

Principle of Confrontation and Serving Notice by Affixation

Dr. Mohammad Ali Khalil Altaany
Faculty of Law
Jadara University, Jordan
mohammadaltaany@yahoo.com

Dr. Farouq Ahmad Al Azzam
Faculty of Law
Jadara University, Jordan
farouq.azzam@hotmail.com

Abstract

This study deals with method of notice by affixation and its effect on the principle of confrontation in accordance with the Jordanian Civil Procedure Law No. 24 of 1988 and its amendments and comparative law. Through which it addressed the issue of notice by affixation service, its legitimacy, effects and the extent of its impact on a fundamental principle of civil litigation. It also addressed the topic of notice by affixation in some comparative legislation.

This study revealed that when the Jordanian legislation adopted this type of notice service it has not done the right thing, but it inflicted harm to the litigants because it is considered a violation of the principle of confrontation.

This study has suggested some amendments to the text of Article (9) of the Code of Civil Procedure which dealt with this type of notices. The study suggests amending Article (9) to be fair and not to disregard any of the basic principles of civil litigation.

Keywords: Jordanian Civil Procedure Law, service of notice of defendants, damage to Litigants, Civil Litigation, Justice of the Judiciary

Introduction

The Jordanian Code of Civil Procedure describes how any person must follow the case when it comes to the judiciary, Whether he is a judge, plaintiffs, a judicial assistant or bailiff, from the beginning of the dispute until the dismissal of the case thereof, whether when the judicial decision is issued, dismissed or ending the case without the judgment or the execution of the sentence.

Most of the modern procedural legislation has ensured that the litigation procedures must be held properly prior to the commencement of its proceedings by notifying the litigants.

This procedure must be taken into account after the case has been registered with the competent court and any dispute procedure must be correct .The parties of dispute

should be notified of any action in the disputed issue, that is consistent with the principle of confrontation, which is confirmed by international conventions as one of the fundamental rights of defense stated in all constitutions, and this is what the Civil and Commercial Procedure Laws have adopted in the various comparative legislations.

The procedures stipulated by the Jordanian legislation to obtain the notice by affixation and the way they are carried out in accordance with this law. Undoubtedly, this can lead to the elimination of the principle of confrontation, according to which the plaintiff must inform his opponent of everything he has done so that the opponent can defend his rights, this principle is imposed on the person who claimed, and he is presumed to inform his opposing party of his requests and to enable him to view the evidence in which he presents proof of his claim.

This prohibition is not limited to the parties of dispute, but it extends to prevent the judge from making any decision based on papers submitted by one of the parties without the other being informed of them¹.

This study deals with the "Principle of confrontation and notice to be served by Affixation".

This study is divided into two topics. The first one deals with the legitimacy of notice by affixation, and the second identifies the effects of notification by affixation and the extent to which the principle of confrontation is achieved.

Topic One: The legitimacy of serving notice by affixing.

Notice in the language means delivering, by which a fact is informed to a specific person.

In the legal term, the term "Notice" means the written document by which a particular person is informed, in accordance with a legal form, of a judicial act that has been or will be performed.

"**Notice**" is the official means by which a legal process is informed to the adversary, enabling him to view it and deliver a copy thereof².

The court must monitor its proper completion in order to ensure the right of defense of the other party, and this will be achieved only through correct notification process.

The Jordanian Court of Cassation stated the objectives of service (for notice) that "the notice of the defendant shall be in accordance with the provisions of articles (6/1), (7/1) of the Code of Civil Procedure provided that the service is delivered by the bailiff to the person required to be notified in person and the paper has to be signed³."

¹ Abdel Fattah, A, 1993, the duty of the judge in achieving the principle of confrontation as the most important application of the right of defense, the House of Arab Renaissance. Cairo.

² Shoshari, S, 2001, Explanation of the Code of Civil Procedure, Dar Al-Thaqafa for Publishing and Distribution, Amman, Hashemite Kingdom of Jordan, p.249

³ Legal Principles of the Court of Cassation in Jurisdiction Cases, Part One, Decision No. 145/89, p. 2154, 1990

In accord to the civil procedure law Judicial papers shall be served by delivering a copy to this who must be served wherever found, If the bailiff does not find the person to be served in his location or at his work site, the paper shall be served to any family member who lives with him , who appear as 18+ years old . If the bailiff does not find a person who can be delivered the notice to after making all efforts, he must hang a copy of the judicial paper in a visible spot where the person is located; or at his work site.

Accordingly, the explanation that the bailiff wrote on the status quo (that he found the door closed but did not mention that he did not find any member of the defendant's family who may be informed on his behalf) is considered not enough and therefore not useful for the time of appeal ⁴.

The importance of the service notice procedure appears in several areas, including the scope of the dispute, considering that any of its procedures is ineffective unless it is notified to the other party. And in the judgment resulting from the acquisition, challenge of litigation and in the observance of the civil obligations imposed by that provision. Thus, notice procedure is fundamental and complementary to the work itself⁵. Article (7) of the Lebanese Civil Assets Law and Article (10) of the Egyptian Civil and Commercial Procedures Law have addressed informing the "concerned parties" about the contents of the dispute papers and procedures. In order to consider the service of notice done according to the duly observed practices, the service shall be deemed as effective once the person in dispute has been notified otherwise, it will be considered void⁶.

Actually, the idea of judicial declaration based on the principle of confrontation, where no action can be taken against any person without giving him enough opportunity to defend himself and to express his defense and his arguments about what has been brought against him⁷.

Pointing out that the dispute does not take place unless the service is done by publishing an announcement in the newspaper to notify the defendant in order to achieve the principle of confrontation between opponents⁸.

Hence, we address this subject through two sections:

Section one: The cases of serving notice by affixation.

By reviewing the text of Article (9) of the Code of Civil Procedure, we find that it has indicated the cases to which it refers to the notice by affixation:

⁴ Op, Cit, Resolution No. 798/88, p. 1695, 1990.

⁵ Abu Eid, E,2002,The Origins of Civil Trials between the Text and Jurisprudence and Jurisprudence, Part V, p. 244.

⁶ Abu Eid,E, op. Cit., P. 245.

⁷ Hindi,A,1995, Civil and Commercial Procedure Code, Part II, p. 67.

⁸Rev. 26/1/84, edition 1272 for the year 50 BC. Gold Encyclopedia - 6 - 233 No. 335, Revocation 31/1/1993 - Appeal No. 2589 of year 57 BC, Journal of Judges 26 p.457

First: If the record required to be communicated to him or any other person of the same status does not find the receipt of the notification in his home country.

- 1- If the bailiff does not find the person who should be served the notice, or any other person who is authorized to receive the notification in his location.
- 2- it is impossible to serve the notice by an agent.
- 3- If the bailiff is unable to deliver the papers, as the place of notification is permanently closed.
- 4- If any person who can be delivered the notice to as per Article (8) abstains from signing the report of delivery, the bailiff must hang a copy of the judicial paper at the front door or in a visible spot where the person is located. This was stipulated by the Court of Cassation in its decision, which contained the following:

The Civil Procedure Law No. (14) for the year 2001 regulates the degree of notification of the person to be notified in the first place, where this is possible according to Article (7) and if it is not possible to inform him in his home or his work site the paper shall be served to his agent, employee or this who lives with him from his ancestors, offspring, spouses, siblings. If the bailiff does not find a person who can be delivered the notice to or if this who he finds from among those mentioned therein (other than this to be served) abstains from signing the report of delivery, the bailiff shall follow the procedures provided for in Article (9) of the same law. Thus. The notice by affixation procedure shall not be served unless the previous methods have been exhausted and the notice paper shall be affixed on the outer door or on a visible spot of the place where the home or the work site of the person to be notified is located.

Since the bailiff explained on the previous notice paper of the primitive judgment that was issued as prima facie case by affixing, that after the investigation and the question about the requested person, he did not find him and did not find anyone to guide him to the place of the person to be notified. In accord to Article (16) of the Code of Civil Procedure provided the invalidity of the served notice when the non-observance of the dates and procedures of notice and its conditions as it stipulates that When the dates, procedures and conditions of the service have not been observed, the service shall be deemed as not taking place. And notifying the defendant is primitive judgment no. (1548/2003) and the form in which it was notified was non - fundamental and contrary to the law. The adoption of the Court of Appeal on the validity of the served notice and its response to the appeal was misplaced and contrary to the law⁹.

Whereas the Egyptian legislation, when investigating any of the two cases stated by the Jordanian legislation, stipulates to hand over the judicial paper to be served to the department's officer, as provided for in Article (11) of the Code of Civil and Commercial Proceedings of Egypt. The same article stipulates that the officer shall, within 24 hours, notify the required person in his home country with a registered copy accompanied by another copy of the paper informing him that the copied paper was handed over to the administration. The Egyptian legislation considered that the announcement was legally effective from the time the photo was handed to the notified person.

⁹ The decision of the Jordanian Court of Cassation in its capacity as a jurist (No. 3694/2005).

The Egyptian and Qatari legislations always permit serving the notice by announcement at home, by this procedure the priority of announcement procedures is equal between the person who is to be notified personally, in his home or in his work site. While the Jordanian legislation disagreed with this procedure as it stipulated that the person to be notified shall be informed first and personally as mentioned in Article (7) of the Jordanian Civil Procedure Law.

Section 2: The procedures of serving the notice by affixation

According to the provisions of the Jordanian Civil Procedure Law and the provisions of Articles (7,8) of this law, notice shall be hanged if it is not possible to serve notice in accordance with the provisions of the articles, as expressly stated in Article (9) of the same law. What we realize from Article (9) is that it did not state that the Bailiff is obliged to mention in his explanation of the case on the notice paper that he made all effort or that he went to the home of the person to be served several times and he did not find him or the person who is one of the persons mentioned in Article (8) of the same law has abstained from signing the report of delivery so that serving notice by affixation can be considered legally.

In reference to the letter of judicial warning, we can notice that the bailiff has mentioned in the description field that:

- When I went to the address of the required person, I did not find him or anyone to represent him, so I hang the notice paper in a visible place on Tuesday 20/1/2004 at 11 pm - in the presence of the witness Samih Ali Ahmed and the record was mentioned, and he signed the paper. Since there is not any condition in the Code of Civil Procedure that obliges the bailiff to return several times and to make all the effort to notify the defendant in person, so the defendant is notified through affixing judicial notice in accordance with the provisions of Article (9) of the Code of Civil Procedure.

The court of First Instance considered the defendant's notice of the legal warning by affixation as illegal, and dismiss the plaintiff's claim because the bailiff did not state in his description that he returned several times and made the effort to notify the defendant personally, the court of appeal, has supported this judgement so what they have concluded is the taken action was contrary to the law and is required rejection in this regard¹⁰.

Hence, the procedures for the notice by affixing are as follows:

Firstly: Fixing a copy of the judicial paper at the front door or in a visible spot where the person is located; or at his work site.

Secondly: the presence of one witness at least.

¹⁰ The Decision of the Jordanian Court of Cassation in its Jurisdiction No. 4525/2005 Five-Body Committee on 11 July 2005, Adalah Publications.

The purpose of this procedure does not achieve the aim of the notice which is to notify the person to be served, as this purpose is attained legally only when the judicial paper is handed to the defendant.

The Ottoman Law of Jurisdiction has excluded from the procedure of notice, the affixation in accordance with the provisions of Article (28), that referred to the local magistrates who are required to notify the person required to be notified by the judicial paper of. The same article also restricted the bailiffs and forced them to inform the president of the court about case. Articles (25,26,27) indicated the procedures of serving notice that a bailiff shall comply to. This is what the comparative legislation has agreed upon.

If the Bailiff does not find a person who a proper delivery can be executed to as per the above article; or if this person from among those stated therein has abstained from signing the original to the effect of receipt or of receiving the copy, he must deliver the notice on the same day to the Officer of the Police Station or this who acts for him as the location of the person to be served is found in his jurisdiction; or his work site as the condition shall be. Within twenty - four hours as from delivering a copy of the service to the police station, the Bailiff must forward a registered-mail letter to the person to be served in his original location; to the effect of informing the person to be served that the copy has been handed to the police station and he must explain all that in details in the service report which must be signed by him to support facts on the ground¹¹.

We conclude from the foregoing that the Jordanian legislation in the Jordanian Code of Civil Procedure stated that if the person concerned refuses to receive the legal paper or refuses to sign the original, that notification is considered correct and based on its effects, While some legislations went into a different form to what was mentioned by the Jordanian legislation. The Egyptian legislation considered the Egyptian Civil and Commercial Procedures Law in Article (11) which stipulated the following: (If the officer does not find the right person to hand over the paper to him according to the previous article, He must deliver it on the same day to the district or center commander, the mayor or the sheikh of the country where the declared domicile is located in his district, after signing the original paper¹².

Comparatively, we find that the Jordanian legislature equates between the two cases of non-presence of the concerned party or refusal to receive the judicial paper from those who may be notified by them in accordance with Article (8) of the Jordanian Civil Procedure Law and thus resorting to the attached judicial paper according to the procedures to be followed in accord to the provisions of the law, however, some legislation differentiate between the case of rejection of the agent or the person be

¹¹ Article (8) Qatar Civil and Commercial Procedures Law No. (13) of 2005 and Egyptian Civil and Commercial Procedures Law

¹² Egyptian Civil and Commercial Procedures Law No. 13 of 1986.

notified to the sign and the case of the failure in notifying the required person personally in his residence, so it is resorted to exceptional reporting.

In accordance with the Lebanese Civil Procedure Law, if one of the above-mentioned persons refuses to receive the papers, the bailiff shall leave the paper there, the notice shall then be considered legal, even if he refuses to sign the judicial paper.¹³

The Lebanese Code of Procedure also states that in the case of the failure of ordinary notification, the exceptional notice is referred to: the filing of a written letter in a sealed envelope with a knowledge of receiving the last known residence or residence that the person to be notified may have, and he required coming to the Clerk Bureau of the Court to receive the paper addressed to him. The cover paper should indicate to whom the judicial paper can be delivered to.

If the addressee fails to receive the judicial paper, the postal officer shall promptly return it to the registry by referring to its absence and shall include in the case file a proof of receipt of the notice. If the postal officer does not find the person to whom the notice is delivered in the prescribed place, he must explain the facts and return the judicial paper to the Registry. In the case where the requested person has not any known place or place of residence. A copy of the paper fixed on the billboard on the court for a period of twenty days. A notice of the person to be notified shall be published in a daily newspaper prepared for judicial declarations. The notice shall be notified by the end of twenty days of the suspension of the copy and publication of the advertisement. The notice shall be replaced by a certificate from the bailiff confirming that¹⁴. The Jordanian Civil Procedure Law stipulates in its Article (8) that if it is not possible to find a person who can be delivered the notice or his agent in accordance with Article (7), it shall be notified by affixation in harmony with the provisions of Article (9) of the same law.

The researcher thinks that the Lebanese legislation procedures provided for in exceptional notice is more effective than what the Jordanian legislator went to and it fulfills the principle of confrontation between the opponents.

Topic Two: The effects of serving notice by affixation and the extent to which the principle of confrontation has been achieved.

The service of notice by affixation has several disadvantages, for example, the notice paper is not handed over to the person required to be notified, to enable him to make his statement and defend himself but is fixed on a door or in a prominent place of his residence. And the notice may be exposed to damage without his knowledge, which prevents him from defending himself. The affixed notice may not be seen by anyone and is limited to those who have issued this type of notice, and it also may be removed by someone and the required person will not be informed of its content. Therefore, this

¹³ Article (400) of the Lebanese Civil Procedure Law

¹⁴ Articles 407-409 of Lebanese Civil Procedure Law.

method leads to waste an important guarantee paper and consequently the notice of affixation violates the principle of confrontation. The researcher addresses this matter by discussing the effect of serving the notice by affixation and achieving the principle of confrontation by affixing the notice.

Section I : The effects of serving the notice by affixation

The service of the notice shall be deemed as effective from the date of affixing the paper to the outer door of the place where the home is located or the place of work required to be notified or attached on a visible side of the same place pursuant to Article (9) of the Jordanian Code of Civil Procedure, and this what the Court of Cassation approved in its decision No. (430/2009), a quasi-judicial body. Article (9) of the Code of Civil Procedure defines the situations in which the notice is attached ,that is when the bailiff does not find a person who can be delivered the notice to as per Article (8) of this law or if this who he finds from among those mentioned therein (other than this to be served) abstains from signing the report of delivery, the Bailiff must hang a copy of the judicial paper at the front door or in a visible spot where the person is located; or at his work site with the presence of one witness at least.

In one case, referring to the attorney's agency, the defendant's agent, we find that the attorney is the recipient of the papers as an agent of the defendant, but the bailiff was unable to inform him after he returns to the place several times. And did not find any person who has the right to be legally informed, he was forced to attach the notice of the verdict to the outer door in the presence of witness Tariq Zu'bi on Sunday at 3:30 pm on 12/10/2008. Which means that notifying the defendant has been in accordance with the provisions of Article (9) of the Code of Civil Procedure and it was correct (TH 2336/2007) dated 17/1/2008. In accordance with the provisions of Article (191/1) of the Civil Procedure Law. The appeal before the Court of Cassation shall be in the judgments issued by the appeals courts in cases exceeding ten thousand dinars within thirty days from the day following the date of issue, if they are valid and from the day following the date of issuing them if they have been subjected to an examination... which is based on the fact that this distinction is not acceptable in form to be submitted after the expiry of this period.

Referring to the text of the decision, I find that one of the effects of the notice by affixing is that it prevented the acceptance of discrimination on the basis of the served notice mentioned above, which I find that the bailiff can inform the agent, who is actually a lawyer who always come to the court so it is possible for the bailiff to inform him personally after making effort. However, as a result of the legislation, it is easy for the bailiff to not exert the necessary effort to serve the notice, which loses its fairness and I find that the legislator should reconsider the reporting mechanism by affixation which is considered a major reason of preventing the right holder to exercise his right and complained of the judgment before the case presented.

Therefore, since the legislator deemed the service as effective, the dispute in accordance with the Jordanian legislation is held and the Court shall proceed with all the

civil dispute procedures. In my opinion, in reference to the normal rules for informing the natural person. We find that the Jordanian legislation has agreed with most of the comparative legislations that the most effective way to notify the person to be served is the handed it personally, in order to achieve justice in the dispute, especially that the legislation did not require the validity of this notice to be delivered to a specific place. Work or any other place if it is within the spatial jurisdiction. On the other hand, the Jordanian Civil Procedure Law may include notice service in the home of the person to be served under article (7) of the same law. The legislation did not restrict the bailiff in term of following the procedure of serving the notice except by verifying the identity of the recipient of the notice. It is enough for the validity of serving the notice that the one who has received the notice, is entitled to receive it even if this relation is not true¹⁵.

Section 2 : The achievement of confrontation principle.

Most jurists agreed that the dispute was a series of successive judicial proceedings by the litigants, their representatives, the judge and their assistants ¹⁶. The civil litigation is based on several principles which are:

The principle of the participation of the litigants and the judge in directing the dispute.

2. The principle of oral pleading.
3. The principle of freedom of defense.
4. The principle of confrontation between adversaries.
5. Principle of participation of judicial agents.
6. Principle of Publicity.
7. Principle of concentration of litigation.¹⁷

The principle of confrontation between adversaries is one of the most important principles of adversaries, since it is not permissible to judge an opponent without hearing his defense or at least his call to defend himself¹⁸. Actually, the principle of confrontation enables every opponent to know the demands of his adversary and his defense and consequently to conduct a discussion between the litigants before the judiciary. This is one of the most basic rights to be enjoyed by any party to a civil action.

Therefore, serving notice by affixation sacrifices this basic principle of on which the civil litigation based on. Because the dispute does not take place properly unless it is done in accordance to duly observed practices in which the opponent is notified, to consider the

¹⁵ Zu'bi,A,2003,Theory of Defenses, referred to in the brief in the Jordanian Code of Civil Procedure,Comparative Study, Part II (Litigation - Judgments and Methods of Appeal) p.552

¹⁶ Raghieb,W,1978, Principles of Civil Debate, A Comparative Study of the Rules of Competence in the Law of Pleadings, First Edition, Dar Al-Fikr Al-Arabi.

¹⁷ Op. cit, Raghieb,W, pp17-22

¹⁸ Raghieb, W,1985,Memoirs in the Principles of Civil Justice, "The Law of Pleadings", p. 22.

served notice legitimate, the other party must be informed of what is being done against it in the courts.

If the Jordanian legislature, stressed on the mechanism of serving the notice in the manner of affixation, which is the third method that must be done after there is no possibility to notify the served person personally or his agent, because some bailiffs avoid making effort or serve the notice to his agent, instead he turns to use the third method of serving the notice (by affixation) that is stipulated in Article (7) of the Jordanian Code of Civil Procedure. And that what was concluded by the Jordanian Court of Cassation as a juridical in its decision (The procedure of serving the notice by attaching it on the lawyer's office door before following the first two procedures of the presence of the person to be served or his representative (not finding the person to be served in his location or his agent)¹⁹.

This is facilitated by the fact that the legislation did not provide that when the notice is served by affixation, it shall be done in the presence of two witnesses and prove their national numbers, their full names and their addresses instead, the legislation left it to the bailiff's conscience who only mention the name of one witness. As a researcher, I think this issue must be taken into consideration as it constitutes a danger to violate the rights of litigants.

On the other hand, some bailiffs do not want to follow the required procedures of serving notice sequence and they jumped to serve it by affixation this led the Jordanian Court of Cassation, in its jurisprudence, in one of its decisions to determine that (If the defendants are informed according to the bailiff's written description that are affixed to the door of the institution's office after they cannot be notified despite the bailiff came more than three times to institution and the employees refused to be informed, in one of the issued decisions this subject (The plaintiff Sami was a defendant personally). It is not possible to consider the employees of the institution as employees of the defendant Sami, which makes attaching the notice on the door of the office of the institution, contrary to the provisions of Articles (8 and 9) of the civil assets which stipulated for the purposes of the notice by affixation that the person who refuse to be notified shall be an employee of the person to be notified.

Another example, for the plaintiffs, the institution and Omer, the bailiff did not mention the time of the notice served to the defendant Omar, nor did he indicate the names of the employees who refused to be informed on behalf of the institution. This way constitutes a clear violation of the provisions of Articles (7, 8 and 9) of the Code of Civil Procedure and that reporting the court decision to the appellants have been made null and void. This way constitutes a clear violation of the provisions of Articles (7, 8 and 9) of the Code of Civil Procedure, and that reporting the court decision to the appellants have been made null and void²⁰.

¹⁹ The decision of the Jordanian Court of Cassation in its capacity as No. 109/1979 is a quasi-judicial body dated 9/4/1979, published on page 1214 of the Journal of the Bar Association on 1/1/1979.

²⁰ The Decision of the Jordanian Court of Cassation in its Jurisdiction No. (1689/2006).

Conclusion

In accordance to the seriousness of serving notice by affixation and its consequences such as violating the rights of individuals and groups in legitimate defense and protecting their rights and gains from intended or unintentional errors of serving the notice, restrictions shall be provided to regulate the notifying procedures stipulated in the text of Article (9) if it remains the same.

On the other hand, using this procedure breaches an important principle of civil litigation, specifically, the principle of confrontation. The Jordanian legislation has neglected by addressing such a mechanism a basic principle of civil litigation that is to ensure the delivering of the judicial paper of the opponent to enable him to demonstrate his defense before the court.

Results:

1. The notice service by affixation in the Jordanian legislation leads to the ignorance of an important principle of civil litigation, specifically, the principle of confrontation with evidence, where the defendant cannot show his defense and his motivation in that dispute.
2. The service of notice by affixation leads to the loss of justice, especially since the litigants before the judiciary must be equal in positions and rights.
3. By using this method, the defendant will be surprised when the decision of the court is irrevocable and its was enforced. And that the appeal of the judgment in most cases does not lead to the desired result if the appeal is rejected.

Recommendations:

The researcher recommended that:

- The legislation should authorize the court to estimate to accept or reject the notice in a way that it deems appropriate.
- Article 9 shall clearly state that the bailiff shall provide the details of the personal identity of the witness who signed or acquainted to the affixed notice. It is preferable that the text of the Article be amended so that the notice is fixed in the place of the defendant in presence of two witnesses instead of one witness and confirm their national numbers.
- Amending Article (9): The notice served shall be notified not by the presence of any witness, but by the presence of the mayor. This leads to ensure the seriousness of the notice and the realization of the principle of confrontation.
- Same as comparative legislations, I recommended that instead of affixing notice when it is not possible to find the person to be served personally or his agent, the notice can be served by the mayor or the police station, this constitutes a guarantee to achieve the principle of confrontation.

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