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COMPARATIVE INVESTIGATION OF RETRIAL IN THE LAWS OF IRAN AND FRANCE

Rassoul Maghsood Pour[1*] , Fezzeh Salimi[2]
1 Assistant professor, Department of Private Law, Mashhad Branch, Islamic Azad University, Mashhad, Iran.
2Assistant professor, Faculty of humanities Department of Law, University of Bojnord, Iran

Corresponding author: Rassoul Maghsood Pour

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ABSTRACT

Like other individuals, the judges are also exposed to trial and error. In order to make up for such mistakes, the legislator has exceptionally predicted stages for doing so.

One of these stages of complaint is "retrial".

In the discussions related to the civil trial procedures, the jurists divide complaints about sentences into complaints through ordinary and extraordinary ways: the ordinary ways include protest and revision. The extraordinary ways include appeal, third person's objection and retrial. In this study, this legal provision and the retriable sentences will be dealt with in the laws of Iran and France.

INTRODUCTION

After the verdict was decisively issued, its content will be assumed correct and it is given credibility barring the retrial of the subject of verdict hence a regulation is formed that is termed the credibility of a finalized case or the axiom of the finalized verdict.

However, the maxim that is formed in this way is no more than a presumption so that it cannot be an end for the judicial trial of the parties' dispute and there might be clear-cut proofs indicating the incorrectness of the verdict due to the judicial mistakes. In this case and in order to eliminate the judicial mistakes and prevent the issuance of the unfair verdict, it has been accepted that the verdicts can be objected and the retrial of the case can be demanded following the verdict's decisive issuance in certain cases through the extraordinary ways that are generally termed objection to verdicts.

This extraordinary way is known as "retrial".

Retrial is amongst the extraordinary ways of complaining about the verdicts and, unlike the maxims "governance of the finalized verdict" and "the judge's completion of the case", it causes the court that has issued a decisive verdict again engage in the investigation of the case and issuance of a sentence. This way of complaining is pertinent to the cases that the lawsuit subject has not been clearly understood by the court for a reason or another and the court has made a mistake in perceiving the reality of the claim's subject and issued a sentence based on its unreal perception thereof and the unreality and unfairness of the court's decision has been made clear with the revealing of the reality following the issuance of a sentence.

Article 426 of the law on civil trial procedures has seminally rendered the retrial unique to the decisive verdicts and, secondly, expressed its aspects exclusively in seven paragraphs.

Literal Definition:

Literally, retrial is a compound noun comprised of "re" and "trial". In Arabic, the term "E'adeh" [retrial] rhymes with "Ef'al" and derived of the root "Awd" meaning returning, turning and redoing of a task (Ansari, Mas'oud and Taheri, Muhammad Ali, (2005), "encyclopedia of the private laws", Tehran, Mehrab-e-Fikr, v.1, 1st ed., p.347).

Thus, retrial literally means reinvestigation of a lawsuit.

Legal Definition:

In legal terms, retrial is the substantive investigation of a case judged and sentenced by a court. In fact, in order for the court's sentence to stay immune of the mistake, an extraordinary way known as retrial has been predicted.

Mr. Dr. Ja'afari Langarudi orders in the extended terminology of law in this regard that "the decisive verdict is issued by a court and, if the law permits the substantive reinvestigation of the case, it is termed retrial which is an exceptional affair and it has been introduced in jurisprudence as appeal.

Kinds of Retrial:

Retrial is divided into two kinds in respect to the method of its implementation:

1) Corresponding to paragraph A of article 432 in the law on the civil trial procedures, retrial is primary if the individual demanding the retrial makes such a request independently meaning that in case that a lawsuit be under investigation, one of the parties to a verdict that has been previously issued files a lawsuit for retrial. This request for reinvestigation of the case is termed primary and the price of the plea should be presented to a qualified court.

2) On the contrary to the primary retrial request, there is a secondary retrial request pointed out in the paragraph B of the same article. The secondary retrial is proposed in the course of trial whereas the primary retrial request is not a file being investigated so that the retrial can be demanded in its course.

Sentences that Can be Retried:

Article 426 of the law on civil trial procedures, passed in 2000, stipulates that "retrial is possible for the decisively decisioned verdicts …". Corresponding to the foresaid article, retrial takes place through complaints that are presented for the verdicts. Therefore, the courts' injunctions and writs cannot be retried.

The other point is that, unlike in the old law, not only the verdicts that have been decisively issued but also the revisable verdicts that have been finalized due to absence of appeals within the specified respite can be also retried.

The new France's law on the civil trial procedures has offered a definition of retrial in article 593 and specifies the realm of the retriable sentences therein. The article stipulates that "the retrial is the violation of a sentence enjoying the credibility of a judged case and serves the issuance of a new sentence regarding the subject and the verdict. The first question that strikes the mind here is that what does "the sentence enjoying the credibility of a finalized case" mean? Article 500 of this same law stipulates that "the sentences that feature no revisability with suspending effect enjoy the credibility of a judged case". This same article stipulates in the second paragraph that "the revisable sentences can enjoy the credibility of judged case when the respite of their revision has reached its termination and no request for revision is presented in this respite for them". Of course, it is evident that if a sentence that can be revised undergoes revision within the specified respite, the revising court's decision that has been made in a decisive manner would enjoy the credibility of a judged case.

Therefore, article 426 of the law on the civil trial procedures has seminally rendered the retrial specific to the decisive verdicts and it has secondarily expressed its aspects within seven paragraphs.

It seems unlike some jurists' criticism of the specification of retrial to verdicts that the legislator cannot be objected in this regard because the finalized writs cannot enjoy the credibility of finalized case except in cases of the writs indicating the abortion of the lawsuit and they do not originally bar the filing of lawsuit. As for the writs indicating the lawsuits' abortion, as well, considering the fact that such writs are issued by the force of the article 107 of the law on civil trial procedures and in cases that the plaintiff generally withdraws from his or her claim, the retrial cannot hold true.

It is worth mentioning that the cases of the retrial had been expressed in article 480 of the former France's law on the civil trial procedures, passed in 1806, and they are a lot more expensive than what has been stated in article 595 of the new law.

Therefore, unlike the laws of Iran wherein the retrial is specific to verdicts, the retrial is not specific to the verdicts in France's law based on article 593 of the law on the civil trial procedures and the writs featuring the credibility of finalized case are also included.

Aspects of Retrial Request in the Laws of Iran:

Retrial damages the solidarity of the verdicts and loosens their credibility; therefore, it should be requested in very limited cases and only for the lawsuits specified in the law.

In the trial session, as well, only the aspect mentioned in the retrial plea is investigated. Based on article 436 of the civil trial procedures, the followings are aspects of the retrial:

1) The subject of the verdict cannot be disputed by the plaintiff. The plaintiff requests the issuance of voidness verdict from the court and, besides doing so, the court issues a sentence indicating the necessity of paying an exemplary price.

2) The verdict has been issued with an amount higher than what has been wanted such as when the plaintiff has requested 20 million tomans but the court has happened to issue a sentence indicating the necessity of paying 30 million tomans based on experts' ideas. This aspect of the retrial can be actualized in cases that the want is the domestic or foreign currency or a general property (such as a hundred tons of wheat or some gold coins) in which case the offering of a verdict and the subsequent making of a retrial request is the reason for the actualization of this aspect of retrial.

3) Existence of paradox in the contents of a verdict as a result of substantiation on the paradoxical principles or articles such as when the plaintiff is sentenced to defeat and having of no right and the defendant is simultaneously sentenced to the paying of the fees of the plaintiff's lawyer.

4) The sentence is found in conflict with another verdict issued previously by the same court regarding the same lawsuit and its parties without a legal cause having resulted in such a contradiction such as when the plaintiff has been sentenced to have no rights in a claim requesting the dispossessing of the defendant from a property but the defendant is found sentenced to the dispossession of a part of the same property in a second verdict.

5) The party opposite to the one requesting the retrial uses deciet and fraud that influence the court's verdict.

6) The court's verdict is substantiated on documents the fakeness of which is found proved following the issuance of the verdict. The fakeness of the document should have been proved by the force of a final verdict.

7) After the issuance of the verdict, documents and evidence are found justifying the veracity of the individual requesting the retrial and it is proved that the foresaid documents and evidence have been kept hidden and not provided to the applicant in the course of trial.

Aspects of Retrial Request in the Laws of France:

The goal of retrial in the laws of France is the same goal in the laws of Iran, i.e. the violation of the sentence with the credibility of judged case (article 593).

In the laws of France, the aspects of the retrial have been expressed in article 595 of the law on civil trial procedures in four paragraphs. These aspects are very limited and narrow and serve the discovery of a documented reality hidden to the court in the course of trial and causing the adoption of incorrect decisions.

1) If it is made clear after the issuing of the sentence that the decision has been acquired based on a party's fraud in his or her favor.

2) If effective documents that had been kept hidden as a result of the actions of a party are discovered since the issuance of the sentence.

3) If judgment is found having been made based on documents the fakeness of which is realized after the issuance of sentence or their fakeness is found justified in judicial terms.

4) If the sentence is found issued based on written judicial testimonies, attestations or oaths the falsity of which is declared following the issuance of the sentence.

Comparison of the Aspects of Retrial in the Laws of Iran and France:

It was made clear from the mentioning of the cases and aspects of retrial in Iran and France that some aspects are shared by the laws of these two country and some others are missing from them and, due to the study's comparative nature, the shared aspects are only investigated herein.

Discovery of the hidden documents, fraud and deceit and the discovery of the fakeness of the document based on which a verdict has been issued are amongst the cases of retrial.

Of course, it is worth mentioning based on article 595 of France's new law on the civil trial procedures that the retrial is accepted based on its aspects when the requesting party is found having been unable to substantiate on these aspects without being recognized guilty and before the sentence happens to enjoy the credibility of the finalized case.

1) Fraud and Deceit:

Fraud and deceit have not been defined in the law. Deceit means conspiracy, deception, cheating, trickery and chicanery. Fraud means changing and transforming and being duplicitous and false (Dehkhoda, late Ali Akbar, dictionary, v.6, p.1129).

By the force of paragraph 5 in article 426 of the law on civil trial procedures, the deceit and fraud used by the party opposite to the one requesting the retrial and having been effective in the court's verdict is amongst the aspects enabling the demand for retrial.

Fraud and deceit are amongst the aspects enabling the retrial demand when they are found having been effective in the court's sentence. Therefore, even if the verdict is issued against the requester of retrial without the opposite party's deceit and fraud, the losing party does not have the right to request retrial.

Based on this paragraph, it is firstly necessary for a sort of deceit and fraud to have been used meaning that a fraudulent intervention is found made with the intention of forcing the court make a mistake and, secondly, the deceit and fraud should have been applied by a party of the lawsuit in favor of whom the verdict is issued. Resultantly, the opposite party is the requester of the retrial and the retrial is demanded with him or her as being a party. Therefore, in case of no use of deceit and fraud but the court's own making of a mistake or the deceit and fraud by a person other than the lawsuit parties, the retrial request cannot be made based on this aspect.

The deceit and fraud are to be necessarily revealed after the issuance of a decisive verdict because it is in case of the revealing of the deceit and fraud before the issuance of the decisive verdict that its effect on the verdict is cancelled. Thus, although there is presented no constraint in paragraph five of article 426 in the law on civil trial procedures indicating the necessity of the revealing of the deceit and fraud after the issuance of the

verdict, such a constraint is understood from the necessity of the effectiveness of the deceit and fraud in the court's verdict. Moreover, by the force of article 429 of the law on the civil trial procedures, the deceit and fraud should have been justified with the final verdict and the respite for the retrial request based on this aspect begins from the date at which the final verdict justifying the existence of deceit and fraud has been finalized.

Fraud has been expressed in paragraph one of article 595 in France's new law on the civil trial procedures. Based on this paragraph, one of the aspects of the retrial request is that it is made clear following the issuance of the sentence that the court's decision has been made under the influence of fraud by a person in whose favor the sentence has been issued.

Comparing this paragraph and paragraph five of article 426 in Iran's law on civil trial procedures, it is made clear that the conditions of these two paragraphs are nearly similar regarding fraud because based on paragraph one of article 595 in France's new law on the civil trial procedures, it is necessary for the fraud or the very fraudulent action to have been made with the intention of making the court make a mistake. Secondly, the fraud should have been performed by a party in whose favor the sentence has been issued. Thirdly, the fraud should have been effective in the issuance of sentence and caused the victory of the fraudulent party in such a way that the court would have probably issued another sentence without the fraud. Fourthly, the fraud should have been revealed following the issuance of the sentence. The only difference in the expressions of these two compared paragraphs is that the constraint "necessity of the fraud's revealing following the issuance of verdict" has not been explicitly mentioned in paragraph five in article 426 of Iran's law on the civil trial procedures and it is inferred from the necessity of the fraud's effectiveness. This constraint has been taken into account and explicitly mentioned in paragraph one of article 595 of France's new law on civil trial procedures. The notable difference in this regard is that, unlike in the laws of Iran that by the force of article 429 of the law on the civil trial procedures, it is necessary for the deceit and fraud to be justified in a final verdict and the respite for the retrial request begins from the date of such a verdict's declaration, such a condition has not been stipulated in the laws of France and this aspect has not been constrained to the justification with a court's verdict and the respite for the retrial request is two months since the parties' being informed of such an aspect as stated in article 596 of the law on civil trial procedures. The load of such a justification within the specified respite is on the shoulder of the applicant and the acceptance of such a request is with the judge and judge's recognition in this regard is beyond the supervision of the country's supreme court.

2) Justifying the Document's Fakeness:

In the laws of our country, the justification of the fakeness of the document on which the court's verdict has been substantiated has been declared in paragraph 6 of article 426 in the law on civil trial procedures. Based on this paragraph, it is necessary for the court's verdict to have been issued based on the document meaning that the document should have been the basis of the court's reaching of such a decision; therefore, if the document is one of the reasons based on which the verdict has been issued, this condition is fulfilled because the substantiation on a document is

expressive of the idea that the other proofs did not have qualification for the justification of the opposite party's right and/or, in other words, the document has been effective in the justification of the claim and/or a part of the total proof. It is also necessary for the fakeness of the document to have been justified following the issuance of the verdict (Keshavarz Sadr, Sayed Muhammad Ali, (1972), "retrial, an extraordinary way of trying the civil affairs", Tehran, Dehkhoda, p.125).

Corresponding to article 429 of the same law, it is necessary for the fakeness of the document or the final verdict to have been proved and the retrial can be requested since the date of the issuance of a final verdict indicating the fakeness of the document. It seems that the legislator has applied the term "final" in this article in its connotative sense as antonymous to "absolute" because one should always believe that the legislators use the words that are applied in their specific meanings in the law in the very connotative meaning.

In the laws of France and in paragraph 3 of article 595 in the new law on civil trial procedures, the court's investigation of the cases based on the documents the fakeness of which is recognized following the issuance of sentence or announced in judicial ways is amongst the aspects of making retrial requests. In this paragraph, besides the cases in which the fakeness of the document is proved before requesting the retrial with the judicial investigation and verdict, the cases in which the fakeness of the document is verified based on reasons like confession to the court doing the retrial are also included by the aspects of retrial request and the retrial is permitted based thereon.

However, the notable difference is that, unlike the laws of our country in which the fakeness of a document should have been proved by a final verdict and the respite for requesting the retrial begins from the date of this verdict's announcement based on article 429, this aspect has not been rendered specific to the justification with judicial verdict in the laws of France and includes the cases in which the fakeness of the document has been proved without prior judicial justification and announcement in the court doing the retrial based on proofs like confession and, by the force of article 596 in this country's new law on the civil trial procedures, the respite for requesting the retrial based on this aspect is, like based on the other aspects, two months since getting informed of the document's fakeness.

3) Gaining Access to Hidden Documents:

As an aspect of request for retrial, paragraph 7 in article 426 of the law on civil trial procedures has announced the gaining of access to documents indicating the veracity of the retrial requester's proof and being kept hidden in the course of trial and not in the hands of the applicant following the issuance of a verdict.

Document has been here commonly applied in its specific sense and it intends any writing that can be substantiated in the course of claim's justification or defense (article 288 of civil law).

In the former law, it had been mentioned that "those documents and writings kept hidden by the opposite party and/or made hidden by the opposite party"; but, it has been mentioned in the current law that "it has to be proved that the aforementioned documents and writings have been hidden in the course of trial and not provided to the applicant".

Of course, it is evident that the hiding should have not been performed by the applicant him or herself and no retrial request can be made based on the documents that have been kept hidden by the applicant him or herself in the course of trial and those s/he has preferred not to provide. It might have been with the objective of reminding and exclusion of this state that the constraint "not being available to the applicant" has been added to the constraint "document's hiddenness" in paragraph 7 of article 426 of the law on civil trial procedures.

Two states are imaginable for the hidden documents: 1) the person who gains benefit from the document is originally not informed of its existence; and, 2) the foresaid document is not in the interested party's hands even with his or her information about the existence of this document rather it is in the hands of a person who avoids offering it.

It appears that article 430 of the law on civil trial procedures that takes the date of receiving or getting informed of the document as the origin for the calculation of the respite for retrial request has paid attention to the two aforesaid states and it can be stated based on this article that the legislator has recognized both the hiding states as enabling the making of a request for retrial.

Access to the hidden documents causes the invalidation of a verdict in the retrial that the document proves the veracity of the retrial's applicant in such a way that if such a document was not hidden, the verdict would have not been issued in favor of the opposite party but in favor of the party applying for the retrial. Therefore, the hidden document's qualification for being a proof should be in such a way that, in case of the existence of proofs in favor of the opposite party, it overcomes the conflict with those proofs.

In the laws of France and in paragraph 2 in article 595 of the new law on civil trial procedures, the access to the determinant documents hidden by the opposite party following the issuance of a verdict is amongst the aspects of requesting retrial. This paragraph is consistent with paragraph 7 in article 592 of Iran's former law on the civil trial procedures (passed in 1939) in that it constrains hiding to the opposite party and it differs from paragraph 7 of article 436 of Iran's new law on civil trial procedures in that, unlike in the laws of Iran that it is not necessary for the hiding of the document to have been committed by the opposite party, the document's hiding is amongst the causes of the retrial in the laws of France when it is done by the opposite party. Resultantly, the achievement of a document that has been hidden in the course of trial but not by the opposite party cannot enable the request for retrial. In some of France's civil trial procedures, emphasis has been placed on the intentional hiding of the documents by the opposite party in whose favor a verdict has been issued as well as the non-guiltiness of the applicant of the retrial. Although the achievement of a hidden document is recognized as one aspect of filing a request for retrial in the laws of both of the foresaid countries, it is evident that such a document should not be the one the nonvalidity of which has been priorly proved and announced. Furthermore, in case that the obtained document is abused by the opposite party during the retrial, the court would investigate the originality of the document. Considering the constraint "the necessity of the document's effectiveness and determinativeness" that has been underlined

in the laws of both of these countries, this same issue can be also understood because the document the invalidity of which has been previously proved or its validity has not been verified cannot be envisioned as determinative and effective.

CONCLUSION:

In regard of the results, it has to be expressed that some cases of the retrial aspects have been mentioned in the laws of Iran and missing from the laws of France such as the verdicts indicating the necessity of the losing party's paying of an amount more than what has been demanded by the winning party, conflict in the verdict's contents and issuance of paradoxical verdicts and, conversely, there are some retrial aspects in the laws of France that are missing from Iran's new law on the civil trial procedures such as false oath and false testimony.

It seems that it is better not to just place the verdicts amongst the subjects of the retrial request as it is so in the laws of Iran and not so in the laws of France; this is an issue possibly without a special philosophy but the qualified writs can be included by the subjects of retrial request, as well.

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