

CONSTITUTIONAL GUARANTEES CONNECTED TO THE RIGHTS OF LITIGANTS DURING THE ELECTRONIC TRIAL: AN ANALYTICAL STUDY OF THE JORDANIAN CONSTITUTION AND LEGISLATION

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Abstract: *Electronic trial (e-trial) is currently regarded as one of the most important steps adopted by countries. The Jordanian legislator has issued many laws and legislations that incarnate and reinforce this approach. The present study endeavored to explain the concept of e-trial and the extent of its compatibility with the constitutional principles that guarantee the rights of defense to present evidentiary requirements whether those connected to granting litigants the right to provide evidence that helps prove or refute this right, as well as enshrine the principle of publicity, which allows anyone to view the course of the trial. As a result, the Jordanian legislator was keen to provide the requirements of e-trial due to its distinctive features that make it an urgent necessity, especially since the ultimate objective of the electronic judiciary (e-judiciary) does not differ from the traditional court, which aims to grant everyone his due.*

Keywords: *electronic litigation, Jordanian constitution, the principle publicity, the right of defense, guarantees.*

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Introduction

The protection of human rights is highly essential, and it has gained the attention of all advanced democratic societies. Among these rights is the right to a fair trial and respect for the rights of defense. Based on the demands made by everyone, the international community spared no effort to develop a set of criteria to guarantee the right of opponents to fair trial. These guarantees aim to protect tangible and intangible rights from the moment the case is initiated until reaching the last stage of litigation. The Jordanian constitutional legislator has included in the Jordanian constitution of 1952 and its amendments the guarantees of the right to litigation before the courts of various degrees and types, as the right to resort to the judiciary is one of the most important rights granted to the Jordanian citizen that may not be deprecated. In light of the tremendous technological and digital development that is overwhelming the daily life worldwide, technology has become an integral and indispensable part of the life of individuals, especially as it facilitates the process of getting things done and speeding up its pace. Given that most governments in the world are using it in all facilities of the state, the Jordanian government adopted the concept of e-government its application in all facilities. Since the judiciary is one of the important facilities in the state, it was necessary for the Jordanian legislator to keep pace with this development. Accordingly, a new term entered the litigation system, which is electronic (e-litigation).

In view of the recent developments in the world and the increase in the number of cases that burden the ordinary judiciary, it has become necessary to resort to technological methods in order to proceed with fair trial proceedings.

1. Problem of the study

The problem of the study lies in the extent of the constitutionality of e-litigation and the following up the lawsuit procedures regardless of their nature, whether they are administrative, legal or criminal.

Study questions: This study raises a number of questions, namely:

1. What is meant by e-litigation?
2. What is the e-court?
3. Are constitutional guarantees compatible with e-courts?
4. What are the guarantees that achieve the constitutional purpose of e-litigation?

2. Importance of the study

Given the progress and technological development, the present study emphasizes the importance of the constitutional foundations and guarantees secured by the constitution as the principle of publicity and respect of defense of rights granted to litigants under the constitutional texts and legislations that include the mechanism of e-litigation. This importance is shown in the differences between the two judicial systems (electronic and traditional).

2. Aims of the study

The study aims to explain the mechanism of e-litigation and the extent of constitutionality of constitutional courts, in addition to the extent of commitment to e-guarantees with the lawsuit procedures.

Previous studies

1. Al-Akidi, Maryam (2022) Administrative Courts and the Possibility of Holding Their Sessions Electronically, Master Thesis, Middle East University, Jordan. This study dealt with an explanation of the concept of administrative e-litigation, which took great strides after the issuance of laws and legislation that incarnate and support this tendency. This study compared the Arab judicial systems that adopted the concept of e-litigation in administrative courts.

2. Khalifa, Rabah Suleiman (2021) The role of electronic litigation in reducing procedural inflation, research, University of Kirkuk, College of Law, Political Science. This study dealt with the role of e-litigation in reducing procedural inflation as a system imposed by the modern procedural policy whose purpose is to alleviate procedural inflation, in a way that contributes to putting an end to the accumulation of criminal lawsuits in the judicial field.

3. Ahmed, Wafaa Helmy (2021) Legal protection for electronic Judicial Procedures: A Comparative study, research, Mansoura University, Faculty of Law. This study dealt with the means of communication used in e-litigation within the scope of the civil judiciary and the stance of the Egyptian civil legislator to the ultimate objective which is the acceleration in adjudicating electronic civil disputes.

4. Methodology of the study

With this purpose in perspective, this study will use the descriptive analytical approach in describing the constitutionality of e-litigation in Jordan.

What is electronic litigation?

The right to litigation is one of the basic rights that man should enjoy. In the light of the progress of the communications and information revolution that is overthrowing the world today, the Jordanian legislator has benefited from it and used it in applying the requirements of litigation under the name of e-litigation. This term (e-litigation) is one of the modern terms that are almost not used in the legal and jurisprudential circles. In terms of purpose, it is not much different from traditional litigation, as they are similar in terms of subject matter and parties. Moreover, the aim of both systems is to allow the aggrieved party to resort to the judiciary to settle the dispute and obtain judgment. Accordingly, this topic will be divided into two themes, as follows:



The concept and characteristics of electronic litigation

The judiciary is a sublime job. It is a humanitarian and social task, aiming to establish justice among people, as the judge assumes the task of examining the dispute between the parties by applying the provisions of the law that guarantees citizens the right to resort to courts in all its forms. The Jordanian constitution of 1952 stipulated in the text of Article (101) that “the courts are open to all and are protected from interference in their affairs.”⁽¹⁾ Therefore, the situation does not differ in whether the court sessions are electronic or traditional; they do not differ in the goal, only in the means of judicial proceedings. As a result of the burden imposed upon the shoulder of the judiciary due to the increasing number of cases brought before it, the attention has been directed to e-litigation, which spread at the beginning of the third millennium as a term. It is considered the latest creation of the human mind in light of contemporary technological progress.⁽²⁾ Consequently, this theme will be divided into two sections to clarify the concept of e-litigation and its characteristics, as follows:

First section: Definition of electronic litigation

First of all, it is necessary to define e-litigation linguistically, and then define it from a legally and terminologically, as follows:

First: Definition of electronic litigation linguistically

Lexically, the word *al-taqadi* “litigation” comes from the verb *qada* “litigate” and *al-qada* “judiciary” that comes from *qada'i* “judicial” and *qadayt* “judged”, as *al-qadi* “the judge” in the language means “the one who decides matters, the arbitrator, i.e. make a judgment among people.”⁽³⁾ Semantically, *al-taqadi* “litigation”, it means *al-qabd* “obtaining”, i.e. I obtained my debt I owes someone.⁽⁴⁾

As for “electronic”, it is a term related to everything pertained to the computer,⁽⁵⁾ as the term “electronic” appears in information dictionaries and its plural form is “electronics”. It is attributed to the “electron” on which “the computer processes depends to perform the most accurate calculations and as quickly as possible.”⁽⁶⁾ Accordingly, it can be said that electronic litigation, from a judicial perspective, is about resolving matters between litigants through the appointed judge using electronic means.

Second: Definition of electronic litigation legally and idiomatically

E-litigation (e-court) is idiomatically defined by some jurists as “an authority for a group of regular judges to consider the case and conduct judicial procedures using recent electronic means within an informational judicial system or systems with integrated parties and means that depend on the methodology of the international interconnection network (the Internet) technology and programs of the electronic computer files in examining cases, adjudicating them, and implementing judgments in order to reach a quick decision in cases and to save time and effort of the litigants.”⁽⁷⁾

Others have defined it as “the process of transferring litigation documents electronically to the court via e-mail, where these documents are examined by the competent employee. A decision is issued regarding them by acceptance or rejection, and an e-mail reply is sent to the litigant informing him of the status of these documents.”⁽⁸⁾

From a legal perspective, the Jordanian legislator did not define e-litigation, but rather defined electronic means, as the Jordanian Electronic Transactions Law stated that electronic means is “the

¹The text of Article (101) of the Jordanian Constitution of 1952 and its amendments

²Al-Akidi, Maryam (2022) Administrative courts and the possibility of holding their sessions electronically, Master Thesis, Middle East University, Jordan, p. 1

³IbnManzoor, Jamal Al-Din (1957) Lisan Al-Arab [Arab tongue], Volume 15, Dar Al-Ma'arif, Egypt, p. 186.

⁴Murtada, Al-Zubaidi (n.d.) Taj Al-Arous, Volume A, Kuwait Government Press, Kuwait, pg. 855.

⁵Ghaleb, Jamal Al-Din (2022) Electronic litigation and its impact on achieving the goal of justice: An applied study, PhD dissertation, International Islamic Sciences University, Jordan, p. 47.

⁶Mu'jam Al-Ma'ani Al-Jami' [Comprehensive semantic dictionary] <https://www.almaany.com/ar/dict/ar-ar>, Retrieved 20/2/2023.

⁷Al Sharaa, Hazem Muhammad (2010) Electronic litigation and electronic courts, Dar Al Thaqa for Publishing and Distribution, Jordan, p. 57.

⁸Ibrahim, KhaledMamdouh (2021) Electronic litigation, the electronic lawsuit and its procedures before the courts, Dar Al-Fikr Al-Jamei, Alexandria, Egypt, p. 12..

technology of using electrical, magnetic, optical, electromagnetic or any similar means.” He also referred to the concept of electronic information by saying “Transactions carried out by electronic means.”⁽¹⁾ Inspecting the system of using electronic means in civil judicial procedures, we find that the legislator also did not set a definition for the term e-litigation, but rather referred to it through the text of Article (2) of electronic means as “the means approved in accordance with the provisions of this system in civil judicial procedures.”⁽²⁾

Accordingly, it can be said that e-litigation does not deviate from being the use of electronic means, whether written, audio or visual, in initiating the procedures of the existing judicial case between the litigants and adjudicating them through a binding judgment.

Second section: Characteristics of electronic litigation

E-litigation has many characteristics that distinguish it from traditional litigation, as it is characterized by speed, ease of communication, and the possibility of transferring files and documents between parties. Among the most important characteristics of electronic litigation are the following:

First: Dispose of paper files and relying on electronic files

One of the most important features of electronic litigation procedures is the non-use of paper documents in all procedures and correspondence between the two parties to litigation. They are conducted between them electronically, which is consistent with the purpose of creating media, i.e. creating a society of paperless transactions.⁽³⁾ The electronic system enables the disposal of the large quantities of paper files that fill the courtrooms, as well as the elimination of the random storage of lawsuit files and the consequent loss and loss of them. Thus, the society of paperless transactions was launched, where all procedures and correspondence between the parties to litigation and the e-court take place without the use of papers. Data messages are exchanged via the Internet and uploaded to a non-paper support inside or outside communication devices signed electronically by the author of the message. Thus, electronic supports have replaced traditional paper supports, and the regulations, their attachments, and memoranda submitted to the courts are converted into electronic documents. This conversion takes place easily - thanks to the services provided by the Internet.⁽⁴⁾

Second: Using electronic means and creating an electronic mediator (electronic court)

The use of electronic media in the implementation of litigation procedures through the electronic communication network is the most important characteristic of e-litigation, given that the latter does not differ in terms of subject matter or parties from traditional litigation. Rather, the difference lies in the way it is implemented: it is done by using electronic means represented in a computer connected to the international communications network, the Internet, which transmits the expression of electronic management simultaneously, despite the distance between the conflicting parties.⁽⁵⁾ It is worth noting that what is meant by the electronic court is "an authority for a group of regular judges to consider the case and conduct judicial procedures using recent electronic means within an informational judicial system or systems with integrated parties and means that depend on the methodology of the international interconnection network (the Internet) technology and programs of the electronic computer files in examining cases, adjudicating them, and implementing judgments in order to reach a quick decision in cases and to save time and effort of the litigants."⁽⁶⁾

By means of electronic files or electronic hearing, it is possible that the lawyer appears in court without the need to travel, or assign his representative to appear in person before the court. Furthermore, the parties can appear in the same way, as the development in the science of modern electronic communications allowed making contact, hearing voices, and transmitting images and exchanging of

¹The text of Article (2) of the Jordanian Electronic Transactions Law No. (15) of 2015

²The text of Article (2) of the Regulation on the Use of Electronic Means in Civil Judicial Procedures No. (95) of 2018

³Al-Kaabi, Hadi Hussein (2016) The concept of remote litigation and its requirements, Al-Haqooq Al-Hilli Journal of Legal Sciences, the first issue, the eighth year, p. 284

⁴Ibrahim, Khaled Mamdouh, Electronic litigation, Ibid, pg. 36

⁵Ghalib, Jamal Al-Din, Ibid, pg. 52

⁶Al-Tasawi, Mohamed Essam (2013) Deliberation and the lawsuit before electronic courts, Dar Al-Nahda Al-Arabiya, Cairo, pg. 66

conversation through the technology (video conferencing). This technology led to a radical transformation in the course of trials in courtrooms by linking this technology to wide television screens that allow immediate listening to and immediate viewing of the statements of some parties, especially those who cannot appear for security, social, political or health reasons. On the other hand, remote litigation reduces the accumulation of judicial transactions and reduces tension and disputes between opponents, especially in family, financial and commercial cases.⁽¹⁾

Third: Speeding up electronic litigation procedures and reducing financial expenses

The slow routine in the application of lawsuit procedures and the increase in fees and expenses called for thinking about a system that provides speed and ease of litigation procedures and reduces judicial costs and expenses. Undoubtedly, this can be achieved through the electronic litigation system,⁽²⁾ given that the process of sending and receiving documents takes place via the Internet without the need for the litigation parties to move to the court or travel from one place to another to attend pleading sessions and review the court's decisions or the judgment issued in the case. This shortens time, saves effort and reduces expenses, which effectively contributes to the completion of litigation procedures quickly and leads to the litigants not going to the court's headquarters. Moreover, it lessens crowding problems in courts, improving the quality of service provided to litigants, and reducing file storage space in courts.⁽³⁾

Fourth: Evidence of litigation procedures electronically

Information technology in the light of the modern era invaded all countries of the world and imposed itself in many of the dealings of daily life. It also made the world as a small village without geographical borders between continents despite the distances and different cultures. This is done through the abundance and multiplicity of modern means of communication, compared to traditional litigation that depends on the paper support in proving the physical existence of transactions in it, writing is not considered a complete proof unless it is signed by hand signature. However, electronic litigation is proven through the electronic document and the electronic signature. The electronic document crystallizes in the rights of the contracting parties. It is the reference to find out what the two parties have agreed upon and determine their legal obligations. Also, the electronic signature is what gives authenticity to this document.⁽⁴⁾ In line with this electronic pattern in contemporary life, it has become necessary to recognize the validity of the procedures that it is conducted electronically.

The Jordanian legislator allowed the use of electronic means, and the Code of Civil Procedure stipulated that "the conditions and procedures for using electronic means are specified for the parties to register the lawsuit and file the other with it under a system issued for this purpose." In the light of this, the Jordanian legislator permitted the filing of judicial and executive lawsuits through electronic means of communication using Ministry of Justice website.⁽⁵⁾

Electronic litigation services

The services of electronic means are the most important features of the trial, as it is one of the means of e-litigation. It provides services to litigants that facilitate trial procedures. The services offered by the e-litigation system vary; therefore, this theme will be divided into three sections as follows:

First Section: Registering the case electronically

To enable citizens and lawyers to register lawsuits and submit them electronically, a website must be created with an address through which they can register lawsuits, deliver evidence and pay fees. That is the electronic lawsuit in all its stages is conducted electronically. This requires that the applicant must have a computer connected to the Internet so that he can access the court's website, where he

¹Dadyar, Hamid Suleiman, (2015) The legal framework for civil litigation via the Internet, Dar Al Thaqafa for Publishing and Distribution, Amman, p. 69

²Dadyar, Hamid Suleiman, Ibid, p. 81

³Khalifa, Rabah Suleiman (2021) The role of electronic litigation in reducing procedural exaggeration, Volume (10), Number (39), Journal of the College of Law for Legal and Political Sciences, Kirkuk, p. 535

⁴Al-Akidi, Maryam, Ibid, p. 27

⁵Al-Zoubi, Muhammad Abd al-Khaleq (2021) Explanation of the Jordanian Civil Procedure Code No. (24) of 1988 and its amendments, 1st edition, Department of the National Library, Jordan, p. 317

chooses the page for registering the case, determines the type of case, and then fills in the required data.⁽¹⁾

As for the case in which it is filed through a lawyer, the method of accessing the court's website differs: there is a special section on the court's website for lawyers. Article (6) of the system for using electronic means confirmed this by saying, "The Ministry provides each lawyer with an electronic account on its electronic portal that is approved for the purposes of registering judicial and executive lawsuits, requests, depositing regulations, data checklist, and all other correspondences and judicial and executive papers". Moreover, "it is assumed that every lawyer submits to the Bar Association a declaration signed by him on the form prepared by the Ministry that includes his information related to his name, address, residence, office, phone numbers and e-mail."⁽²⁾ This can be done "through the electronic link with the Bar Association. After sending the required documents, they are signed by the lawyer via electronic signature technology, and then the court notifies the claimant of the acceptance of the registration. The other party shall be notified of the statement of claim and its attachments. The statements of claim may also be exchanged between the parties of the case using electronic means.

Second section: Recording records electronically

The recording of procedures in the e-court is different from what is recorded in the traditional courts, where those procedures are recorded technically in the electronic case file. It will be a program on a presentation file that has storage capacity of audio and images, such as PowerPoint and Flash MX files. Accordingly, the judge proceeds with the trial electronically through the electronic record, in which the voice and image of the judge, the voice and image of the plaintiff or his representative, the voice and image of the defendant or his representative, the witnesses and the clerk who will write down every procedure that takes place through the audio and image pages will appear. After the completion of each session, one of the clerks begins to print the minutes of the session. The records of the electronic sessions consist of presenting the course of the trial in audio and video, exactly as it happened. The judge can stop the recording sometimes if he sees a justification you. Furthermore, the parties can copy the file or request a copy of it with this type of notation or obtain a printed copy by e-mail. However, the decision must be printed. The exhibits are kept in the lawsuit file, and the scanned images are stored on specific files as a PDF file. Thus, the case file will include is a computer recorder of two parts, the first section exhibits, evidences, regulations, and schedule of appointments all with photocopies. The second section is a technical audio and video recording of the course of sessions and trials, whether in the case of appearance to the court by means of computers and the camera of the device that captures the person present and the requests he submits and defenses he raises or by attending via the website. After completing each session, the follow-up unit prints the proceedings of the sessions documented by photo recording and saves them in paper files as an additional documentation method for the trial proceedings. In the event that the original of the exhibits is requested, the original is kept in these files or the copy after viewing it. As for the court's decision, it must be printed and signed by the judge who issued it, because the decision is authoritative not only with this system, but also with all state departments and institutions.

Third Section: Submission of defenses online

One of the requirements of guaranteeing the right to litigation stipulated in the Constitution is to guarantee the freedom of claim and defense at the same time, so that equivalent justice can be achieved between the two parties to the lawsuit. This enables each of the two parties to submit judicial claims to the court, so the plaintiff files the request, and he is the one who moves the case before the court. As for what the defendant presents as a judicial request, they are the defenses by which the claim of the plaintiff is advanced. Defense is the means by which the opponent responds to opponent's request with the intention of avoiding or delaying the judgment of his opponent with what he claims.⁽³⁾ The defenses are the means that the defendant resorts to respond to the plaintiff's request, whether it is an

¹The text of Article (4/a/1) of the system of using electronic means in civil judicial procedures

²The text of Article (5) of the system of using electronic means in civil judicial procedures

³Al-Zoubi, Awad Ahmed (2006) The origins of civil trials: A Comparative study, Dar Wael for Publishing and Distribution, Amman, pg. 692.

opposition to the subject of the claimed right or related to the dispute or a defect in the judicial procedures.

It is sufficient to guarantee the right to defense that he be able to present it because defense is a purely negative means in which the role of the defendant is limited to trying to maintain the apparent position represented by his acquittal of what the plaintiff assigned to him. Since the defenses are divided into two types, formal defenses and substantive defenses, it must be noted that it is possible to avoid the idea of formal defenses that can be objected to, such as lack of non-specialty jurisdiction of the court, or not raising of the invalidity of judicial notifications, or defenses that are presented during the pleading in all its roles, such as defenses related to the unification of lawsuits, or the inadmissibility of filing a lawsuit in the system. The electronic system shall be electronically programmed to verify these defenses by accepting or rejecting them automatically, to be completed by the electronic system of the court itself with the provision of technical guarantees for all the aforementioned issues. As for the substantive defenses, they can be submitted electronically via the Internet through electronic programming by the litigant or his lawyer.

Second topic

Constitutional guarantees related to the rights of opponents

Any dispute assumes the existence of two parties between whom a dispute has arisen related to a duty or a legal right claimed by the injured party by the other party causing the damage. The role of the judiciary is prominent in resolving the dispute between the two parties and giving each of the right his right on the basis of the case between the conflicting parties. The litigation procedures begin before the court under the authority of the competent judge to hear the dispute brought before him.

Before the judiciary all the rights of the litigants that enable them to prove and refute their rights must be guaranteed, whether the litigation procedures are conducted traditionally or electronically. On the basis of the existence of a dispute, the rights of the litigants related to proof, submission of documents, regulations and pleadings, and access to all documents must be guaranteed, in addition to ensuring the implementation of the principle of public trial sessions; so, this research will be divided into two themes, as follows:

Realizing the principle of the right of defense

The human right to defense is a sacred right, and it is one of the oldest rights known to humanity, which was defended by the international community and guaranteed by national constitutions, especially since human self-defense is an imminent necessity by which he wards off damage to himself and his money. Therefore, the judiciary is resorted to in order to redress the rights of those affected. Article (101) of the Jordanian Constitution of 1952 and its amendments stipulates that "the courts are open to all and are protected from interference in their affairs."⁽¹⁾ Therefore, this theme will be divided into two sections, as follows:

Section one: Ensuring the rights of the litigants to provide means of proof

There is no doubt that one of the most important rights of litigants, whether in the civil or criminal courts, is to grant each party the right to present arguments that enable it to prove the dispute presented to the court. It is not conceivable that there is any judicial ruling that is not based on legal evidence that favors the position of one of the parties to the dispute. Evidence plays a fundamental role in the nature of the case before the court, as the means of proof presented in the case are written, personal, traditional or electronic. It must be noted that some consider that using of the electronic systems is beneficial because of its shortening of time and effort. Others find that the entry of electronic systems into the courts will annihilate the basic pillars on which the litigation system is based, as the traditional courts are prevailing in public opinion because they are in their view the most conservative of the justice facility.⁽²⁾ In this regard, the focus will be on electronic means of proof and the extent of their constitutionality when presented before the electronic court.

¹The text of Article (101) of the Jordanian Constitution of 1952 and its amendments.

²Al-Zoubi, Muhammad Abd al-Khaleq, Ibid, p. 320.



First: The right of the litigants to submit electronic means of proof

The electronic means of proof differ from the traditional means of proof, but the practical reality prompted the legislator to develop a new type of evidence presented before the e-courts, such as e-mail messages, text messages, mini-video technology, and voice messages. Therefore, the extent of adherence to the constitutional right that gives litigants the right to present means of evidence before the electronic court will be researched as follows:

A- Electronic writing: The written power of transactions is proven by signing them according to what was stated in the Jordanian Evidence Law, where it was stated that the written evidence consists of three forms (official documents, ordinary documents, and unsigned papers). In the case of electronic litigation, this is proven by means of e-documents that are signed through the electronic signature. The Jordanian legislator considered that electronic writing constitutes an argument in proof.⁽¹⁾ In this regard it is necessary to refer to the concept of electronic writing as "that writing that is inserted on an electronic support that can be retrieved and reproduced by a computer, no matter how type, degree of progression, or material components thereof".⁽²⁾ That is, it can be said that it has become possible to dispense with written evidence, whether it is signatures, letters, documents, or any other paper evidence, especially since it can be transmitted by telephone, telex, or e-mail. Pictures and documents can also be transmitted by fax. Through this means voice, images and writing can be transmitted at the same time remotely to any destination⁽³⁾.

Based on the aforementioned, it is clear that paper documents can be replaced by printed e-documents using telex, especially since it is designed to receive words, numbers and symbols. It is characterized by stability and can be read clearly even after the passage of time. The same applies to the fax, which is used to transmit images, editors and documents in any language and in colors.⁽⁴⁾ Each of the telex, fax, and e-mail messages have the power of ordinary documents of proof,⁽⁵⁾ which are signed by virtue of the electronic signature, which has the authority of proof in the lawsuits. Based on this view, it is clear that e-writing helps the litigants to prove or refute their rights, as it is considered a guarantee of the constitutional guarantees guaranteed by the constitution to the opponents in order to defend themselves.

B-The electronic testimony: The e-testimony does not differ from the traditional witness except through the method in which it is carried out. The e-testimony is done by electronic means approved by the Ministry of Justice, while the traditional witness is done in presence before the judge and the parties of the dispute. There is nothing to prevent the e-testimony from being completed since all the case procedures including hearings are done electronically. The testimony means that it is "testing the person with what he may have seen or heard in-person or perceived in general with his senses, and hence the testimony is direct evidence in the case".⁽⁶⁾

The testimony that is transmitted by sound or sound and image together through electronic means that transmit these two characteristics has become multifaceted in light of the tremendous development. The e-testimony carried out according to this method is either directly through a phone call to the judge in the session, or by means of an audio recording (voice note) that the witness sends to the court or the testimony that is transmitted by audio and video together and is done through a video on a CD or by direct contact with the judge using (Video conferencing) or (Tele presence).

¹The text of Article (6) of the Jordanian Electronic Transactions Law

²Musa'ida, Nael Ali (2012) Writing in Electronic Contracts in Jordanian Law, Journal of Sharia and Law, Volume 26, Issue 50, p. 199.

³Meshri, Hassan (2019) The Impact of Scientific Development Methods on Civil Evidence, Zain Human Rights Publications, 1st Edition, Beirut, p. 147.

⁴Abdul Razzaq, Younes (1989), Information Technology, Cooperative Press, Amman, pg. 37

⁵Article (13/3/a) of the Jordanian Evidence Law No. (30) of 1952 and its amendments stipulates that "taking into account the provisions of this paragraph, faxes, telexes, e-mails, and similar modern means of communication shall have the strength of ordinary documents of proof if they are accompanied by a testimony whoever sent it to confirm its issuance on his behalf, or with the testimony of the person to whom it was delivered to confirm his receipt of it, unless otherwise proven.

⁶Ibrahim, Khaled Mamdouh (2020), Electronic Evidence in Criminal and Civil Matters, First Edition, Dar Al-Fikr Al-Jamaly, p. 171

The Jordanian legislator stipulated in Article (9/a) of the Regulation on the Use of Electronic Means in Civil Procedures No. (95) of 2018 that “the court may decide on its own or at the request of one of the parties of the case to hear witnesses using audio-visual electronic means approved by the Ministry” in the event that the witness resides in an area outside the jurisdiction of the competent court, or if the witness is unable appear in the competent court for any reason”.

Accordingly, we find that the e-testimony must be done through simultaneous audio and visual means, provided that this method is approved by the Ministry of Justice to ensure quality and confidence in order for it to be in conformity with the legal and constitutional procedures.

C-Electronic declaration: The Jordanian legislator defined declaration in the text of Article (44) of the Evidence Law as “acknowledgment is informing a person about a right he has to another”. Article (45) of the same law clarified that the judicial declaration is the acknowledgment of the opponent before the judge. The researcher believes that since all the procedures of the case, including hearings, are done electronically, there is no legal or judicial impediment that prevents proving the declaration through electronic means, especially that all the minutes of the sessions are archived in advance by electronic means, but that declaration must be made in the same way that the sessions are attended and recorded. It should be noted in this regard that in light of the spread of the Corona virus, which disrupted most of the facilities of life, including the judicial facility, the Jordanian state issued a defense order that stipulates the continuity of the right to litigation and the orderliness of court work in light of the repercussions of the spread of this epidemic. Article (9/a) stipulated that the court may use visual and audio communication techniques in the following cases:

1: Holding sessions to discuss experts. In this case, the court shall mention in the minutes of the session the method by which the identity of the expert was established.

2: Holding any session or taking any action in matters other than those indicated in Clause (b) of this paragraph”.

D- Electronic inspection: The Jordanian legislator considered inspection as an evidence of proof, but it is considered an investigative procedure that reveals the truth. It is often used in criminal cases more than in civil ones. However, the practical reality that imposed the use of electronic means does not prevent it from being relied upon as evidence in civil cases, as the transition to the virtual world takes place via the Internet, where documents and signatures can be viewed.

The researcher believes that if one of the parties to the dispute is unable to provide the electronic evidence, whether it is written, a testimony, or other means of proof, the electronic support on which documents have been edited, or any evidence that helps reveal the truth, can be handed over, especially since the original support of the data is very important when it is presented to the court and it is not enough to control the copies. At the same time the court can request a reservation on this support, whether it is telex, fax or other modern means.

The researcher supports her previous point of view with the permissibility of adopting the inspection as evidence of electronic proof in civil lawsuits, since it is possible in the case of criminal lawsuits in which reservations are allowed on any evidence that would help in reaching the truth, based on the text of Article (32) of the Jordanian Code of Criminal Procedure.

H- Electronic-Electronic expertise: Article (71) of the Jordanian Evidence Law clarified that experience is considered evidence of proof, and therefore it can be said that expertise is “the technical advice that a judge or investigator uses to help him form his belief on issues whose assessment requires special scientific knowledge not available to me.”⁽¹⁾

And since experience is used as electronic evidence in electronic trials, then any of the litigants can request it to be conducted on documents, documents and electronic signatures.

F-Electronic evidence: The Jordanian legislator did not set a definition of presumption, but he clarified in the text of Article (40) of the Law of Evidence the concept of legal presumption and in the text of Article (43/1) of the same law the concept of judicial presumption. Legal jurisprudence defined it as

¹Mubarakia, Taqi, and Gharibi, Fatima Al-Zahraa, (2022) The role of expertise in proving electronic transactions and the technical rules that govern them in discovering digital evidence, Journal of Human Sciences, Vol. (33), Issue (2), p. 131

“inferring the incident required to be proven from another incident on which evidence of proof is based⁽¹⁾”.

Referring to the text of Article (43/2) of the Evidence Law, we find that it does not permit the proof of judicial evidence except in the case of testimony. Guided by the text of this article, there is nothing that prevents, from the researcher’s point of view, from deriving judicial evidence that the judge reaches in the event that the testimony has been done through one of the available electronic means. Based on the aforementioned, it is necessary to refer to the Jordanian Court of Cassation, which has affirmed in many decisions the authoritative proof of electronic means. One of its decisions stated that “considering electronic data as authoritative in proof, although electronic data has authoritative evidence, but it is necessary to prove the validity of this data ..considering the provisions of Articles (3/13/c) and Article (15) of the Evidence Law and Article (100) of the Law Regulating Insurance Business and its amendments No. (33) for the year 99, which permitted the use of all methods of proof in matters related to insurance, including electronic data or data issued by computers, telex correspondence, fax, or e-mail, and keeping a miniature copy (microfilm or other modern technology devices) instead of the original books, so they are authoritative in proof.”⁽²⁾

This means that the submission of electronic means of proof does not violate constitutional principles. This is consistent with the right of the litigants to defend their rights. However, the litigants have a procedural obligation to submit all the evidence electronically only. They may not, for example, submit documents on paper supports, otherwise the competent court will rule non-acceptance on its own without the need of rebuttal of the opponent in front of the court⁽³⁾.

Second section: Securing the principle of adversary system

The principle of adversary system is “a principle based on the need for each party in the litigation to know everything that is going on in the existing litigation, whether it is related to requests or defenses and the documents that support them and the various procedures that require a decision on them.”⁽⁴⁾ It is based on the constitution, as it is not possible to imagine judging a person without giving him the opportunity to defend himself before the governing bodies. From this standpoint the principle of face-to-face (in-presence) or adversary system was linked to the rights of defense as they represent two inseparable concepts.⁽⁵⁾

It must be noted that the presence of the person is necessary as a sure guarantee for the embodiment of the principle of oralness, especially since the judge and the litigants can simultaneously discuss the evidence presented. The validity of evidence is not enough for the court to be convinced with. Rather, this evidence must be discussed in the trial sessions in order to achieve the interest of the litigants.⁽⁶⁾ There is no doubt that the importance of this stage lies in the extent to which the material elements of the dispute are effective, especially since the party who has not been notified of a specific document or any procedure can ask the judge for re-notification if it is proven that the notification did not take place. The procedures that resulted from non-notification of any of the litigants related to the subject matter of the dispute in accordance with the stipulated legal deadlines stipulated in the law are considered null and void.

To sum up, since the principle of adversary system is very important in traditional trials, this also applies to electronic trials, especially since the latter aims mainly to speed up the procedures of the case and spare the effort on the litigants.

¹Al-Shahawi, Qadri Abdel-Fattah, (2006) *The Theory of Evidence in Civil and Commercial Matters*, first edition, Dar Al-Nahda Al-Arabia, Cairo, p. 214.

²Decision of the Jordanian Court of Cassation (Rights) No. (7621) of 2019, ordinary body, dated 12/30/2019, Your decision website.

³Ahmed, WafaaHelmy (2021) Legal protection for electronic judicial procedures: A comparative study, special issue, *Journal of Legal and Economic Research*, Mansoura University, p. 619

⁴Hamden, Soumya (2021) *The Impact of the Prestige Principle on the Convening of Civil Litigation*, Department of Legal and Political Research and Studies, Volume (5), Issue (2), p. 230

⁵El Goumi, Abdel Salam (2011), *Guarantees of the Right to Fair Civil Trials between International Principles and the Algerian Legislature*, Master Thesis, KasdiMerbah College, KasdiMerbah University, p. 77

⁶Mabrouk, Linda, (2022) Guarantees of a fair trial through the use of video chat technology, *Journal of Rights and Human Sciences*, Volume (15), Issue (1), Algeria, p. 1645

Securing the principle of publicity

One of the important guarantees that would make the litigants feel fair and the proper conduct of the case procedures in their proper course is granting the litigants the right to confrontation. However, this guarantee must be made public, leaving no room for doubt that the litigation procedures are flawed or that the ruling judge in the case is biased towards one of the parties. In order to achieve this, it is necessary to devote and respect the principle of public hearings of the trial. Accordingly, this theme will be divided into two sections to indicate the extent of adherence to the principle of public hearings during e-litigation, as follows:

Section one: Concept of the principle of publicity

This principle means that the sessions of the court examining the case take place in a place where any person may enter and watch the proceedings of the trial without restriction except what is required to maintain order. ⁽¹⁾Most of the world's constitutions and international conventions stipulated this principle because of its importance and considering it the most important guarantee of fair trial guarantees.

The Jordanian constitution stipulated the principle of public hearing in the text of Article (101/2), saying: "Court sessions are public unless the court decides that they should be secret in consideration of public order or the preservation of morals".

The International Covenant on Civil and Political Rights also confirmed this principle in Chapter 14, where it states in the first paragraph: "All people are equal before the judiciary, and every individual has the right, when deciding on any criminal charge brought against him, or his rights and obligations in any civil lawsuit, that his case be considered in a fair manner and publicly by a competent, independent, impartial court established by law.

The press and the public may be prevented from attending the trial in whole or in part for reasons of public morals, public order, national security in a democratic society, or the requirements of the sanctity of the private life of the parties to the case, and within the minimum limits that the court deems necessary. The matter of publicity in some exceptional circumstances, except that a judgment in a criminal case or civil lawsuit must be issued publicly, unless the matter is related to juveniles whose interest requires that, or the lawsuit deals with disputes between spouses or is related to guardianships over children.

Second section: Extent to which the principle of public hearings can be applied in electronic litigation

Based on the aforementioned, it is clear that the principle of publicity is not an absolute principle. Moreover, in light of the spread of the Corona virus and due to the quarantine measures, the courts have become almost empty. In order not to disrupt progress of rights, it was necessary to proceed with the pending cases through visual technical means of communication. Since there is no exceptions to the principle of publicity, it is possible to adopt one of the techniques of video conversations such as (videoconference), where it means "an audio-visual communication that takes place at one time between parties interacting together in different locations. Through the capabilities of audio-visual computers and digital video cameras, that is, the interlocutors in the various sites can direct questions, inquiries and comments to the main site and receive answers and special inquiries. ⁽²⁾

The Jordanian system of using modern technology means in criminal procedures No. (96) of 2018 in Article (5) provided that "when using modern technology means, the provisions of confidentiality, publicity, attendance and discussion provided for in the law, especially those related to the right of defense and the presence of the attorney during legal proceedings investigation and trial using modern technology and in coordination with the competent authority."

Accordingly, it can be said that the principle of publicity in remote trial sessions through communication techniques would prejudice this principle, especially since these sessions are conducted through the devices of the litigants and the court and no one can view them. It is necessary to ensure respect for the

¹Al-Masrafawi, Hassan Sadiq, (1998) Al-Masrafawi in the Origins of Criminal Procedures, Manshaat Al-Ma'arif, Alexandria, p. 547

²Omar, Abdul Majeed, (2018) Fair Trial Guarantees in Light of Remote Communication Technology in Criminal Proceedings in the UAE: A Comparative Study, Kuwaiti International Law Journal, Sixth Year, Issue 4, p. 337 and beyond

principle of publicity by informing the public of the date and place of retransmission. This is something that is not imagined to happen in reality, especially in civil cases. If the matter is related to a criminal case, which its commission will be reflected on society, and to reduce the level of crimes, the court sessions, including the verdict session, may be broadcast on national screens, by linking them to the technology of remote video chats to achieve a social deterrent.

Despite this, when we refer to the text of Article (101/2) of the Jordanian Constitution, we find that it permitted in certain cases the confidentiality of sessions, such as juvenile cases. That is e-trials are not considered a complete violation in the stipulated cases, thus excluding cases that are supposed to be public. In addition, means of communication of both the court and the parties are linked to devices belonging to the Ministry of Justice, which enables these sessions to be reviewed at any time when doubts arise about their credibility.

Conclusion

E-litigation is regarded as one of the recent applications in the scientific development in the jurisprudential and legal fields. It began to appear in contemporary legal systems as it is characterized by speed in completing procedures and reducing financial expenses, as well as the ability to exchange and extract documents in an easy way through the Internet.

The Jordanian legislator has kept pace with these developments in line with the requirements of the modern era and in line with the constitutional principles that ensure the guarantee of defense rights of the litigants. A set of results and recommendations were reached as follows:

Results


1. The Jordanian legislator kept abreast of developments and improved the level of litigation by adopting electronic means, which are no longer an option but a practical reality.
2. E-litigation is consistent with constitutional principles, although it may be considered a violation of the principle of publicity, but it is in line with what was stated in the constitution, which in some cases permitted confidentiality of sessions.
3. The difference between e-litigation and traditional litigation is in terms of the means, but in terms of the end, it is compatible in applying justice and respecting the rights of the defense.
4. E-litigation provides many services, such as registering lawsuits electronically, writing records, and submitting defenses via the Internet.
5. E-litigation is characterized by many characteristics that make it an urgent necessity in light of the present time.
6. E-litigation would ensure that litigants submit all evidence by electronic means without prejudice to constitutional principles.

Recommendations

1. The need to provide fair litigation guarantees that ensure the protection of confidential data and documents, which reassures citizens that this judicial mechanism is new.
2. Ensuring the publicity of hearings in all types of cases, with the exception of those that the legislator approved of their secrecy.
3. Work on training and qualifying judges, court employees, and lawyers to enable them to keep pace with this developed system.
4. Work to introduce the electronic litigation system into the academic education curricula and turn it into a specialization subject in itself.

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