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# Jurisprudential and Legal Pathology of in Absentia Trial Rules and Providing Appropriate Solutions

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## *Abstract*

The in-absentia ruling has been an important legal issue since the rise of Islam. The strict and unconditional requirement for the presence of both parties in legal proceedings would undoubtedly lead to the infringement of many rights. Especially in modern times, with the growth of life and the complexity of urban relationships, one party in a dispute may violate the rights of others, which undoubtedly contradicts religious and legal principles. After several decades of applying the original civil procedure laws regarding in absentia rulings, the Iranian legislator initially adopted two criteria: actual notification to the defendant and the ability to appeal the in absentia ruling. However, in 2000, these criteria were deemed invalid, and actual notification was considered sufficient to classify a ruling as issued in the defendant's presence. In Imamiyyah jurisprudence, despite permitting in absentia proceedings, the primary factor in distinguishing whether a ruling is in absentia or issued in the presence of the parties remains a topic of debate. This article, using a descriptive-analytical approach, examines the challenges of in absentia proceedings due to their importance and the existing uncertainties surrounding the matter. The study argues that in an in absentia trial, the case is examined without the defendant's presence, leading to the issuance of an in absentia ruling. The issuance of such rulings has been a controversial issue in legal proceedings. To address the existing gaps, legalizing in absentia trials could be a feasible solution. However, granting unlimited and unrestricted permission for such trials does not solve human legal issues; rather, in its unrestricted form, it could worsen many problems. Therefore, it is necessary to establish clear limitations to prevent the opportunistic misuse of this legal exception.

***Keywords:*** *In Absentia Trial; Objection; Judiciary; In Absentia Ruling; Enforcement Guarantee*

## *Introduction*

One of the key issues in judicial proceedings is in absentia trials. Based on the fundamental principle of adjudication, dispute resolution should always occur in the presence of both parties. Therefore, allowing in absentia trials is an exception to this principle and should only be permitted to the extent supported by religious and legal reasoning, adhering to the most certain and limited interpretations.

The purpose of objection (waqaha) is to challenge a ruling that was issued in absentia. French law permits objections only to non-appealable in absentia rulings, provided that the summons was not properly delivered to the convicted party. However, in Iran's judicial system, trials are assumed to be conducted in person—meaning that the defendant or their attorney must be present during the proceedings or submit a written defense. In absentia trials and rulings are recognized only under specific conditions. Notably, in cases involving divine rights (ḥuqūq Allāh), in absentia trials are not permitted; they are allowed only for offenses related to private and public rights. For individuals convicted in absentia, the law grants the right to objection (waqaha), allowing them to correct potential violations of their rights resulting from the in absentia proceedings. A convicted party may waive their right to objection; in such cases, if the ruling is appealable, they can instead pursue an appeal. During the objection phase, an in absentia ruling can be modified; however, increasing the severity of the ruling contradicts the principle of legal interpretation in favor of the accused. Some argue that intensifying the ruling is permissible, particularly when the nature of the charges changes, in which case there is no legal barrier to issuing a stricter ruling.

Another critical aspect of enforcing a final in absentia ruling is the requirement for the prevailing party to provide a credible guarantor or appropriate security, as outlined in Article 306, Note 2, of the Civil Procedure Code. This requirement is broadly supported by Islamic jurists, ensuring that the absent convicted party has financial protection against potential losses. Considering these factors, in absentia trials have been established under specific conditions in Islamic law and legal frameworks. However, it is crucial to recognize that granting unrestricted permission for in absentia trials could lead to numerous legal complications. Therefore, legislators—drawing from Islamic jurisprudence—have explicitly defined procedural safeguards for both civil and criminal in absentia rulings to prevent misuse and injustice.

**The Concept of in Absentia Proceedings**

An in absentia judgment is a legal term referring to a ruling made by the court in the defendant’s absence, regardless of whether the ruling is in their favor or against them. In Iranian law, the issuance of in absentia judgments has been recognized as legitimate under certain conditions from the beginning. Article 303 of the Iranian Civil Procedure Code states that a court ruling is considered in-person unless the defendant, their lawyer, legal representative, or appointed agent fails to attend any court session, does not submit a written defense, or if the summons is not properly served. Furthermore, Article 305 specifies that all in absentia rulings are subject to objection. The most comprehensive definition asserts that if the defendant or their lawyer does not attend any court session, fails to submit a written defense, and has not been properly served with a summons, the trial is deemed in absentia, and the ruling issued is also in absentia.

The late Najafi, relying on the absolute meaning of narrations from the Infallibles and jurisprudential fatwas, argued that the term "absence" refers to non-attendance at the court session. Furthermore, since the validity of testimony, as one of the means of proving a claim, is absolute, he considered the testimony of two just witnesses against an absent party in a court session to be binding. He maintained that since the defendant would still have the opportunity to present their evidence later, no harm would be inflicted upon them (Najafi, 1404, Vol. 40: 221). Similarly, Shahid Thani interpreted absence in the same manner and did not regard distance or proximity as an obstacle to issuing a ruling (Shahid Thani, 1413, Vol. 13: 468; 1410, Vol. 3: 104). Some scholars, while accepting the permissibility of issuing a ruling against an absent party, defined the threshold of absence as a distance at which prayers are shortened, essentially equating the absent party with a legal traveler. "It is permissible to issue a ruling against an absent person, and the measure of absence is the distance at which prayers are shortened" (Hilli, 1405: 527).

The general acceptance of evidence regarding the absent party and the literal meaning of "absent" has led some jurists to consider absence from the court session as a criterion for judgment (Shahid al-

Awwal, 1414, Vol. 4: 53). On the other hand, some jurists argue that because a judgment against an absent party contradicts the principle of equality between the parties in a lawsuit—where their presence is one manifestation of this equality (Maqid Damad, 1406, Vol. 3: 239)—they limit the application of a judgment in absentia to cases where the defendant is not in town or cannot be summoned (Muqaddas Ardabili, 1403, Vol. 12: 205). A third group, seemingly interpreting the term "absence" in the hadiths as referring to a lawful journey, has based their case on this interpretation. However, the term is not exclusively used in this context, and its usage in the hadiths and in everyday language contradicts their claim. It appears that the second definition of "absent" in the context of judgment is more reasonable than the first, as the general acceptance of testimony as a basis for issuing a judgment against the absent party is not a valid criterion for a judgment in absentia.

**Distinguishing between in-Person and Absentia Proceedings**

According to Article 303 of the Civil Procedure Code, a judgment is considered to be in absentia if three conditions are met: First, the defendant has not attended any of the court sessions. Second, the defendant has not submitted any written defense. Third, the court summons has not been properly delivered to the defendant. Therefore, if the defendant is present at any of the court sessions, or if at least one written statement is submitted, or if the summons is effectively delivered, the judgment will be considered in person, even if the defendant has not attended any sessions or submitted any defense. Given these conditions, the judge must ensure that if all three conditions are met, the judgment is issued in absentia.

In one case, actual notification of a summons will not prevent an appeal against the judgment. However, the absence of the defendant at any stage of the proceedings and the failure to submit a defense or objection statement will allow the defendant to appeal the judgment in the same court. This is provided for in Article 364 of the Civil Procedure Code, which pertains to the appellate court. According to this article, in cases where the appellate court's judgment is based on the defendant's conviction, and the defendant or their lawyer has not been present at any stage of the proceedings and has not submitted a defense or objection statement, the judgment of the appellate court can be appealed and reviewed in the same appellate court within twenty days after the actual notification is made to the defendant or their lawyer. Once this period expires, the issued judgment becomes final.

According to Article 303 of the Civil Procedure Code, one of the conditions for a judgment to be considered in absentia is that the defendant has not submitted a written defense. This raises the question of whether submitting documents such as notifications, illness reports, medical certificates, attorney introductions, or involving an attorney to review the case file, among similar actions, constitutes a written defense and thus makes the judgment considered as made in the defendant's presence. In response to this question, we assert that while these actions are not considered a defense, they do demonstrate the defendant’s actual awareness of the ongoing lawsuit. The reason the judgment is considered in person is that the real notification of the lawsuit is the deciding factor, and the legislator has established real notification as the sole reliable criterion to ensure the defendant is informed of the legal proceedings. The presumption is that judgments are made in person, and in cases of doubt, this presumption must prevail. Therefore, with a logical interpretation of Article 303 of the Civil Procedure Code, in the aforementioned cases, the judgment will be considered as made in person, provided that the actions mentioned have been taken within the legal time frame for defense.

## Procedural Law in Absentia Proceedings

### 1. Swearing in the Plaintiff

In jurisprudence, it has sometimes been discussed that, assuming the permissibility of an in absentia judgment and the existence of conditions for absentia proceedings, in order for the plaintiff's case against the absent defendant to be adjudicated, the plaintiff must swear an oath in addition to presenting evidence. If the plaintiff has evidence and swears an oath about the continuation of their right against the absent party, the judgment against the absent party will result in the sale of their property, and the plaintiff's claim will be paid (Ibn Sa'id Hilli, 1405, 525). Some have attributed the practice of swearing an oath along with presenting evidence, without requiring a guarantee, to the well-known scholars. In the Civil Procedure Code, according to Article 115, to prove the absence, the defendant's or suspected person's details are published once in a widely circulated newspaper, after which the court proceeds with the case.

### 2.Filing a Lawsuit by a Court-Appointed Lawyer

When a case against an absent party is admissible, should the court appoint someone to respond on behalf of the absent party, or not? It may be argued that appointing such a person is unnecessary, but in our opinion, such a person should be appointed because the case requires a response, and the absent party cannot provide one.

Considering that Article 35 of the Constitution of the Islamic Republic of Iran emphasizes the right to legal representation, and based on Article 9 of the Law on the Formation of Criminal Courts, along with the regulations of Note 2 of Article 7 and Article 12 of the Law on the Establishment of Public Courts passed on September 20, 1979, and its subsequent amendments as per the directive of the Guardian Council dated July 17, 1982, the appointment of a court-appointed lawyer is legally obligatory. The appointment of a court-appointed lawyer is crucial in criminal courts, especially when the primary penalty for the crime is execution or imprisonment. Currently, according to the explicit provision of Note 1 of Article 186 of the Criminal Procedure Code, in cases where the punishment involves "retribution, execution, stoning, or life imprisonment," if the defendant does not personally appoint a lawyer, the appointment of a court-appointed lawyer is mandatory, except in cases involving crimes against chastity where the defendant refuses to appoint or introduce a lawyer (Akhondi, 1387, Vol. 4: 213-214).

## Issuance of Judgment Against an Absent Party

Lawsuits filed against an absent party should be considered valid by default, as the absent party retains the opportunity to defend themselves. However, this does not imply that every invalid or unfounded lawsuit is presumed valid; rather, it means that the plaintiff's claims are assumed to be true unless proven otherwise (Khodabakhshi, 1390, Vol. 2: 184). Therefore, if the absent party later appears in court after a default judgment has been issued and challenges the credibility of witnesses, claims to have settled their debts, argues that they have already paid what is due, or contests the competency of the original judge in another court and can provide evidence, the judge must review their claims and issue a ruling based on the principle that "the absent party is bound by evidence if they present it" (Sanglaji, 1384: 147). However, the objection must be filed within a specific time frame. In other words, the absent party has the right to object to the judgment and defend themselves once they are informed of the default judgment. Moreover, there is no difference whether they approach the judge immediately or after a prolonged period, as the delay does not impact the matter (Hosseini Shirazi, 1437: 84). Regarding this issue, Article 305 of the Civil Procedure Code establishes that the absent party has the right to object to the default judgment, and this objection is referred to as "Wahkha'i," which, according to Article 306 of the same law, must be filed within a specified period. Once the objection is filed, its effect becomes evident. The objection has a suspensive and blocking effect, meaning it halts the enforcement of the

default judgment, and the court is required to suspend its execution until a new judgment is issued (Malemir, 1383, Vol. 12: 183).

**Execution of Default Judgment**

The default judgment is grounded in various foundations, including hadiths and narrations from the infallible Imams, as well as the opinions of Islamic jurists. One of the most widely cited hadiths concerning default judgment is the hadith of Jamil ibn Darraj, which permits the execution of a default judgment on the condition that a guarantee is provided. The author of *Sharh al-Lam'ah* explains that a judgment can be made against the absent person regardless of whether they are far or near, even if they are in the same city and their attendance at the judgment session is not impossible (Shahid Thani, 1410, Vol. 3: 250). This perspective holds that once a judgment is permitted against the absent party, there is no distinction based on proximity or distance from the court. The reasoning, as explained, is based on the general permissibility of issuing judgments in such cases.

The late Allama Hilli (may peace be upon him) also permitted the ruling on default judgment, stating: "A judgment is made against the absent party with evidence, and their property is sold to pay the debt" (Allama Hilli, 1360: 109). The content of this statement indicates that if there is evidence against the absent party, a judgment is issued, and if the judgment involves financial matters, their property is sold to settle the debt (Sharbini, 1377, Vol. 4: 407). Since issuing a default judgment is accepted, it is assumed to be enforceable. The legislator has taken into account the rights of the parties involved in establishing regulations regarding default judgments. On the one hand, to ensure the rights of the plaintiff, the default judgment procedure is accepted, and on the other hand, the possibility of the defendant's objection after proper notification is also acknowledged. The execution of default judgments is likewise accepted.

**Limited Interpretation of the Scope of Default Judgment**

In the new Civil Procedure Code, the legislator has outlined specific conditions for issuing a default judgment. If any of these conditions are met, the judgment issued will be considered as a judgment in personam and cannot be classified as a default judgment. These conditions include the absence of the defendant or their representative from any of the hearings. What makes the judgment a default judgment is the defendant's lack of awareness, which prevents them from defending themselves and leads to the violation of their rights. However, if the defendant is aware of the lawsuit and has the opportunity to defend themselves, this situation does not apply, as attending one of the court sessions is considered a form of awareness by the defendant. Some legal scholars believe that the legislator made a mistake in drafting this provision and that it would have been better to add "legal representative" to the mentioned individuals (Shams, 1388, Vol. 2: 23; Hayati, 1392: 116). According to Article 32 of the new Civil Procedure Code, ministries, government institutions and agencies, state-owned companies, Islamic Revolutionary organizations, public non-governmental institutions, municipalities, and banks can, in addition to using lawyers, use their legal departments or official employees who meet the necessary conditions and are introduced for filing and pursuing any lawsuit or defense. According to Article 303 of the Civil Procedure Code, if none of the conditions apply to the aforementioned entities, but a legal representative is appointed, the judgment issued will still be considered a default judgment. This contradicts the very philosophy behind issuing a default judgment, which is to prevent the violation of the defendant’s rights due to lack of awareness of the lawsuit. This is because with the appointment of a legal representative, the defendant’s lack of awareness about the judgment is resolved. However, in the absence of a clear specification by the legislator regarding the legal representative, the judgment must still be considered a default judgment.

**Determining the Authority to Obtain Security or the Rate of the Guarantee**

According to Note 2 of Article 306 of the Civil Procedure Code, the execution of a default judgment is contingent upon obtaining a valid guarantee or appropriate security. However, the law does not specify where this should be done. As a result, two different opinions have been proposed:

**First Group:** The court is considered the authority responsible for obtaining security or determining the rate of the guarantee. Justifications for this view include:

1. Since resolving ambiguities, issues related to execution, and disputes arising from them falls under the court's responsibility, it is preferable for the court to handle the procurement of security. Additionally, deciding whether the security is appropriate or whether the guarantee is valid is a judicial decision requiring the court's ruling (Ebheri, 1391: 208; Madani, 1383, Vol. 2: 361). The execution of judgments is merely the task of the enforcement officer.

1. According to Articles 437 and 386 of the Civil Procedure Code on retrial and appeal, the court is tasked with obtaining security.

2. Article 12 of the Civil Execution Law places the execution unit under the supervision of the court.

3. According to Article 5 of the Civil Procedure Code, issuing an execution order is the responsibility of the first-instance court (Ebheri, 1391: 208-207).

**Second Group:** Some believe that it is the responsibility of the execution of judgments unit to obtain appropriate security or determine the guarantee rate, based on the fact that the execution of the judgment is carried out by the enforcement authorities. According to many legal scholars, the time for providing security or the guarantee rate is when the judgment debtor is handed over or the execution begins, and execution is carried out by the enforcement unit. Therefore, the authority to obtain security lies with the enforcement of judgments unit (Zar'at, 1383: 990).

It seems that, although the practices of courts in this regard vary, with some courts taking responsibility for obtaining guarantees or security while others leave it to the court, the removal of security after reviewing an appeal and rejecting it must be done by the authority that took the security. Therefore, the enforcement unit cannot be the authority responsible for obtaining or removing it.

On the other hand, in similar provisions, such as securing a claim, temporary orders, and depositing potential litigation costs under Article 109 of the Civil Procedure Code, this responsibility is entrusted to the court. In no case is the enforcement unit mentioned as the authority for obtaining or removing security. Therefore, the court, being more familiar with the circumstances of the case, can decide to obtain security or a guarantee based on the specifics of the situation.

## *Discussion and Conclusion*

In the author's view, broadening the scope of judgments considered "in person" could significantly resolve the issues related to absentee judgments. This would involve enacting a law where delivering judicial documents to the father, mother, spouse, children, and grandchildren at the declared address is considered as part of making the judgment in person. Such a measure could prevent situations where one family member is unreachable by another, especially given the widespread use of communication tools like mobile phones, faxes, the internet, etc. Certainly, if a summons or notice is delivered to a family member, they would promptly inform the relevant person. As a result, the defendant would be notified of the lawsuit, thus eliminating the justification for absentee judgments.

In our country's judicial system, the general principle is that hearings are in person, meaning the defendant or their lawyer must attend hearings or submit a defense statement. However, absentee hearings and judgments are allowed in exceptional cases. In French law, the issuance of absentee judgments is also restricted by specific conditions, as discussed in detail. However, it seems that if the legislator had been more specific in defining the conditions for issuing absentee judgments, or considered additional factors like notifying the defendant through any means, including introducing a lawyer to review the case or participating in sessions such as expert determinations, it would have been closer to fairness. Unfortunately, these points appear to have been overlooked by the legislator.

It appears that if we accept the perspective that the appeal session (known as "Wakhwahi") for someone who was absent during the session that resulted in an absentia judgment, and was entirely unaware of the proceedings, should not be considered the trial's first session, denying them the rights and benefits of that session would be somewhat unfair. Therefore, if we align with the opinion of the group of jurists who maintain that the appeal session for the appellant is viewed as the trial's first session, it would align more closely with justice. Ultimately, considering all factors, it seems that even though the legislator has made efforts to safeguard the rights of both parties in the context of absentia judgments and the appeal process, while preventing possible abuse of those rights, there are still certain cases, as elaborated in detail, where the risk of such abuse remains. It is hoped that through more thorough legislation, while protecting the rights of both parties, these potential avenues for abuse will be eliminated, resulting in a fairer trial process.

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