

Effects of Absence Defect on Criminal Procedures

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ABSTRACT

This research deals with the destructive effect of the lack of procedural defect, as it is a defect that ends the entire procedural bond, so it destroys all penal procedures, and therefore it has another effect related to the first, which is the rebound effect as a natural result of this defect, as it leads to a rebound effect on the previous procedure and the subsequent procedure, and that these effects are final effects that cannot be corrected. Therefore, the defect of non-existence is described as a defect with a permanent effect in the procedural scope, and therefore it affects the systems related to the criminal case, including the civil case.

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1. Introduction:

The non-existence makes the procedure, regardless of its nature, non-existent, and therefore it cannot be relied upon by any other procedure, because the non-existence makes the procedure not produce any effects, so if the non-existence is related to a separate procedure, then this procedure and the non-existence become the same, and if this procedure is related to a procedural block, it will directly affect the subsequent procedures and even the previous procedures will destroy them, and therefore it cannot be relied upon, and the absence of it will have great effects in the criminal judgment as it is the most important procedure in the criminal case and the ultimate criminal litigation. The nature of the absence makes the penal judgment non-productive and therefore not acquired for the authority of the ruling.

2. Statement of the Problem.

The problematic of the study of this topic revolves around the legislative shortcomings in the Iraqi Code of Criminal Procedure No. (23) for the year 1971 as amended, as there is no text indicating the defect of lack in this law explicitly, whether from near or far. Therefore, this necessitates research on this topic and a statement of its provisions in the legal system, and for this reason, the research problem is also clear in that the theory of nullity in the Criminal Courts Code has not been completed yet, because this theory is not completed until it is recognized by the legislator and formulated in clear legal texts.

3. Importance of Study.

The importance of research in the absence of criminal procedures in the Code of Criminal Procedure highlights that it is a subject that is used in the event of insufficient procedural penalties, as these penalties are limited only to the existence of procedural work from a legal or material aspect, but if the procedure does not exist from a physical or legal point of view, then it is impossible to trace it back to a specific defect of these

defects. Hence its rhythm, as well as the development of specific and clear criteria that accurately shows the occurrence of the lack of defect in the procedural work.

4. Study Methodology.

The study relied on the comparative analytical approach, by analyzing the legal texts, judicial rulings and jurisprudential positions in both the Iraqi and Egyptian regimes in order to find an effective treatment for the study problem.

5. Demolition Effect of the Nullity Defect.

As the consequence of the lack of criminal action procedures in general is its ineffectiveness and its production of the legal effects that were supposed to be generated by any procedure if it was free from the defect of lack. (Al-Sayed Al-Batanoti, 2012, 71-81). Among these effects is the nonexistence of the confession as a result of its issuance by coercion, as it is considered as if it did not exist and does not exist legally or materially, so it is not considered to have been issued by the accused and therefore cannot be convicted on the basis of this confession, and this effect extends to all subsequent procedures automatically, i.e. That all procedures that follow the non-existent confession are considered non-existent, as if a judgment of conviction was issued based on this confession, where it is also non-existent and has no legal or material existence. (Sorour, 1959, 56-93)

The effect resulting from the absence leads to the loss of the legal value and therefore does not establish any procedural link, and the Iraqi legislator has shown this effect in Article (127) related to the use of illegal means to influence the will of the accused, as well as in Article (218) related to the issuance of a confession through coercion, Whereas, the legislator arranged the effects of non-existence in these cases, although he did not directly declare this defect. (Othman, 1991, 44-54) . The Egyptian legislator also referred to this effect in Article (302/2) prohibiting the accused from swearing an oath, and protecting him from coercion when he gives his statement.

As for the French legislator, he also referred to this effect by recognizing the right of the accused to remain silent at the stage of gathering evidence in an explicit text after amending Article (63/1) of the Criminal Procedure Code according to Law No. (516) of 2000 issued on June 15, 2000, where this new amendment stipulates that the person detained by police must be informed of his right not to answer any questions that are directed to him by the investigators. The French legislator also referred to this effect by applying the right to silence in the preliminary investigation stage based on Article (3/116) related to the first appearance before the investigating judge, as this article stipulates that the person under investigation (the accused) may not be interrogated without his consent (Al-Ahwal, 2016, 41-45). On this basis, the non-existent results in repercussions on all actions taken on the basis of the non-existent procedure, and this represents the strength of this defect. The Iraqi, Egyptian and French legislation indicated the consequences of this effect in terms of strength.

6. Rebound Effect in the Defect of Nullity.

The effect of the absence does not go to a specific procedure, but it reverts to the entire procedural relationship or one of its stages, as violating the essential controls leads to the demolition of the procedural block taken in one of the stages of the criminal case. Therefore, the non-existence affects the emergence of the procedural links themselves, making them non-existent, just as the effect of the non-existence reverts to the previous procedures that were built on the non-existent procedure (Al-Mazuri, 2009, 122-178). As the effect of non-existence reverberates immediately on all previous procedures that are closely linked, whether the procedures related to this non-existent procedure are previous or subsequent.

We see that this effect is conditional on the connection of the procedure with another, but if it is separate and the procedure is not linked to another previous or subsequent procedure that achieves this effect, the most prominent example of which is the lack of judgment, then the effect of the absence is limited to this procedure of the litigation procedures, and therefore it does not demolish all the criminal litigation procedures.

We did not find any reference in the Iraqi Code of Criminal Procedure to this effect, while the Egyptian Code of Criminal Procedure referred to it in Article (336), where it stipulated: ((If it is decided that any

procedure is invalid, it deals with all the effects that result directly from it...), the French Code of Criminal Procedure also referred to it in Article (172/2) where it stipulated ((Whenever the invalidity occurred, the Indictment Chamber shall determine whether this invalidity should be limited to the defective procedure or extend to all or some of the following procedures)).

The Iraqi criminal judiciary referred to this effect, as it stated in one of the decisions: ((During scrutiny and deliberation, it was found that the cassation appeal was submitted within the legal period, so it decided to accept it in form, upon reviewing the discriminatory decision, it was found that it was incorrect and contrary to the law, because the cassation decision included the rejection of the objection submitted by the convict (Discriminator) in form, and the consideration of the absentee judgment issued against him as the status of a judgment in presence. When examining the file of the absentee judgment subject of the objection, it was found that the discerning person was referred to the court (Misdemeanor of Al-Rumaita) to conduct his trial in absentia on a non-summary claim in accordance with the provisions of Article (459) penalties, and that the aforementioned court notified the accused of the announcement on the court notice board and he was sentenced in absentia on 11/2010 29, and it notified him in the same way, and the court, with its notification procedures, has violated the provisions of Article 143/c of the Iraqi Code of Criminal Procedure, because the crime of giving a check without balance is an important misdemeanor that the aforementioned article necessitated informing the accused of it in two local newspapers. In view of the aforementioned, and because the decision of the objection judgment in absentia was based on legally invalid procedures, therefore, it was decided to overturn all decisions issued in the case and return it to its court in order to conduct the trial again)) (Hussein, 2004, 51-84).

7. Life-Long Effect of the Defect of Nullity in Terms of the Inability to Correct.

The philosophy underlying the idea of transforming the defective procedure or the idea of correcting the defective procedure is the legal remedy for the procedures that are defective, since this matter widens the circle of correct procedure and narrows the scope of procedural defect cases, thus, the legislation that adopts this idea aims to limit the imposition of procedural penalties in general. The philosophy of the idea of transformation or correction lies in simplification, reduction of effort and time, and thus economy in the punitive procedure, which is based on correcting these defective procedures instead of relying on procedural penalties, and thus reducing their various dangerous effects (Fouda, 1996, 33-36).

Correction is not just an arbitrary idea devoid of controls, as it is imposed by necessity and therefore must be estimated as much, so it is not possible to resort to excessive resort to this idea in all cases, so that the medicine does not turn into a disease. In return, this idea must not be neglected and its scope reduced. (1) Therefore, this idea is not resorted to in all cases, especially with regard to the defect of absence, as this defect is considered one of the most severe defects that respond to criminal procedures, as such a procedure does not need correction or execution, as it is as if it does not exist (Al-Shawarbi, 2000, 67-70).

There are those who believe that the defective procedure, regardless of whether it is invalid or non-existent, remains as it is and is transformed into another valid action that is applicable in the legal system, where the procedure remains present, but it creates effects that differ from the effects of the original procedure (Mahmoud, 2020, 69-92). We do not support the latter view, as conversion requires a criminal procedure that exists from a physical and legal point of view (Hosni, 2011, 67-34), but it is not correct, as for the non-existent procedure, it does not exist at all, either legally or materially. Correction also requires achieving the purpose of the procedure despite its defect, and this is what the Egyptian legislator referred to ((the effect of invalidity disappears if the purpose of the procedure has been achieved for all concerned parties despite its defect)) (Rasool, 2017, 62-79), This does not apply to the defect of non-existence because it does not exist and therefore does not achieve the purpose of correction.

Also, correction is not possible in the defect of non-existence, and the reason for that is that this defect leads to the absolute invalidity of the procedural actions completely to enter into the procedural association. Where the absence is not limited to a specific procedure, but rather extends to the entire procedural association or a whole stage thereof, even if this defect is limited in its source to a procedural action only (Behnam, 1984, 12-23).

8. Effect of Absence of a Criminal Case on Civil Case.

The absence of a criminal case extends naturally to the absence of a civil case, as the lack of jurisdiction of the criminal court in a criminal case automatically entails its lack of jurisdiction over a civil case. Absence of the jurisdiction of the court in the criminal case entails the lack of its jurisdiction in the civil case automatically, and among the effects of the lack of jurisdiction on the civil case in this regard is that the non-admissibility of the criminal case due to the absence automatically entails the non-acceptance of the civil case affiliated to the criminal case. Among the effects of non-existence in this case is the death of the accused after and before the criminal lawsuit is filed, so the procedural connection to this lawsuit is non-existent, whether naturally upon the death of the accused before it is filed, or as a technical tool for non-existence when the accused dies after it is filed. This, of course, will lead to a lack of procedural communication with the civil case (Abdel-Karim, 2015, 17-19).

The Iraqi legislator has adopted this effect in Article (278) of the Iraqi Code of Criminal Procedure, which stipulates: "The revocation of the judgment shall result in the removal of its criminal and civil effects in whole or in part, and the return of the fine, compensation, and the things and money confiscated or confiscated in kind, if any, or the payment of their value if not. existed, unless confiscation is legally required)), The Egyptian Code of Criminal Procedure was also taken into account in the text of Article (451), as well as the French Code of Criminal Procedure in Article (627), as these articles correspond to what was stated in the Iraqi Criminal Procedure Code (Hindi, 1998, 77-105).

The Egyptian Court of Cassation referred to this effect, as it stated in its decision ((...The appealed judgment, when it decided to refuse to pay on the grounds that the judgment in the criminal case had become final, because it was not appealed by the accused and the Public Prosecution, despite his acknowledgment that the criminal case was instituted by someone who does not have the power to file it, he made a mistake in applying the law, which defects it and necessitates that it be overturned and corrected, and that the civil case alone is not accepted with regard to the person responsible for civil rights)) (Okasha, 1995, 39-57) .

It is clear from the aforementioned, that the absence has great effects on the penal procedures, and therefore these effects are sufficient to indicate the importance of the lack of defect and its place among the procedural defects that plague the penal procedures. Whereas, the defect of non-existence leads to the termination of the procedure from the material and legal point of view, as well as it reverts to the previous and subsequent procedures, in addition to that it does not accept transformation and correction, and the defect of non-existence leads to a direct impact on the civil lawsuit affiliated to the criminal case.

Conclusion

First: Results:

1. The apostate effect of the non-existence defect is conditional on the connection of the procedure with another, but if it is separate and the procedure is not related to another previous or subsequent procedure that achieves this effect, the most prominent example of which is the lack of judgment, then the effect of non-existence is limited to this procedure of the litigation procedures, and therefore it does not destroy all criminal litigation procedures.
2. That correction is not possible in the defect of non-existence, and the reason for that is that this defect leads to the absolute invalidity of the procedural acts completely to enter into the procedural bond, where the absence is not limited to a specific procedure, but rather extends to the whole procedural bond or a whole stage of it, even if this defect is limited in its source to a procedural act only.
3. The absence of a criminal case naturally extends to the absence of a civil case, as the lack of jurisdiction of the criminal court in the criminal case automatically entails its lack of jurisdiction in the civil case.

Second: Recommendations:

1. We suggest to the Iraqi criminal legislator the need to regulate this defect in explicit texts in the Criminal Procedure Code No. (23) of 1971.
2. We suggest that the legislator include cases of defectiveness in clear legislative texts to remove confusion, ambiguity, and the overlap between defectiveness and other procedural defects, to avoid substituting the judiciary for the legislator in setting different criteria in each direction.

3. We suggest amending the text of Article (266/a), which provides for the possibility of requesting correction of the judgment issued by the Court of Cassation and to include the judgments issued by the Criminal Court in its cassation capacity, in order to avoid other lengthy non-existent procedures.
4. We suggest adding the following text to the Code of Criminal Procedure: (The state's legal system is null and void, the procedural litigation loses its presumptions, and the procedural work loses one of its basic pillars, without which it cannot exist.)

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