

What if Judges' Robes are not as spotless as they should be?⁽¹⁾
**Comparative Analytical Study of the Effects of Disqualifying
a Judge in the Civil Procedures Law of Jordan**

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ABSTRACT:

This article deals with an important issue to the administration of justice in Jordanian law, which is the effect of disqualifying a civil court judge under the 'Judges Disqualification System' (JDS). The importance of this article is derived from the important role a judge plays in a civil case. It is not enough, as will be discussed in this article, for a judge to be impartial. A judge must also appear to be impartial. Accordingly, this article answers the question of what happens if a judge's appearance was affected with one of the cases that deems a judge disqualified in the Jordanian law. However, although the article mainly addresses this issue in Jordanian law, a comparison is made to the position of the English law regarding this issue. The article concludes with a set of recommendations which aim at achieving a higher level of justice.

Key Words:

Judges; Impartiality; Disqualification; Civil Judges; Effects of disqualification; Jordanian Civil Procedures Law; English Law.

(1) In emphasising the appearance of impartiality of a judge, Rubin J said: «Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct». In *Hall v Small Business Administration* [1983] 695 F. 2d (5th Cir.) 175, p 176

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1. INTRODUCTION:

The Jordanian law prevents people from taking the law into their own hands. As a result, alternative and lawful methods of right protection were created, the main of which in Jordan is litigation before courts of law.⁽¹⁾ The Jordanian legislator regulated the litigation process before courts of law in more than one law.⁽²⁾ The most important of which is the Civil Procedures Law (CPL).⁽³⁾ Still, courts of law are mainly administered by judges, who need to meet many requirements in order to be appointed in this post. These requirements are set to guarantee that judges are well-chosen and well-qualified to perform their tasks. This was regulated in the Judicature Autonomy Act.⁽⁴⁾ The CPL also contains many rules to guarantee and assure judges' well-performance of their work, since- it is agreed- judges, in Jordanian law control the proceedings before him from beginning to end.

However, if the Jordanian law is to be compared to other jurisdictions (i.e. to the English law), it can be said that Jordanian law is a 'Civil or Statutory Law', while English law is a 'Common Law'. This is due to the differences between the two types of legal systems. A Common Law country is one in which the courts can create law. Accordingly, English courts, which depend on judicial precedents,⁽⁵⁾ do create law themselves.

(1) For more about the meaning of adjudication system see Ahmed Muslem,, *Fundamentals of Pleadings*, (Dar Alfikr Alarabi, Arab House of Thinking, Egypt without a year of publication), p. 40.

(2) It is worth noting here that litigation in Jordan is included within the judicial authority, which stands along with the two other constitutional authorities; the Legislative and the Executive. These three authorities were addressed in the third section of the Jordanian constitution. It is also worth noting that Judicial Authority performs its tasks through what is known as courts of law (the courts). See articles from 24 to 27 of the Jordanian Constitution.

(3) This law is the law no. 24 of the year 1988 and its amendments. There are other laws such as the Structure of the Ordinary Courts Law no. 17 of the year 2001, and the law of the Court of Reconciliation no. 15 of the year 1952. Yet, it is worth noting that the Jordanian legislator has achieved more than one amendment on more than one law recently, such as the Amending Law no 26 of 2017 of Judicature Autonomy Act, and the Amending Law no 31 of 2017 of Civil Procedures Law.

(4) Law no. 29 of 2014.

(5) However, after the introduction of the CPR,(it is to be noted that CPR is an abbre=

While, on the other hand Civil or Statutory Law Countries are ones in which a court merely applies and interprets the legislator's enacted law.⁽⁶⁾ This is the case in Jordanian law. However, it is perceived that English law is a mixture of common and statutory law. This means that courts do create law, and legislator's enacted laws also exist in English law.⁽⁷⁾

Nevertheless, the English law, as a common law, is said to have been affected by the introduction of the Civil Procedure Rules (the CPR).⁽⁸⁾

= violation of the Civil Procedure Rules, which is issued by The Civil Procedure Rule Committee, according to the Civil Procedure Act 1997. These rules are applied in England and Wales) it was noted that precedents may no longer be a defining aspect of English Law since there are written rules a judge needs to adhere to. Furthermore, the CPR states that a judge under these rules has an overriding objective to deal with cases justly. Courts, as a result, may try to implement justice as they perceive it themselves not as it was seen by earlier judges in similar cases. For more on this, see in I. Grainger and M. Fealy, *The Civil Procedure Rules in Action*, 2nd ed. (Cavendish, London, 2000), p. 17. However, addressing and discussing in detail this issue lies beyond the scope of this article. however, so far, English law is still recognised as common law, adopting the principle of precedents.

(6) H. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France*, (6th ed. Oxford UP, NY, 1993), p. 7.

(7) It is important to clarify the fact that different legal systems have different legal classifications (descriptions). These are, sometimes, described as 'inquisitorial' or 'adversarial' legal systems. Inquisitorial legal systems, in brief, are legal systems in which judges are given power to intervene and control the cases put before them beyond the parties' propositions. This is to say, that a court searches and calls for facts by itself. While, generally, in the adversarial system, a court is not given this power and is restricted to the parties' propositions and actions in the case. Yet, it is accepted that no legal system is entirely or purely adversarial or inquisitorial. Nevertheless, a system may be prescribed as adversarial or inquisitorial according to the degree it gives to the role of the court. If the court's role is more active, the system may be referred to as an inquisitorial one, and if the court's role is less active, however, and the court still plays a role in directing cases, the system may be described as adversarial. See H. Abraham, *supra* n7, p. 15. Also see J. McEwan, *Evidence and the Adversarial Process: The Modern Law*, 2nd ed. (Hart Publishing, Oxford, 1998) p.1 et seq. See also M. Zander, *Cases and Materials on the English Legal System*, (Butterworths, London, 1999) p. 313. See also J. Jackson "Analysing the New Evidence Scholarship: Towards a new Conception of the Law of Evidence" 1996, *Oxford J. Leg. Stud.*, 16, p. 326. J. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, (2003) 52, *ICLQ*, p. 281.

(8) It was mentioned earlier that CPR is an abbreviation of the Civil Procedure Rules, which is issued by The Civil Procedure Rule Committee, according to the Civil Proce=

What if Judges' Robes are not as spotless as they should be?

However, this does not mean that the English legal system has changed in a way that makes it proper to refer to it as a civil law system.⁽⁹⁾ Accordingly, the English legal system is still referred to as a common law system, however, although the courts have greater powers than ever before.⁽¹⁰⁾ As to Jordanian law, as a civil law country, courts do play more active role in the case. Judges, in Jordanian law, are given a great and a wide-reaching role in handling the disputes. Nonetheless, such powers of a judge are regulated by the law. A judge is subjected to certain principles when handling a case. One of the most important principles governing a judge when dealing with disputes is the principle of 'neutrality' or the 'non-bias' principle (the impartiality of a judge).

Accordingly, a judge is required to treat the parties equally. Furthermore, a judge is also asked to take a neutral position in the case. Therefore, he/she is forbidden from exceeding the parties' demands and pleadings. A judge is forbidden from bridging- or filling in -the gaps in a party's adduced evidence.⁽¹¹⁾

Still, it is to be noted that the absolute neutrality of a judge is inconceivable. This is so, since the judge is the authority that administers and controls the litigation process. Such a position necessitates giving a positive role to the judge. The positive role of a judge is conferred upon him to guarantee a successful and efficient administration of the cases before him. This positive role of a judge in the case is seen in more than one occasion.⁽¹²⁾ In emphasising this fact, the Court of Cassation, in one of

= dure Act 1997. These rules are applied in England and Wales.

(9) It is said that this law is still in general considered as adversarial. However, it is contended that the CPR has made English law 'less adversarial' as mentioned earlier. See also Sir J. Jacob "The Fabric of the English Civil Justice" (Stevens and Sons: London: 1987), p. 5-8. Also see J. McEwan, supra n8, p. 10, where the author comments on the proposals adopted by Lord Woolf, which have generally been adopted by the CPR. See also J. Jolowicz, *The Woolf Reports and the Adversary System*, (1996) 15, *CJQ*, p. 209. See also J. Jolowicz, *Adversarial and Inquisitorial Models*, supra n10, p.286

(10) See I. Grainger and M. Fealy, supra n6, p. 24.

(11) Ahmad Abo Alwafa, *Civil and Commercial Pleadings*, (Munsha't alma'aref, Knowledge Institution, Alexandria 1986), p.59 - 60.

(12) It is agreed that a judge has a great authority concerning the administration of the=

its decisions, after saying that "... it is initially the parties' responsibility to adduce evidence in a case to prove their claims" said:

"... a judge's impartiality principle is not absolute, since a judge is allowed to interfere and to play a role in the evidence in the following cases: 1- He may question the parties on any material matter. 2- He may call for real and expert evidence when needed in the case. 3- He may also ask the parties to hand in to the court any relevant and material documents under their possession. 4- He may also ask any of the parties to swear (to give oath) if that party's evidence was incomplete. 5- A judge may also question and examine the witnesses once the parties finish questioning, examining and cross- examining them ..."⁽¹³⁾

This decision is clear in showing that a judge, under the Jordanian law, is empowered of performing and conducting certain actions in the case. Still, when stating that absolute impartiality is not imaginable in the Jordanian law, as decided by the court, one does not mean that a judge can- in any way- be biased and is allowed to decide and address a case unlawfully in favour of one of the parties.⁽¹⁴⁾ No one, in any way, tolerates

= proceedings. Therefore, stipulating his impartiality constitutes a cornerstone in this function. For more reading as to a judge's authorities in a civil case see Omar N. Ismael, *The Judge's Discretionary Authority in Civil and Commercial case Analytical and Applied study*, (Dar AlJame'a AlJadedda, New University House, Alexandria, 2008), p. 80 et. seq. However, in comparative law, a judge plays a vital role managing the case as well. For more on the judge's role in this regard, see for example, Evan Bell, *Judicial Case Management*, (2009)2, *Judicial Studies Institute Journal*, referred to at [http://www.jsijournal.ie/html/Volume 9 No. 2/9\[2\] Bell Case management.pdf](http://www.jsijournal.ie/html/Volume 9 No. 2/9[2] Bell Case management.pdf) visited 13th Feb. 2015.

(13) Cassation Court Decision no. 45232005/ dated 262006/4/. Adaleh. Visited at 12th Jan 2015. It is pertinent to note here that Adaleh is an electronic commercial program concerned with organising and gathering legal-related information, including courts' decisions and enacted laws. Hereafter it will be referred to as (Adaleh).

(14) Same thing also applies to the common law system; since it is also contended there that absolute impartiality is not appreciated, and is accordingly should not be welcomed. Professor Lucy addresses this fact, from a different angle concerning common knowledge of a judge, by saying that although absolute impartiality might be possible it is not desirable at all. He says that judges seeking absolute impartiality will need to «...set aside what they know of human kind and their lives. The beings then judging us would know nothing at all of what standard human lives look and feel like or, knowing something, would completely ignore it. Expecting real judges

What if Judges' Robes are not as spotless as they should be?

or supports a court favouritism of one of the parties over or against another. This article, as will be seen below emphasizes on judges' impartiality, not only in their actual conduct, but in their appearance as well.

However, it is conceivable for a judge to be faced with situations where his impartiality is affected and questioned. The Jordanian legislator has regulated these situations and has adopted a system according to which a judge is to be banned and prevented from hearing or addressing the case. Therefore, these situations are perceived to be of great effect, since prevent a judge from performing the task he was appointed as a judge to perform. These situations are named as the "judges' recusal" and "judges' disqualification" cases. This article is solely concerned with addressing the effects of deeming a judge disqualified, where a disqualification case stands in the proceedings (under the JDS as will be seen below). The study is in no way set to address the effects of the recusal cases (under the JRS will be seen below). However, the differences between the two systems will be illustrated hereunder.

The importance of this article is derived from the fact that it, according to the best of the author's knowledge, is the first one dedicated to addressing, in detail, the matter in question. Furthermore, this article analyses the regulation in Jordan along with courts' decisions. The article ultimately suggests reforms that can improve both the regulation and thinking of the matter in question in Jordanian law. Nevertheless, despite the fact that this article is mainly concerned with Jordanian law, it light will be shed on the approach followed in the English law towards the matter in question.

The article begins with clarifying the meaning and importance of the JDS, which constitutes the first step in addressing the point in question.

to embody such an attitude would be to expect them to live debased lives. Just like us, their commitments and associated experiences make them the people they are; they serve to give judges both prior knowledge of human life and found various pre-judgments and evaluations in their own lives». See William Lucy, *The Possibility of Impartiality*, (2003) 25, 3, *Oxford J. Leg. Stud.*, referred to at LexisNexis. Visited 18th Oct.2016.

Then, illustration is given to the effects of disqualifying a judge under the JDS before delivering a final judgment in a case. Afterwards, discussion is made to the case where a party raises the judge's disqualification issue after a judgment is made in a case. The English law's approach will also be visited as a further step to see how different it is from the Jordanian law. Finally, the article concludes with assessments and recommendations.

2. Meaning and Importance of JDS:

It is important, as a first step before addressing the effects of disqualifying a judge, to define the JDS and show its importance in Jordanian law.

2.1 Meaning of JDS:

As mentioned above, the litigation process is administered by «judges», who are humans. Accordingly, judges are affected by natural and social rules governing their affairs and dealings. For example, judges, by nature, are found to be of appreciation of certain matters like favouring both their own interest and the interest of those who are attached to them, such as their spouses, children or parents. Furthermore, judges may also like or dislike- like if they were involved in a dispute against- other people. These characteristics are common between all humans as a general rule.

However, it is important to note that humans are not affected, to the same level, by such situations, rules or relations. That is to say the level of effect or influence of such circumstances differs from one person (i.e. a judge) to another, depending on different factors, such as cultural, social and economical ones.⁽¹⁵⁾ Therefore, it is conceivable to see a human (i.e. a judge) affected by a relation with a far relative of his family for the only reason that he shares the family name with him, which is imaginable where family or tribal ties are strong in a certain society. Such a relationship may be irrelevant to another person (i.e. another judge) in

(15)It can be said that prosperity and fortune sometimes makes the circle of a person's relations wider than the case if he was found to be in a less prosper or less wealthy (tight-economical) circumstances.

another culture, where family ties are less appreciated. Therefore, and due to the vital and important role a judge plays in the administration of justice, the Jordanian legislator observes that it is of great importance to state, define and name certain cases, if existed, a judge is disqualified and, as a result, he is to be prevented from addressing or dealing with the dispute before him.⁽¹⁶⁾ These cases, in Jordanian law, were adopted under a system called the 'Judges Disqualification System (the JDS) as mentioned earlier. Under this system, if a judge is faced with any of the adopted cases, a judge must be disqualified. However, further illustration is given below.

2.1.1 JDS and JRS:

The JDS is not the only system adopted to protect and maintain appearance of impartiality of a judge. The Jordanian law adopts another procedure, which is called the Judges Recusal System (JRS).⁽¹⁷⁾ Once again, in this system (i.e. the JRS), same as it is the case with the JDS; the law identifies and maintains certain circumstances. If any of these circumstances is established, a judge is to be disqualified and prevented from addressing a case.⁽¹⁸⁾

For more clarification, it can be said, in brief, that JRS is a system that

(16)It is important to note here that it is more likely that the situations and cases according to which a judge is deemed disqualified to act in the case, in the Jordanian law, are adopted by the legislator depending on the cultural, economical, religious and social structure of the Jordanian society. In other words, what is adopted in the Jordanian law to decide that a judge is disqualified may not be applied in another country (in England for example). This is due to the differences between the two places in the above mentioned factors.

(17) It should be noted here that this research is only concerned with the JDS as a system established to prevent disqualified judges from hearing a case. It is not dedicated, in any way, to discuss the other system (the JRS). However, the JRS may be addressed wherever it is related to the matter in question. Yet, further illustration of this system will be given below.

(18)Another system is added to those two systems, which is the system of recusal of judges' on their own volition. This system is different from the two previously mentioned systems (i.e. the JRS and the JDS), since it is a system that regulates the judge's right and obligation to ask for his own recusal. This system lies beyond the scope of this study.

aims at achieving same results sought by the JDS.⁽¹⁹⁾ However, the cases adopted under the JRS to recuse a judge are less serious in effect on the administration of justice than those adopted under the JDS. In other words, JRS cases do not seriously affect a judge's appearance of impartiality as it is the case under the JDS.

Specifically, the Jordanian legislator adopted more than one case under the CPL, and referred to them as "judges' disqualification cases", which are known as JDS cases, and on the other hand the legislator adopted other different cases under the JRS, and called them "judges' recusal cases", which in turn constitute the JRS cases. The two sets of cases, under the two systems, were made by the legislator's own estimation, according to his own adopted view and assessment.

The distinction made between the two systems is a legislator-made one. For example, the legislator decides that if a party works for a judge, then this constitutes a JRS case.⁽²⁰⁾ While, on the other hand, the legislator says that if a party is a spouse of a judge, then this will be a JDS case.⁽²¹⁾

It is then the legislator's will, depending on his own estimation, that makes a certain case affecting a judges' appearance of impartiality a one put under the JRS or, to the contrary to that, makes it a one included within the JDS. However, the cases imposed under the JDS have greater influence and effect on the appearance of impartiality of a judge than those imposed under the JRS. As seen above, in the given examples of the cases under the two systems (the JDS and the JRS), a judge, in the case where a party is his or her spouse, faces more pressure his or her appearance of impartiality is affected to a higher level than in the case where a party sitting in a case is his or her employee. A wife-husband relationship with a party has, for sure, greater effect on a judge than a worker-job owner one.

As a result, different level of influence on a judge imposed under the

(19)Awa'dh AlZuibi, Civil Procedures Law, (2nd ed. Dar Wa'el, Wa'el House, Amman, 2006) p. 9596-.

(20)See article 134/3 of the CPL.

(21)see article 132/1 of the CPL.

What if Judges' Robes are not as spotless as they should be?

JDS cases has, accordingly, led to different rules applicable to each one of the two systems. The legislator stated that once a JDS case is found a judge is automatically disqualified, and his work is considered null and is set aside. Moreover, no parties' waiver is admitted or allowed in JDS cases, since they are attached to public policy. Moreover, as a one of the main differences between the JRS and the JDS, it can be said that the law sets no time limits for the parties to call for a judge's disqualification, and for setting that judge's work aside, under the JDS.

This is not the case with the JRS, which mainly depends on the parties' positions towards it. That is to say a judge, under the JRS, is recused only if a party, the affected one, applies to achieve such an end (i.e. to recuse that judge). Moreover, the party's recusal application, in order to be admitted, must be made within a certain time limit.⁽²²⁾ Otherwise, a party will be assumed to have waived his right in this regard.⁽²³⁾

In brief, it can be said that the Jordanian law adopts two systems to prevent judges from hearing cases as a general rule; the JDS and the JRS. Each one of these two systems contains more than one case adopted by the legislator. The cases adopted under the JRS have a lesser effect on a judge's appearance of impartiality than those adopted under the JDS. Therefore, the law treated the two systems differently, by stating that the JDS cases are related to public policy and that if any of the JDS cases is established a judge must be automatically banned from addressing a case. Moreover, his done work is deemed null and is set aside no matter what. The parties have no say in this. Their agreement to the contrary, is not of any effect. Any of the parties, at any time of the case, can call for setting aside the judge's achieved work. This is not the

(22)It is worth noting that recusal application must be submitted at the beginning of a case before commencing the proceedings, unless the JRS case occurs, or was discovered by a party, after that date, and in the latter cases, the recusal application must be made at the first hearing following that occasion. See article 136 of the CPL.

(23)In other words, if parties did not- or failed for any reason to- ask for a judge's recusal under the JRS, and that judge issues a judgment, his decision is considered correct, since the JRS is not attached to public policy. This, as will be illustrated hereinafter, does not apply to the JDS.

case with the other system as illustrated above. Yet, once again, this article is to address the effects of disqualifying a judge under the JDS as a general rule.

Nevertheless, it has been rightly observed that JDS, and this applies to JRS, is not adopted as a result of lack of confidence of judges,⁽²⁴⁾ since the adjudication and litigation process should only contain trustworthy people (i.e. judges).⁽²⁵⁾ What is meant by this system, then, is to protect the appearance of impartiality of a judge, since, in such cases it can be reasonably thought that a judge will not act impartially in a case, even if he was actually impartial in handling it.⁽²⁶⁾

Once again, the JDS is maintained and adopted to ensure that justice is not only done but also to be seen done. It, the JDS, is then, defined as a system that leads to preventing a judge from acting in or hearing a case when certain circumstances, stated by the legislator, are established. These circumstances, as a general rule, negatively touch or affect the image or appearance of impartiality of a judge rather than his actual impartiality.⁽²⁷⁾

2.2 The importance of the JDS

The importance of this system comes from the task it performs, which

(24) See in Mohammed Obied, *Judicial Autonomy: comparative study*, (Without Publisher, 1991) p. 14 and 15.

(25) In this meaning see Ahmad Abo Alwafa, *Comments on the Pleadings' Law Provisions*, (Dar Al Matbo'at AlJamei'a, The University Publications House, Alexandria, 2007) p. 635.

(26) Some say that if a case of judges' disqualification is seen in a case, the disqualified judge will be looked at with <doubt>. This, in the given view, means that that judge will be accused of bias and partiality in the eyes of those watching him, whether they were parties or audience. See, in this meaning, Abdel Fattah Murad, *Professional Contraventions of Judges and Attorneys general: Analytical, Authentic and Comparative study*», (Without Publisher, 1993), p. 657.

(27) Protecting the image of impartiality of a judge as a warranty supporting a judge's actual impartiality is also recognised by comparative jurisdictions as well. See for example, C Okpaluba and Laurence Juma, *The problems of proving actual or apparent bias: an analysis of contemporary developments in South Africa*, at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2011volume14no7/2011%2814%297%20JumaDOC.pdf> visited 3rd May 2016.

What if Judges' Robes are not as spotless as they should be?

is to keep appreciation, respect and confidence in the litigation process by safeguarding judges from any doubt concerning their impartiality when dealing with cases before them. This idea was emphasised by the Court of Cassation, when addressing the issue of non-appealability of its judgment. The court said:

“The general rule is that the decisions of this court are not subjected to appeal and..., there is no way to challenge its decisions except in the cases stated in articles...132/CPL. ...the latter, [i.e. article 132/CPL], is concerned with the cases lying within the JDS. If any of the cases adopted therein is found in one of the Court of Cassation judges, a party can challenge the reached decision, asking for setting it aside. This exception is adopted to safeguard and maintain confidence in the adjudication system. It also prevents chaos and disorder in it (i.e. in the adjudication system)”⁽²⁸⁾

The importance of judges' appearance of impartiality is also recognised in English law.⁽²⁹⁾ English courts, Lord Denning for example in one case, emphasised on this fact by saying: “Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking: ‘the Judge was biased’”⁽³⁰⁾

Furthermore, the JDS has an economic importance, since it saves costs for both the parties and, more importantly, to the community as a whole. This is due to the fact that litigation is a process performed in courts, which are part of the judicial authority. Courts are considered as public establishments or public entities that are maintained and administered

(28)Cassation Court Decision no 2001/947 .dated .2002/1/7 Adaleh .Visited12th Jan 2015.

(29)See for example, chapter 13 of the Guide to Judicial Conduct 2013, which is (This Guide) drafted by a working group of judges set up and published by the Judges' Council. This Guide states, in its preamble, that it «is intended to offer assistance to judges on issues rather than to prescribe a detailed code and to set up principles from which judges can make their own decisions and so maintain their judicial independence».

See at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf visited at 22nd Oct. 2016.

(30)*Metropolitan Properties Ltd. v. Lannon*, (1969) 1 QB 577, p 578.

by the state, which is funded by the people (tax payers), as a general rule.⁽³¹⁾ Therefore, JDS is perceived to save costs on both litigants and community as a whole. This is due to the fact that if such a system does not exist and judges do decide cases under doubts against their impartiality, there will be more appeals against court decisions. More appeals mean more cases. Such a thing will consume the parties' time and cost when they spend longer time and more money for fees, lawyers, experts... etc, in a two courts' level. The court's efforts, and ultimately the community as whole (i.e. the state's treasury) who sponsors the judicial authority, will also be affected as a result, when trying the case more than one time as a result of appeals in such cases.

Furthermore, more cases, as a result of more appeals made when such a system is not applied, may also mean more pressure made on judges to decide the heavy load of cases. Such pressure may lead judges to give less accurate judgments. Such a thing may also increase the number of appeals. This may ultimately lead to loss of confidence in the judicial system as a whole, which affects the country internally and externally, in more than one aspect; mainly, disputants may become unwilling to sue and be sued before Jordanian courts, and may refer their cases to international and foreign courts or tribunals such as foreign arbitration bodies. As a result, it is vital to pay attention to all what increases confidence in the adjudication system and in the persons administering it (i.e. the judges).

3. Disqualification Issue before Delivering a Judgment:

The main effect of disqualifying a judge is to prevent that judge from hearing the case.⁽³²⁾ However, it is imaginable for a disqualified judge

(31)Litigants are required to pay certain fees when filing their cases. Still, what litigants pay does not cover the real costs of litigation. This is due to the well-known principle of "free access to justice" or "the free-of-charge litigation". For more about this principle see Awa'dh AlZuibi, *Civil Procedures Law*, supra n20, p. 48.

(32)It is important to note that both parties can call for the prevention of a disqualified judge from addressing the case. Furthermore, the disqualified judge is obliged and asked, himself, on his own volition to call for his recusal. The study and analysis of both applications, the one made by the parties or by the judge, and the procedures =

What if Judges' Robes are not as spotless as they should be?

to act in the case, both before and after calling for his disqualification or prevention by the parties. Moreover, a judge, and the parties as well, may be unaware of the existence of the disqualification cause for a reason or another.⁽³³⁾ In addition, a judge and a party may know about the existence of the disqualification case and choose not to raise it at all or may choose to wait until late in the case to raise it. In such situations- and in all other cases where a judge appears to be disqualified- what effects does the disqualification of a judge have upon the procedures and actions made by the judge before being set-aside?

As an answer, distinction is made between two situations; the first of which is the case where the disqualification issue is raised before delivering a decision on the case by a judge, and the other one is where the disqualification question is raised after a court decision is made by a judge.⁽³⁴⁾ This part of the article will address the case where the disqualification issue is raised before a judge who has delivered a judgment on a case, while the next part will address the other side of the

= set to deal with them can be addressed in a separate detailed study, since this study is set to address the effects of disqualifying a judge. However, it is worth noting that if the authority of competence sees that a judge is disqualified, it will decide that he must step down and be removed from the case. This result is reached and imposed regardless of any agreement made by the parties, even if the disqualification reason applies to both parties to the same level. In other words, it is conceivable, theoretically at least, to see a judge sitting in a case with two parties (two opponents), who are relatives of his to the same degree (two brothers for example), attending before him. In such a case, even if a judge may be impartial in acting in the case, he is to be disqualified. In such a case, in the given example, a judge is disqualified according to his relation to each party. In this meaning, see Ahmad Abo Alwafa, *supra* n26, p. 636.

(33)For example, a judge's wife is imaginable to live far away from him, without being divorced, and she is engaged with the party in a dispute that the judge (her husband) knows nothing about, and the party also does not that his opponent in the other case is the judge's spouse.

(34)However, it is important to note that there is another imaginable case, which is seen where a judge is deemed disqualified and put away, before acting in the case. This case was not illustrated here, since it raises no problems. A judge in this case did not act in the case. Therefore, he will be set aside and replaced by another judge before taking any action in the case. However, if he acts in the case despite the fact he is considered disqualified, his work will be null and void as will be illustrated hereafter.

story (i.e. the other scenario).

Where the question of disqualification of a judge is invoked before a judgment is delivered in the case, the question will be what effects the law imposes in this regard? Under the law, the Jordanian law, all steps taken by the disqualified judge in the case are considered null and void, and they as a result must be set aside.

The law does not differentiate as to whether a judge, or the parties, knew of the reason disqualifying a judge or not. The law states that if a reason of disqualification exists in a case, a judge is to be excluded and prevented from hearing it, and all the actions made in his presence in the case are set aside.⁽³⁵⁾ The law, then, did not state that the nullification of the work of a disqualified judge is only made from the time he knew about the reason of disqualification.

This approach seems to be logical and agrees with the purpose sought by the JDS, since it is adopted to protect and safeguard the appearance of impartiality and honesty of a judge. Therefore, a judge is to be prevented from hearing a case regardless of his knowledge of the reason disqualifying him or not. This approach also prevents any inconsistency that may be seen if such a differentiation is made.

In other words, inconsistency exists if a judge is disqualified and his work is set aside in a case depending on the fact that he has observed the reason of disqualification, and if he is unaware of the existence of the reason of disqualification in other similar case or situation, his work is left intact and unaffected. Allowing such a differentiation affects the administration of justice and due process, since it is sometimes difficult to prove the judge's awareness of the existence of the disqualification reason, and adopting such an approach, will make the parties undergo a new hardship, by bearing the burden of proof of such awareness. Therefore, one can say that the law's adopted approach seems more equitable and efficient.

However, the legislator failed to make clear another related point, which

(35)This is embodied in article 132 of the Civil Procedures Law.

What if Judges' Robes are not as spotless as they should be?

is the case where the disqualification reason in a judge exists or occurs long after acting in a case, and before delivering a final decision. For example, a judge may- after acting for a long time in a case- get married to one of the opponents sitting before him,⁽³⁶⁾ or to an opponent's daughter, mother, sister, or niece.⁽³⁷⁾ Similar suppositions or possibilities are imaginable in the case of a female judge, who may get married, for example, to the opponent, to his son, father, brother...etc These examples, although theoretically introduced, may be seen in practice.

In such cases, reasons for disqualification did exist long, or at any time, later or after the judge was involved in the proceedings.⁽³⁸⁾ The question, therefore, will be: What effect does such a case has on a judge's work? In other words, will a judge's conducted work be affected or set aside from the beginning of his involvement in the proceedings or what?

As an answer, it can be said that no problem appears as to the work made by a judge after the occurrence of the disqualification reason, since it is unquestionably nullified and set aside as illustrated above. Yet, the question is still posed as to the previously accomplished work of a judge (i.e. the work done before the disqualification reason has occurred): Does this work face the same end? Such a case is not addressed by the Jordanian law as noted above.

Nevertheless, logic and the purpose of the JDS may give an answer. That is to say, the work of a judge is to be nullified and set aside only from the time the reason of disqualification is established and not before that, since a judge's appearance of impartiality is not affected until the reason of disqualification is established.⁽³⁹⁾ Therefore, if a new judge is called

(36) Being a spouse of one of the opponents constitutes a reason of a disqualification of a judge. See article 132/1 of the Civil Procedures Law.

(37) Being a relative of one of the opponents, whether by blood or by law, to the fourth degree constitutes a reason of a disqualification of a judge in the Jordanian law. See article 132/1 of the Civil Procedures Law.

(38) There are many other imaginable cases in this regard apart from marriage related relations. A judge's son, or the judge himself, may at a later stage in the case become interested in its outcome. This, as seen above, constitutes one of the disqualification reasons according to the Jordanian Civil Procedures Law.

(39) It is to be noted that if a judge has a relation with a party that prevents him from act=

in the case, he may rely upon the procedures taken by the replaced (i.e. the disqualified) judge from the time until before the occurrence of the reason of disqualification, unless these procedures are deemed incorrect for any other reason.

4. Disqualification Issue after Delivering a Judgment:

It is imaginable for a judge, despite the fact that there was a case calling for his/her disqualification, to hear a case and issue a judgment on its substance. In such a case, will that judgment be immune from challenge? In other words, what is the effect of the disqualification of a judge on his accomplished work? As an answer, it can be said that same as it is the case above, the disqualified judge's work will be deemed null and is accordingly set aside.⁽⁴⁰⁾ This, the nullification or setting his work aside, is attached to public policy.⁽⁴¹⁾

However, the Court of Cassation, in one of its judgments concerning this issue has gone far from just setting aside and nullifying a disqualified judge's decision. In the case in question, a judge was disqualified according to the fact that he heard the case at the Court of First Instance. Afterwards, after being promoted, he at the Court of Second Instance (i.e. Court of Appeal) addressed the same case (the one he addressed before) and delivered a decision (a second one at the appellate stage). This according to the Jordanian law constitutes one of the JDS cases, since justice requires that the case be heard by different judges at the appellate stage.⁽⁴²⁾ The Court of Cassation, in this case, decided

= ing in the case without bias, a judge can be recused under the JRS. This means if a party sees that a judge is passionate to a party and proposing to marry that party or his daughter as given in the example above, he may apply for his recusal for this reason. The JRS was regulated in article 134 of the Civil Procedures Law. However, detailed illustration of the JRS lies beyond the scope of this study.

(40)Article 132 Civil Procedures Law

(41)See Awa'dh AlZuibi, Civil Procedures Law, supra n20, where the author, in p.95, states that such nullification is attached to public policy and that no agreement to the contrary is to be made.

(42)See for example, the position of- and the applications made in- other jurisdictions, in the common law countries, concerning the case where a judge has an attachment with the case, whether as a judge, as an expert, as a witness, etc..., see C.=

What if Judges' Robes are not as spotless as they should be?

that a decision made by a disqualified judge is not only null but also a 'nonexistent one'. The court said:

"The judge's participation in hearing the case at the appellate stage [before the Court of Appeal], after previously hearing it at the Court of First Instance, is contrary to article 132/6 of the Civil Procedures Law and makes him disqualified to deal with the case in the appellate stage. Therefore, the panel of judges at the appellate stage was incorrectly formed... Therefore, the procedures conducted before such incorrectly formed panel of judges is considered both null and nonexistent. Moreover, they have no legal effect and do not establish any right to any of the parties".⁽⁴³⁾

This view was emphasised by the Court of Cassation in another judgment where the judge, who heard the case at the appellate stage, before the Court of Appeal, sat to address it again, later on, as a member of the Court of Cassation. The court decided that

"... if the judge participated in issuing both the Court of Appeal and the two Court of Cassation judgments [on the same case], then these two Court of Cassation judgments are accordingly given by a panel of judges that was illegally and wrongly formed, and as a result, these two decisions are considered nonexistent...".⁽⁴⁴⁾

Such a view raises a question as to the position of the Jordanian law in this regard. In other words, does the law agree with the court's adopted view? Does disqualification of a judge lead to nullification of the reached decision or does it make it a nonexistent one? A related question that needs to be answered before answering this question is: Does nullification of a decision or setting it aside differ from considering it nonexistent?

= Okpaluba and Laurence Juma, *Apprehension of Bias and the Spectacle of the Fair-Minded Observer: A Survey of Recent Commonwealth and South African Decisions on Prejudgment*. At [http://www.ufh.ac.za/speculumjuris/files/pdf/SJ2714FPLaurance 2 Prejudgmentart .pdf](http://www.ufh.ac.za/speculumjuris/files/pdf/SJ2714FPLaurance%20Prejudgmentart.pdf) visited at 3rd of May 2016.

(43) Cassation Court Decision no. 1521999/ dated 281999/2/. Adaleh. visited at 12th Jan 2015.

(44) Cassation Court Decision no. 482002/ dated 282002/1/. Adaleh. Visited at 12th Jan 2015.

As an answer to the latter question, it can be said that, although nullification of a decision or setting it aside agrees with considering it nonexistent in that both results are seen as a consequence of a defected procedure. However, they are different from each other in more than one point; mainly, the nonexistent judgment is a judgment that lacks a requirement or a pillar stipulated for its existence. An example is seen where a judgment is issued by non-a-judge, or where a decision is given by two judges only if the law stipulates that it should be delivered by three or five. While, on the other hand, a null or void judgment is a judgment that contains all requirements needed in a judgment, but at least one of the conditions set by the law for its correctness is not met. An example of a null or void judgment is the judgment delivered without sufficient, or with no, reasoning at all.⁽⁴⁵⁾

Furthermore, a nonexistent judgment has no legal effect, no value, and it establishes no legal position or right to any of the parties. Contrary to that, the null or void judgment which has legal existence and has all effects expected of a judgment until it is challenged and set aside in the ways prescribed by the law.⁽⁴⁶⁾ Moreover, nonexistent judgments need not be challenged by way of appeal to be removed. It is sufficient for a party to ask for the removal of the nonexistent judgment before any authority of concern, such as the very court that ordered or delivered it in the first place, with no time limits. That is to say parties may always contend that the decision is nonexistent before the same court that issued it or before any appellate court to obtain a judgment stating that that judgment is nonexistent. This is so, since the rule is that a nonexistent judgment has no legal presence, although it has material presence, while a null judgment has legal and if not challenged by

(45) See articles 160 and 198/4 of the Civil Procedures Law, which states that a judgment must be built on clear and sufficient reasons.

(46) It is worth noting that nonexistent procedure cannot be ratified, corrected or agreed upon by the parties or the court. It also has no whatsoever value. However, for more about the 'nonexistence' notion in procedural work in general and in the courts' delivered decisions, see, for example, Ali Hasan, *Procedural Sanction in Criminal Procedure Rules*, (Munsha't alma'aref, Knowledge Institution, Alexandria, 2008), p. 311 and 313.

What if Judges' Robes are not as spotless as they should be?

appeal to decide its nullification and set it aside, it will be seen, although null, as truthful same as it is the case with the fully correct judgement,⁽⁴⁷⁾ same as is the case with the correct judgment.⁽⁴⁸⁾

This view was emphasised by the Court of Cassation, in one of its decisions, where it said that "... a nonexistent judgment has no legal effect, while the null judgment is considered existent and having all legal effects until it is set aside by an appellate court".⁽⁴⁹⁾ Furthermore, a nonexistent judgment cannot be compulsorily enforced, since it has no legal value. Yet, a null judgment can always be executed and enforced if not properly challenged or appealed.

It is obvious then that a nonexistent judgment is different from a null judgment.

Again, the question that is still needs to be answered is whether the position held by the Court of Cassation regarding the judgments delivered by a disqualified judge consistent with the Jordanian legislator's adopted regulation. As an answer, it can be said that the previous decisions (the Court of Cassation decisions considering the disqualified judge's judgment as nonexistent) are not compatible with the view adopted by the Jordanian legislator, who says that such judgments are null and should as a result be set aside by way of appeal only.

Therefore, courts are advised not to adopt this view anymore. Nevertheless, it is worth noting that the majority or the mainstream of the Court of Cassation's decisions agree that a disqualified judge's judgment is considered null rather than nonexistent.⁽⁵⁰⁾ This latter view

(47)The expression or the saying 'a title of truth' is used to refer to court decisions when they become unappealable as a general rule, since they will be assumed to contain the truth and no one is allowed to challenge them apart from some extraordinary cases determined by the law. This is adopted to give stability and confidence in the court's reached judgments.

(48)See Omar N. Ismael, *supra* n12, p. 42. See also Awa'dh AlZuibi, *Concise Civil Procedures Law*, (Dar Alethra', Alethra House, 2009, p. 400.

(49)Cassation Court Decision no. 3091975/ dated 61975/8/. At Adaleh. Visited 12th Jan. 2015.

(50)See, for example, the Cassation Court Decisions no 1633/2006 dated 7/12/2006, no. 4430/2005 dated 29/6/2006, no. 3292/2005 dated 9/4/2006, no. 14/2000 dated =

agrees with the provisions of law, and again should be always adopted by the court.

However, in order for a party to nullify or set aside a decision made by a disqualified judge, he needs to appeal against that decision before a higher court. Yet, the law gives no answer as to the case where the law prevents appeals against courts' judgement,⁽⁵¹⁾ since in such cases parties will be deprived of their right to challenge and appeal against judgments made by disqualified judges.

Furthermore, the Jordanian law, as a general rule, prevents appeals against the judgments of the Court of Cassation, which is the highest court in the country. However, the legislator, in article 133 of the CPL, states that if it appears that one of the judges of the Court of Cassation is disqualified after issuing a judgment, that decision is considered null and should be set aside, and as a result, the court needs to re-address the case after replacing the disqualified judge.

5. Further Highlights in Jordanian Law:

However, more than one point can be raised concerning the Jordanian law's regulation of the matter in question.

First: A question is raised to the effect that why did not the Jordanian legislator differentiate between two imaginable situations; the first of which is the case where more than one judge are addressing a dispute and the case where only one judge is conducting the proceedings. In other words, one may say that no problem exists if only one judge is hearing the case, since if he is found to be disqualified his work will be nullified and set aside. No one can dispute this fact.

Yet, the matter may be viewed in a different way, if the case was heard

= 10/7/2000, and no. 3105/2000 dated 20/3/2001. All of these decisions were referred to at Adaleh. Visited 12th Jan. 2015.

(51)It is worth noting that the Jordanian law prevents appeals against certain decisions. This applies to the decisions made by the Court of Reconciliation (the Magistrate Courts). Article 10/2 of this Court's Law states that this court's decisions in cases with amounts of money less than 250 Jordan Dinars are unappealable before the Court of Appeal.

by a panel of judges, and only one of them was found to be disqualified. In the latter case, a view may be given to the effect that one disqualified judge may have no influence or weight where there are other judges (a majority) involved in a case. In other words, a court, in the Jordanian law, may hold its hearings as a panel of three, five, or nine judges, in certain cases,⁽⁵²⁾ and if a court is, for example, held by nine judges and one of them is found to be disqualified, the question will be what effect will such a thing has on the case (both on the conducted proceedings and the reached judgment)? One may say that the disqualification reason must be disregarded, and accordingly the conducted proceedings and the reached decisions must not be nullified or set aside, especially if the disqualified is the only one who dissented and opposed the majority's reached decision.

In other words, the suggested view may contends that there should be no problem (i.e. no question of bias or disqualification must be raised) if, for example, there were eight views against one in a case,⁽⁵³⁾ and that the disagreeing judge was the affected by the disqualification reason. This proposition may also argue or say that there is no point in nullifying or setting aside the majority's reached decision, since they listened not to (i.e. they did not agree with) what the disqualified judge has adopted.

This proposed view seems to be of high merits, since it tends to save time and cost.⁽⁵⁴⁾ To be specific, under this view one may say that there will be no need to nullify a judgment, and accordingly, there will be no need to initiate new proceedings to challenge and set aside the reached judgment in order to re-address the case again.

Nonetheless, this view was not adopted. The Jordanian law decides that, in all cases, a judgment is nullified and must be set aside wherever

(52)For example, the Court of Cassation may hold its hearings with 5 members or with 9 members, and the Court of Appeal holds its hearings with 3 members panel as a general rule.

(53) In the panel of nine, for example.

(54)This opinion and the arguments given are, according to the author's best knowledge, suggested by this article for the first time. They were logically thought of. However, nothing prevents their existence in practice.

a disqualified judge is involved and participated in the proceedings.

However, the Jordanian law's adopted view, the latter, seems to be more logical and more accurate. Many arguments support this;

First of all, this view is in agreement with the parties' needs for justice and due process. It supports the feeling of justice in the parties' hearts, since parties do, in most cases observe and know that a disqualified judge has, regardless of his reached decision, participated in the proceedings, which led to the final judgment. Therefore, they will feel uncomfortable towards any decision reached while that judge was acting in the case.

A second supporting argument finds its roots in the wisdom sought from involving more than one judge in a case, since it is undisputable that assigning more than one judge in a panel to hear a case aims at achieving a very important end, which is to have more than one legal mind thinking of, and evaluating, the matter in question. This is supposed to be in a totally objective and neutral atmosphere. Each mind of these, each one of the judges, is supposed to draw the attention of the other ones (other judges with him in the panel) to the angle from which he sees the case (i.e. his own authentic thoughts and views of it). Therefore, if doubt existed in a judge's impartiality, the role he has in the case may become under question and suspicion as a result. A reasonable doubt may exist to the effect that the other judges were deprived of fruitful, or neutral, views that may be, or could be, held by that, the disqualified, judge and, as a result, the purpose of involving multiple judges in a case is not achieved.

Moreover, doubt may also exist to the effect that that judge may have distracted the other judges in a way that unlawfully affected the outcome of the case, despite the fact that he disagreed with them in the final given decision. Therefore, the Jordanian law's adopted view seems to be accurate and correct.

Second, it is obvious that the legislator has adopted a solution to the case where the disqualified judge is one of the Court of Cassation's panels. The law decided that a re-hearing is to be made to the case,

What if Judges' Robes are not as spotless as they should be?

after eliminating and excluding the disqualified judge. In other words, the legislator, who, as general rule and as mentioned earlier, prevents appeals against the Court of Cassation's reached judgments, states, in article 133 of the CPL, that this (the non-appealability of this court's decisions) does not apply if a disqualified judge participates in the proceedings before it. This was emphasised by the Cassation court, which for example, in one case, decided that

"...the general rule is that the judgments of this court [the Court of Cassation] are not appealable, since this court is the last stage of adjudication, and its judgments are unchallengeable. They are not to be appealed in any way. This is emphasised in article 204/CPL. However, an exception to this rule can only be made in ...the case where one of the court's judges appeared to be disqualified after hearing the case. These are the only cases a party is allowed to ask the Court of Cassation to set aside its decision and re-hear the case again. These ...exceptions ...adopted to increase confidence in, and to safeguard, the adjudication system..."⁽⁵⁵⁾

The legislator, then, states that if a Court of Cassation judge is found to be disqualified, a re-hearing or retrial of a case must be made after replacing the disqualified judge.

Third: Furthermore, it is of importance to note here that the legislator has adopted a general way of appeal called 'Retrial', which means the re-hearing of a case by a court. To be precise, in this appellate method, which is regulated in article 213 of the CPL, a party to a dispute can challenge a court's reached decision before the very court that issued that decision, only where one of the reasons stated by the law are established, and where it is not possible for the party anymore to challenge that decision before the Court of Appeal.⁽⁵⁶⁾ What is of significance here is to note that

(55)Cassation Court Decision no. 9742001/ dated 72002/1/. At Adaleh, Visited 20th Jan. 2015.

(56)Once again, retrial, under article 213/CPL, is an appeal that is allowed where certain reasons and conditions are established, and as will be illustrated hereafter. An example of a retrial reason is the case where a party wins a case depending on deceit or forged documents, and this was discovered after the decision was made and =

the existence of a judge's disqualification cases does not constitute a reason for retrial, apart from the above given case concerning the Court of Cassation.⁽⁵⁷⁾

Accordingly, this regulation raises more than one point, as follows:

1. It is recommended for the Jordanian legislator to state that the disqualification of a judge constitutes a reason for appeal, through retrial, regardless of the court in question (whether it was a Court of Cassation or not). This is due to the fact that, as mentioned above, the Jordanian law states that certain courts decisions are final and unchallengeable in any way of appeal apart from retrial. Therefore, if a disqualified judge- in the current adopted regulation- participates in hearing a case before this type of court, there will be no way to challenge the disqualified judge's reached decisions in this case, since again disqualifying a judge does not constitute a reason for retrial as a general rule. Therefore, in such a case, allowing appeals by retrial against such decisions seems to be a right and a recommended solution.

Therefore, the Jordanian law is recommended to make the disqualification of a judge a reason for retrial and insert a provision to this effect in article 213 of the CPL, since, again, the current retrial reasons embodied therein do not contain, as one of them, the judge's disqualification case.⁽⁵⁸⁾

= after it is no longer possible for the party to bring his case before the court of appeal. In such a case a party can bring his case before the very court that tried his case at the first stage asking this court to retry it again removing from its consideration the committed deceit or forged documents. Once again, it is emphasised, that the disqualification reasons of a judge do not constitute reasons for retrial, as a general rule. However, this was not seen to be the case before the Court of Cassation, as illustrated above. However, for more about the appeal by retrial see Awa'dh AlZuibji, Civil Procedures Law, supra n20, p. 907.

(57) It is worth noting that the reasons according to which an Appeal of Retrial can be made are stated in article 113 of the Civil Procedures Law. This article does not state that deciding a case by a disqualified judge is a reason for retrial.

(58) It is worth noting that the case concerning the Court of Cassation was introduced in a separate provision, in article 133 of the Civil Procedures Law, which is concerned with the work of this court. It can be said that it is uncertain that the legislator meant to apply article 133, which is concerned with the Court of Cassation, to all other courts. Nothing supports such a proposition.

What if Judges' Robes are not as spotless as they should be?

Adopting this view achieves a higher level of justice, since it makes it possible for the parties to challenge the decision made by a disqualified judge in all cases, especially in those cases that cannot be brought before the Court of Appeal.

2. The legislator when regulating the situation before the Court of Cassation left an important matter, which is the procedural part, unattended. That is to say no regulation is given to the steps that are to be taken and the time limits that must be respected in this regard. In other words, the law does not say how a party is to challenge a Court of Cassation's judgment. Moreover, the legislator does not state that a party needs to appeal against the Court of Cassation's reached judgment within a certain time limit. The law only states that a Court of Cassation's reached judgment, which is issued by a panel containing a disqualified judge, can be set aside and that a party can ask for retrial after excluding, and replacing, the disqualified judge.

Therefore, it is important for the legislator to re-address this issue in a way that achieves a higher level of justice, since a winning party- especially where there is no time limit for appeal against the Court of Cassation decisions under the existing regulation, will always be subjected to the threat of the other party's appeal. Such a thing affects the stability that should accompany the courts' decisions. Furthermore, in general, the lack of a regulation showing the procedures that must be followed in appeals against the Court of Cassation decisions, leads, for sure, to chaos and uncertainty, which is also unappreciated. Therefore, the legislator needs to take this point into consideration along with the above addressed points in order to reach a higher level of justice.

5. The position in English Law:

It is obvious from the above given illustration that the Jordanian legislator, who has- in advance- adopted certain cases, if established a judge will be automatically deemed disqualified and once any of the disqualification cases is established, all the work performed by a judge will be considered null and is accordingly set aside. In comparison to

what is adopted in other common law jurisdictions such as English legal system, it can be said that this law addressed the matter in question from a totally different approach. However, it is seen above that this law also emphasises on judge's impartiality. For example, Lord Devlin, in one of his written works says:

[I]mpartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.⁽⁵⁹⁾

Moreover, English courts from early days supported impartiality. For example, in *R v Sussex Justices, Ex parte McCarthy*,⁽⁶⁰⁾ here in this case, the facts were about a motorcyclist, who was prosecuted for a road accident before a magistrates court. Yet, the justices (the panel hearing the case) have addressed the case with the presence of a clerk, (an attorney) who was supposed to help them reach a decision on it. Nevertheless, this clerk was, in fact, part of the firm (the solicitors firm) hired by the claimants to receive civil remedies (in civil proceedings) from the defendant, for the latter's alleged dangerous driving.

This clerk retired with the justices to reach a decision. The reached judgment was to convict the defendant. Nonetheless, the defendant, after learning of the clerk's involvement in reaching a decision on his case, applied to have the reached decision quashed and set aside. However, the justices gave sworn affidavits saying that they reached their given Judgment of conviction without consulting or having any interference from the clerk.

(59) Lord Devlin "Judges and Lawmakers" (1976) 39 M.L.R. 1 at 4, referred to in George Niven, One Rule to Rule Them All: A Unitary Standard of Bias in Judicial Review, at <http://www.otago.ac.nz/law/otago638178.pdf>

(60)[1923] All ER Rep 233. Referred to at <http://www.bailii.org/ew/cases/EWHC/KB/1923/1.html> also see in https://en.wikipedia.org/wiki/R_v_Sussex_Justices,_ex_p_McCarthy also see in <http://johnhemming.blogspot.ae/2011/04/r-v-sussex-justices-ex-p-mccarthy-1924.html>

What if Judges' Robes are not as spotless as they should be?

Yet, the appellate court quashed the reached decision on this ground. Lord Chief Justice Hewart, issued a famous decision in this case, stating: It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed".⁽⁶¹⁾

(61)Ibid.,

It is obvious from this decision that appearance of the court matters and that justice must not only be done but must be seen done as emphasised by the court.

However, as mentioned above, the English law left to the court itself the right to determine both the cases according to which a judge is to be disqualified and the effects of disqualifying a judge.⁽⁶²⁾

The English courts have addressed this matter in many cases.⁽⁶³⁾ For example, in some cases, the courts adopted what is referred to as “automatic disqualification” of a judge. This was seen in *Dimes v. Gran*,⁽⁶⁴⁾ where a judge, Lord Cottenham, has addressed a case brought by a company (Canal Company) he had shares in it. The judge’s attachment to the case was discovered later on, and accordingly, the work made by the judge, Lord Cottenham, was set aside by the House of Lords. Lord Campbell re-emphasised on the famously adopted principle that “no man is to be a judge in his own cause”. Lord Campbell said:

“No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen’s Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort,

(62) However, it is worth noting that judges should be recused only where there are reasonable bases and reasons supporting that. See Abimbola A. Olowofoyeku *Inappropriate recusals* (2016), 132 *Law Quarterly Review*, p.318 et seq.

(63) See Finín O’Brien, *Nemo Iudex in Causa Sua: Aspects of the No-Bias Rule of Constitutional Justice in Courts and Administrative Bodies*, at http://ijls.ie/wp-content/uploads/2013/07/IJLS_Vol_2_Issue_2_Article_2_O'Brien.pdf visited 17th Oct. 2016

(64) *William Dimes v The Proprietors of the Grand Junction Canal*, T. E. Skidmore, A. Boham, and W. W. Martin HL [1852] 10 E.R. p 30\ referred to at Westlaw, which cites it as (1852) III House of Lords Cases (Clark’s) p 759.

What if Judges' Robes are not as spotless as they should be?

in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside”.⁽⁶⁵⁾

In this case, it was sufficient for a judge to be disqualified and his work is set aside depending on the fact that he had pecuniary interests in a case. This automatically leads to a judge disqualification and to setting aside his work as a result. Yet, the English courts in another case, said that a judge is to be disqualified and his work must be set aside if he had interest in the outcome of the case, even if the interest he has in a case is not a pecuniary one. This was seen in the case of *Pinochet*.⁽⁶⁶⁾ The question of the case was whether Pinochet, as a former head of state in Chile, could be given immunity from extradition or not. In this case, one of the judges hearing the case, Lord Hoffmann, was an unpaid director and chairperson of Amnesty International Charity Limited. The latter was an organisation controlled by Amnesty International, who was a party in the proceedings. Amnesty International had permission to act as interveners in the case. Accordingly, the House of Lords decided that Lord Hoffmann's decision is to be set aside, since his relationship with Amnesty International is sufficient to automatically disqualify him.⁽⁶⁷⁾ Lord Browne-Wilkinson said:

“My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest; there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an

(65)Ibid, p 793.

(66)Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, HL [2000] 1 A.C. p. 119.

(67) See comment on this case and its effect in Timothy H. Jones, Judicial bias and disqualification in the «Pinochet» case, 1999, 3, Public Law, p. 391 et seq. Moreover, as to the assessment of the decision made on this case and the automatic disqualification in general see Abimbola A. Olowofoyeku, The “Nemo Judex” Rule The Case Against Automatic Disqualification, (2000), 3, Public Law, p 456 et seq. Also see in James Maurici, The Mmodern Approach to Bias, at <https://www.scribd.com/document/45758115/The-Modern-Approach-to-Bias> visited 18th Oc. 2016.

economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties".⁽⁶⁸⁾

However, in another case, in *Locabail*,⁽⁶⁹⁾ the courts said that it is difficult and unproductive to name the cases that disqualify a judge and accordingly lead to setting aside his judgment. The court said that there should be a real danger that of bias. The court also said that- in all cases- parties can waive their right in recusing a judge.⁽⁷⁰⁾ Parties' waiver can be presumed in such a case if they waited for too long before asking for a judges' recusal.⁽⁷¹⁾ Lord Bingham said:

It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable

(68)Ibid, p 135.

(69)*Locabail (U.K.) Ltd. v Bayfield Properties Ltd. and Another Locabail (U.K.) Ltd. and Another v Waldorf Investment Corporation and Others* *Timmins v. Gormley Williams v H.M. Inspector of Taxes and Others* *R v Bristol Betting and Gaming Licensing Committee, Ex parte O'Callaghan* Court of Appeal [2000] Q.B. p 451

(70)For an assessment of the parties' right of waiver of judges' recusal, see James Goudkamp, "The Rule against Bias and the Doctrine of Waiver" (2007) 26 C.J.Q., p 310 et seq. However, assessment of this issue lies beyond the scope of this study.

(71)The court said: «The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be». See in *ibid*, p 480.

What if Judges' Robes are not as spotless as they should be?

bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers".⁽⁷²⁾

However, the English courts, in another important case, which is the case of *Porter v Magill*,⁽⁷³⁾ confirmed that a disqualified judge is to be set aside, and the test of a judge's disqualification for apparent bias is a subjective one, which is the fair-minded and informed observer. Lord Hope said:

"The test of bias or apparent bias is whether the circumstances would lead a fair-minded and informed person to conclude that there was a real possibility that the tribunal would unfairly consider the case of a party"⁽⁷⁴⁾.

It is obvious, in this case, that the House of Lords accepted the fair minded person, or observer test,⁽⁷⁵⁾ to disqualify a judge and to set his performed work aside, as long as the circumstances of the case in question are taken into account.⁽⁷⁶⁾

However, the court's latter view was- later on- adopted in more than one case. This, for example, was seen in the decision made by the Court of Appeal in *Mengiste and Other v Endowment*.⁽⁷⁷⁾ In this case, a party (i.e.

(72)Ibid, p 480.

(73)*Porter v Magill, Weeks v Magill* HL [2002] 2 A.C. 357

(74)Ibid p. 453.

(75)For application of this test, see Zia Akhtar, The Rule against Bias: The impact of the Judicial Code of Conduct in England and the need for impartiality in European Court rulings, (2014)5, 3, Civil Procedure Review, p 22-25. At http://www.civilprocedurereview.com/busca/baixa_arquivo.php?id=103&embedded=true visited 20th Oct. 2016

(76)However, there were calls to retire this test, since it represents the courts' views in this regard. That is to say the court is the party who makes the assessment of bias in the name of the fair-minded observer. However, assessing this subject lies beyond the scope of this study. For more on this regard, see Abimbola A. Olowofoyeku, Bias and the informed observer: a call for a return to Gough, (2009) 68 (2), Cambridge Law Journal, p. 388 et. Seq.

(77)*Mengiste and Another v Endowment Fund for the Rehabilitation of Tigray and Others* Court of Appeal (Civil Division) [2013] 5 Costs L.R. 841.

the claimant) called expert evidence to address the point of whether a certain law (i.e. the Ethiopia law) was fair or not. The claimant's expert during examination and cross-examination failed to understand his duties towards the court according to the CPR Part 35. Therefore, the judge had severely criticised both the expert's adduced evidence and the apparent failure of the claimant's lawyer to properly prepare that expert for trial. Moreover, the judge said that due to such failure, the other party can apply for a wasted costs order, and that what had actually happened at a later stage in the case.

The claimants' lawyer wrote to the judge asking him to recuse himself from hearing the wasted costs order, since he (the judge) made the criticisms that lead to the application for the order in the first place. The judge refused to recuse himself. However, the Court of Appeal decided that a judge is disqualified and that his ruling on the wasted costs application is to be set aside.⁽⁷⁸⁾ Arden LJ, said:

"An independent judiciary is an essential requirement if the rule of law is to be maintained. Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Judges who have a financial interest in a case are automatically disqualified. Depending on the circumstances, judges can also be disqualified by other matters, such as an involvement with one of the parties in the past. The ability of the judge to deal with the matter uninfluenced by such matters is not the issue:... The test for determining apparent bias is now established to be this: if a fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the judge was biased, the judge must recuse himself".⁽⁷⁹⁾

(78) For more on this case, see Ahmed Masood, *Judicial recusal*, (2013), Law Society Gazette, at <http://www.lawgazette.co.uk/judicial-recusal/5038104.fullarticle> visited at 22nd Oct. 2016.

(79) *Ibid*, p. 842.

6. Assessment:

It is obvious that the English law, as a leading common law legal system, has also recognised the fact that a judge must not only be impartial but must also appear to be impartial. The English courts emphasised once and once again that justice, in this law, must not only be done, but must also be seen done. This is similar to the case in the Jordanian law. However, the approach followed in the English law is a bit different, since it leaves the determination of the cases of disqualification of a judge in the hands of the courts, which appeared to have adopted more than one view in this regard. Although assessing the approaches followed by the two legal systems towards the cases of judges' disqualification lies beyond the scope of this study, it is worth noting that the English courts have ended at adopting a subjective test in this regard, which is the fair-minded and informed observer test. However, the English courts, in all their judgments, agreed on setting aside a disqualified judges' work.⁽⁸⁰⁾ This is what is of importance in this regard.

This is to say that what is of concern in this study is the effect of disqualifying a judge on the judge's performed work. It was seen that the Jordanian law nullifies and sets aside a disqualified judge's performed work, and once again this is also the case in the English law, which is seen to have even revoked the highest court's decisions for apprehended or apparent bias. This is to say that the House of Lord's decisions were set aside when they appeared to have been made by a judge who is found to be disqualified under test adopted by the court.

7. Conclusion:

To conclude, the law expects judges not only to be impartial in fact but also to appear impartial, since justice must not only be done but to be seen done. Such a thing was seen to strengthen public confidence in the administration of justice. It also strengthens the whole judicial system. This principle is adopted in both Jordanian and English legal

(80)In English law, a party can ask to set aside a disqualified judge's decision. See James Goudkamp, Facing up to actual bias, (2008), (27) 1 C.J.Q. p 32.

systems. Despite the fact that the two laws adopted different approaches to maintain judges' impartiality, they both agreed that there are certain situations that judges' in which must not hear a dispute. These cases are determined by the court in the English law through studying all the matters and circumstances involved in the case and applying certain, logical and justifiable, tests such as the fair-minded and informed observer one, which was emphasised by English courts in their latest decisions. On the other hand, the Jordanian law pre-determines these situations and circumstances which lead to automatically preventing a judge from hearing a case.

The article has addressed the effects that are to be seen in the case where a civil court judge is disqualified, whether this disqualification was made according the court adopted tests, which is the case in the English law, or was it determined by the legislator as it was seen to be the case in Jordanian law. The two legal systems agreed on the effects that are to be imposed as a result of disqualifying a judge in the case. Both legal systems state that a disqualified judge must be prevented from hearing a case and that another judge must be called in the proceedings, and that that judge's performed work is to be set aside. Nevertheless, the Jordanian law adopted more than one rule in this regard, and the courts'- in this law- were found to have addressed the issue in question in more than one decision. The study, as seen above, recommends that the Jordanian law re-regulate the matter in question in order to address the points raised in it in order to reach a higher level of justice, since, after all Judges' robes should always be as spotless as required to reflect their actual conduct.

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Table of Contents

Subject	Page
Abstract	93
1. Introduction	94
2. Meaning and Importance of JDS:	99
2.1 Meaning of JDS:	99
2.1.1 JDS and JRS:	100
2.2 The importance of the JDS	103
3. Disqualification Issue before Delivering a Judgment:	105
4. Disqualification Issue after Delivering a Judgment:	109
5. Further Highlights in Jordanian Law:	113
5. The position in English Law:	118
6. Assessment	126
7. Conclusion	126
Bibliography	128

