the registration number 116/1884 based on the normal contract of 10/9/1368 and its amendment, and also to pay the amount of five million nine hundred thousand Rials in damages related to the

delay in carrying out [giving] the said commitment and the construction defects related to the said license plate. Considering that according to the answer of the registration office 26599-16/8/1372, the owners of the mentioned registration plate are other persons than the defendant, and according to the content of the court, since the lawsuit was not filed by the original party, it was not considered admissible, it was issued an order to reject it and declares." (Kamiar 1376, 39: 3) So, filing a lawsuit against a non-genuine person is subject to clause (4) of Article 84 of the Civil Procedure Law, and based on Article 84 of the said law, it is one of the cases of issuing a decision to dismiss the lawsuit.

14 - Disability of the respondent

As we explained before, the lawsuit is brought to the attention of someone who has the necessary legal and natural ability to do the request. A person who, according to the legal provisions, does not have the ability to execute the sentence in case of conviction, naturally cannot be a party to the lawsuit and the lawsuit will not pay attention to him.

In other words, even though this person is actually in debt; However, due to the fact that the law has deprived him of the ability to fulfill his religion, he cannot be considered a party to the lawsuit. This inability may be temporary; But the defendant must have the ability to implement the request at the time of filing the lawsuit; Otherwise, the court will issue an order rejecting the petitioner's claim. It is obvious that the petitioner can subsequently renew his lawsuit against the respondent who has obtained the necessary legal power. The incapacity of the defendant is also included in Article 89 of the Civil Procedure Law, referring to Paragraph (4) of Article 84 of the said Law, and is one of the grounds for issuing an order dismissing the lawsuit.

15 - Lawsuit against non-existent defendant

The petitioner always does not know the respondent in any dispute and does not know about his situation; In this way, either he is basically not familiar with the reader, or it has been years since he met him, and he is unaware of the life and death of the reader.

Therefore, sometimes the plaintiff may file a lawsuit against someone who lacks independent personality, and sometimes the defendant may die at the same time as filing a lawsuit, and the plaintiff may file a lawsuit against someone who has lost his personality due to death. Therefore, it should be seen what is the duty of the court and its office in this situation and what decision should they make?

Usually, the defendant's status is known in court and this is when the case has reached the court from the office. But before that, according to paragraph (2) of Article 51 of the Code of Civil Procedure, the inclusion

of the name and other details of the defendant is sufficient to complete the petition in this regard, and the court office is not responsible for checking the veracity of the petitioner's statement in this regard, and it is also optional. Not in this field.

In our opinion, mentioning the details of the defendant is enough to comply with the provisions of paragraph (2) of Article 51 of the Code of Civil Procedure, and whether the defendant is alive or not is beyond the inspection and supervision of the court office; As the office of the court is obliged to verify the attention of the lawsuit to the defendant who is alive; But the fight is not against him. The majority of jurists do not consider the court office competent in this matter and have left the decision to the court. According to them, in this situation, the most appropriate decision of the court is to issue an order not to hear the lawsuit (Shams 2013, 275:2).

Here, the existence of a defendant means its introduction in the petition and is different from the actual existence of the defendant. If the defendant has died, the lawsuit will not be considered; Not that the filing of a lawsuit is not realized. According to Article 49 of the Civil Procedure Law, the date of receipt of the petition at the court office is considered the date of filing the lawsuit. Since the sentence of Article 49 of the Code of Civil Procedure is absolute, and since the legislator has not made a difference between whether the defendant is alive or not in this sentence, and since the defendant may have died at the time of filing the petition, there is no doubt that the filing A petition on behalf of the deceased is also considered a lawsuit and there is no reason for the intervention of the court office and a notice to correct the defect.

Despite this, in our opinion, the most appropriate decision of the court in facing the lawsuit filed against the deceased is to dismiss the lawsuit, not to not hear the lawsuit; Although, as we said, the majority of the courts of justice in this field show a tendency to issue an order not to hear the lawsuit.

However, we emphasize that dismissing the lawsuit is the best decision; Because, according to Article 84 of the Law of Civil Procedure referring to Clause (4) of Article 84 of the same law, if the lawsuit is not directed against the defendant, the court should proceed to issue an order dismissing the lawsuit, and naturally, the lawsuit does not attract attention to someone who has died. In fact, filing a lawsuit against an unreal defendant is not different from filing a lawsuit against a deceased defendant, due to the fact that the lawsuit is not paid attention to both defendants, and the reason for not paying attention to the lawsuit is the same in both assumptions.

Failure to pay attention to the defendant who is still alive is due to the fact that the petitioner did not make the real defendant a party to the lawsuit, and failure to

pay attention to the deceased also means that the real defendant (heir) was not made a party to the lawsuit. Hence, in both cases, the fight does not concern the readers.

Therefore, considering that according to Article 89 of the Civil Procedure Law, if the lawsuit is not against the defendant, the court will issue an order dismissing the lawsuit, in the lawsuit against the deceased or the defendant who does not have an independent personality, while the court office cannot be given jurisdiction, the most appropriate The order that the court can issue is the order to dismiss the lawsuit. (Shams, Kurd Zanganeh 2016, 22

16- Determining the defendant in the third party entry lawsuit

In this paragraph, it is necessary to talk about the concept and types of third-party entry lawsuits and the conditions for its filing. Article 130 of the Civil Procedure Law stipulates in this regard: "Whenever a third party asserts a right independently in the subject matter of the proceedings of the main litigants, or considers himself to be the rightful party of one of the interested parties, he can declare until the end of the proceedings. It has not been entered into a lawsuit, whether the proceedings are at the initial stage or at the appeal stage[...]" Therefore, as explained in the third-party lawsuit, this lawsuit is also of two types; The third entrant may independently claim a right for himself or he may consider himself to be one of the interested parties. (Qurbani 1391, 88)

A third party entry lawsuit requires submission of a petition; According to the last part of Article 130 of the Civil Procedure Law, this lawsuit is filed by petition and requires compliance with all the legal formalities of filing a lawsuit (Articles 48 to 60 of this law). The petition for the entry of the third party and the copies of its documents and appendices must be as many as the original litigants plus one copy, and it will have the conditions of the original petition. After receiving the petition of the third party, the time of hearing the main lawsuit will be announced to him and a copy of the petition and its annexes will be sent to the parties of the main lawsuit. If there is not enough time, according to the order of the court, the time of the hearing will be changed and notified to the litigants. Also, the arrangements for handling third party entry at each stage, whether first or revision, are equal to the general regulations regarding that stage.

The third entry lawsuit is subject to the general conditions of the tari lawsuits; On the other hand, according to Article 17 of the Civil Procedure Law, this lawsuit is one of the vague lawsuits and is admissible if it is related to the main lawsuit or comes from the same source. However, when the court determines that the third lawsuit is for the purpose of collusion or

investigation, or the investigation of the main lawsuit is not dependent on the investigation of the third lawsuit, it separates the third lawsuit from the main lawsuit and deals with each one separately. (Khoda Bakshi 2013, 212)

Filing a third-party lawsuit is not bound by a certain time; Unlike third-party, opposing and additional lawsuits, third-party lawsuits can be filed until the end of proceedings is announced. The termination of proceedings is reflected in the case by the court's decision. The court proceedings end when the negotiations of the parties and the hearing of the evidence have been done sufficiently according to the judgment of the court, and there is no need for further proceedings, and in other words, the case is ready to issue a decision, whether the case is in the preliminary stage or in the Appeal stage.

In this case, if the suit or petition is dismissed and the case is being heard at the primary stage, the primary court must hear the third-party entry lawsuit, and if the case is being processed at the appeal stage, the third-party entry lawsuit will be sent to that court. In any case, rejecting or canceling the petition or rejecting the claim of a third party will not prevent him from entering the appeal stage.

The extent of linking the third lawsuit with the main lawsuit depends on the type of this lawsuit; The effect of rejecting the lawsuit or petition, returning the petition and the lawsuit, and even compromising the main lawsuit compared to the third party lawsuit is that if the third party lawsuit is independent, it will be dealt with alone, but if it is subordinate to the lawsuit of one of the parties to the original lawsuit, the third party lawsuit will be included. its rules.

For example, if a third-party lawsuit is filed in favor of the plaintiff, and the plaintiff's lawsuit is lost for some reason, the third-party lawsuit will also be dismissed accordingly. Therefore, it seems that some of the opinions of the Supreme Court of the country, which generally and regardless of the type of third-party entry lawsuit, considered the termination of the main lawsuit as the reason for negating the third-party entry lawsuit, are not correct.

17 - Determination of the defendant in the counterclaim

A lawsuit that is filed by the defendant for the purpose of joint investigation following the lawsuit of the plaintiff and has a complete connection or unity of origin with it is called a counter-suit (Article 17 of the Civil Procedure Law related to Article 141 of this law). The defendant is not required to file a counterclaim against the petitioner and can file his desired lawsuit later; However, since the counter-claim leads to d For example, the owner, who is a resident of Isfahan, is evacuating his rental property located in Kashan, and

has paid expenses in the rental place in the direction of the tenant. By filing this lawsuit, the defendant actually reaches the desired result sooner; What, if the defendant did not raise this counterclaim, he should have first vacated the rented place and then filed his claim at the plaintiff's place of residence (Isfahan).

This lawsuit has a dual nature, meaning that on the one hand it is considered a defense and on the other hand, since it is filed in the form of a lawsuit, it is actually considered an attack. Hence, it is called offensive defense. But what is the criterion for distinguishing between defense and confrontation? A counterclaim is filed by means of a petition, but claims for clearing, peace, termination, rejection of the demand and the like that are stated to defend the main claim are not considered counterclaims and do not need to submit a separate petition, and the title of accounting, clearing or any statement which is considered a defense, it is not a false claim, it will not be subject to Article 17."

However, the counterclaim may, in addition to rejecting the main claim, state a new claim that necessarily requires filing a petition according to Articles 142 and 48 of the Civil Procedure Law. Realizing the defendant's contractual settlement does not require a petition. Therefore, our legal experts agree on the title of clearing, which is stipulated in articles 18 and 142 of the aforementioned law, that it does not include judicial clearing, that is, a type of clearing that requires judicial proceedings and proof of claims. 2)

18 - Defendant's rights and filing a counterclaim

Another right of the defendant is to file a counterclaim, which is stated in cases 141 to 143 of the Civil Code. Article 141 of the aforementioned law stipulates: "The defendant can file a lawsuit against the plaintiff's claim. Such a lawsuit, if it has the same origin or is completely related to the main lawsuit, is called a counterclaim and will be dealt with jointly, and if there is no counterclaim, it will be dealt with separately in the competent court. There is a complete connection between two lawsuits that the decision in each one is effective in the other.

A counterclaim, like the main claim, must be based on a petition, but some defenses that are raised directly to nullify the main claim are not false claims and do not require a petition, such as claims for clearing, settlement, termination, rejection of demands, and the like. Without the need to submit a petition, the court will be obliged to process it. For example, if the tenant files a petition against the landlord's claim for arrears of rent, this is a counterclaim.

A counterclaim is filed by the defendant against Khohan and in Article 141 of the Code of Civil Procedure. M stated: "The defendant can file a lawsuit against the plaintiff's claim. If such a lawsuit is caused by the same origin or has a complete relationship with

the main lawsuit, it will be dealt with as a counter-lawsuit...".

Therefore, counterclaim is the defendant's right. Now, if the claimant files a counterclaim in response to this lawsuit, it is not correct to apply a counterclaim against him, because in this case, it would be far-fetched. Therefore, a counterclaim is a claim filed by the defendant against the main claim filed by the plaintiff.

The question that arises is whether the third party can also file a counterclaim or not? According to Article 139 A.H. A.D.M. is a third party who is attracted as a defendant, and all the provisions regarding the defendant are applicable to him, therefore, the third party can also file a counterclaim against his party.

Another question that arises is whether the litigants can file a counterclaim against the third party or not? In this regard, it should be noted in detail, according to Article 130 of the Civil Code, the third parties involved in the litigation are divided into two categories: the first category, the individuals who have independent rights in the subject of the proceedings. The second category is the people who consider themselves to be the beneficiaries of one of the litigating parties and join the lawsuit to strengthen him.

The first category of persons, because they actually file a lawsuit against the litigants or one of them, and they are considered as plaintiffs in the exact and complete sense of the word, and their opposite party is considered the defendant, so they can be the defendant in a counterclaim and the litigants They can file a counterclaim against such a third party. However, the second category of persons, since they do not claim rights for themselves independently and their position is subservient to the person who declared themselves to be the beneficiary of his entitlement, therefore, according to the said party, they cannot be included in the title of claimant or defendant in the sense of to be precise and complete, and as a result, they cannot file a counterclaim and they cannot file a counterclaim against them either.

The lawsuit filed by the defendant against the claimant's lawsuit is counterclaimed if it originates from the same origin or is completely related to the original lawsuit. According to the last part of Article 141 A.H. A.D.M., which stipulates: "... between two lawsuits, there is a complete connection when the decision in each is effective in the other." For example, in the case of the requirement to draw up a document on the part of the plaintiff, the defendant in the counter-suit sought to cancel the affidavit in favor of the validity of the options. Here, the decision of the court in one of the main claims or tary will be effective on the other.

Conclusion

One of the important stipulations in the civil procedure law is the determination of the defendant by the plaintiff. The determination of the defendant by the

petitioner and its determination, as it is a judicial matter, is ultimately related to the court's determination. Based on this, the defendant is a person who commits to the petitioner, but it is not easy to determine who is obligated, for this reason, it should be seen who has a legal relationship with the petitioner or finds that he has refused to do so or is against the contract has been performed which has caused the claimant's loss, in addition, sometimes the defendant is not the same person and in these cases, the entry of a civil lawsuit, including the entry of a third party, is also brought up, and the plaintiff must, in determining the defendant, other parties to the lawsuit according to the specific rules of the law Specify civil proceedings. The issue of how to determine the defendant or plaintiffs in order to include their names and other details in the petition is one of the important issues in civil proceedings. The aforementioned problem and its importance is due to the fact that, on the one hand, the legislator did not provide a definition of the defendant in the civil procedure law, and on the other hand, he obliged those who intend to file a lawsuit as plaintiffs to correctly determine the plaintiff or plaintiffs of their lawsuit and then Write their names and other details in the petition. In this way, according to the aforementioned legal duty and the absence of a definition of the defendant, the petitioner usually determines them with his personal opinion and taste, and usually writes the names of those who are directly related to him as the defendant and the party to the lawsuit in the petition. He knows them and considers them responsible or responsible for his claim and demands that they be sentenced to fulfill his demands by the court. While according to the unwritten and sometimes specified rules of the aforementioned law, in many lawsuits, it is not enough for the plaintiff to file a lawsuit only against those who are really on his side and he wants to condemn them to fulfill his wishes by the court. Rather, according to the existing procedure and in practice, in many cases, in addition to the mentioned individuals, other people should also be named as defendants in the lawsuit, so that the court can deal with the lawsuit with the presence and intervention of all of them and by establishing the relationship. The causation and responsibility between the claimant and the plaintiffs, and also on the condition of sufficient evidence, all or some of them to fulfill all or part of the plaintiff's demands. Therefore, the defendant of the lawsuit is not only the person against whom the claim is made (plaintiff against), but it may be necessary for other persons to be named as the defendant of the lawsuit so that the court can deal with the matter. Another point is that according to the civil procedure law, wrongly identifying the litigants is not a violation of the petition, and before the court starts hearing, the court office is obliged to issue a notice to the petitioner and the petitioner must resolve the problem by referring to the

court. Therefore, if the petitioner has not been careful enough in determining the defendant or defendants of the lawsuit and they have not determined them correctly, the court after entering into the essence of the case and usually citing Article 2 of Law A. d. M., under the title that the claim has not been filed correctly according to the law, issues the decision to reject the claim and files the case. Although this decision is not about the substance of the lawsuit, it is a negative decision against the petitioner and may be a problem for him.

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