



Invalidation in Criminal Procedures (A Comparative Study)

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Abstract: Because of its importance in the area of penalty procedures, nullity occupies a wide range in the law regarding the precise legal problems it raises which require attention and study to find the necessary solutions to them to ensure the conduct of criminal justice, especially since the majority of criminal legislators believe that invalidation is the key to the construction of every law, and the best guarantor of the application of the law in its correct form, because it is impossible to the law to be applied without the validity of the correct procedural actions, meaning that it requires the validity of the criminal procedures, so the invalidity of those procedures is related to how valid the judicial decision is .

And for this, it has become an absolute duty to find suitable solutions to ensure the correct conduct of criminal justice, especially after the scope of topics has expanded and penal procedures have developed as a result of the progress and development of societies that have included them, so that they can face the multiple cases that relate to the diverse interests that the courts consider. However, the solution presented is to establish a penalty that results from a violation of the general legal rules in order that they have a binding character, and the best expression of this solution is the theory of invalidation , and the basis of this theory is based on the principle of giving a penalty for a defective legal action, and thus most criminal legislation has tended to regulate cases of invalidation with texts in its laws, with an exception for the Iraqi legislator who did not specify this theory with texts that regulate it in the Code of Criminal Procedure, rather, distributed throughout its texts without being united for distinctive ends .

It is obvious that it has become an inevitable duty to challenge the issue of invalidation of criminal procedures and the consequences and penalties that result from them when they are violated. Therefore, writing this research is a start to show the role of invalidation and its importance in criminal procedures according to a research plan consisting of two sections.; In the first section, I will discuss what the invalidation of procedures is, and it lies in three branches. In the first, I explain the definition of invalidation , in the second I discuss the basis of criminal protection for invalidation , and the third one is devoted for the distinguishing of invalidation from similar legal systems. The second section is devoted to the types and causes of invalidation , , and in also three demands, I will explain the pillars of invalidation in the first requirement, and the second will be for the types of invalidation . As for the third requirement, I will discuss the reasons for invalidation , and this is what I will address successively according to the research plan.

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introduction

Invalidation occupies a wide area in law, because of the delicate legal problems it raises that the judiciary must solve with a fair ruling consistent with justice. It has also been said about invalidation that it is “the

key to building all of the law”⁽¹⁾, and that it is the best guarantor of the application of the law in its correct form. The importance of invalidation emerged after societies have been advanced and criminal procedures have developed as a result of the widening range of topics they cover, and they have different degrees of importance, so that they can face the multiple hypotheses related to diverse interests. From other side, the cases that are being handled by the courts are so great in number due to the number of crimes committed because of the increase in population.

For this reason, it becomes necessary to establish a penalty resulting from violating important legal rules so that it has a binding formula, and the best of that is the theory of invalidation, as this theory is essentially based on the principle of penalty for defective legal work, and the importance of this theory is highlighted in the Code of Criminal Procedure. The legislator has tended The Criminal Code in most countries regulates cases of invalidation through provisions in their laws in order to leave no room for doubt and the person conducting the procedure knows in advance the fate to which his work may be exposed and thus takes into account the provisions related to it.

However, the Iraqi legislator did not specify the theory of invalidation with texts regulated in the Iraqi Code of Criminal Procedure. Rather, some of the invalidation provisions were distributed in the aforementioned law without being united by a single tenacity. The Iraqi legislator left the assessment of invalidation rulings to the judgment of the judge to see the defect in the procedural work and then assess the gravity of the violation.

Generally speaking, the issue of invalidation of the criminal procedures is of great importance in the correct application of the law in a way that achieves justice, so that safety and reassurance prevail, which is the goal of the person who aspires to achieve it, since the theory of invalidation in the Code of Criminal Procedure has very great importance in organizing the criminal dispute to the point of imposing punishment on the offender. So, invalidation provides adequate guarantees for individual freedoms.

First: The importance of research

The importance of this research lies in the extreme position of procedural law, whether it is the Code of Criminal Procedure, as some criminal legislation calls it, including the Iraqi criminal legislation, or it is the Code of Criminal Procedure, as some criminal legislation calls it, such as the Egyptian criminal legislation. Whatever the name, it is an extremely essential law for it is related to the criminal dispute, as the state organizes the criminal dispute in order to impose punishment on the offender, and in this dispute the state's supreme interest in retribution against the offender conflicts with the interest of the accused, and the need seems important and urgent to reconcile the two interests and provide adequate guarantees for individual freedoms in order to establish a fair trial.

In fact, there is no importance in the rules enacted by the legislator and the guarantees he establishes when they are ignored and not observed. Yet, the role of invalidation appears as a procedural sanction that represents the obligatory nature of the procedural rule, and leads to the demolition of the flawed procedural work and the waste of its legal effects and the extremely important consequences that result from it, the most dangerous of which is the escape of the criminal from the punishment if his conviction is based on false evidence.

Second: The research problem

Despite the great importance of the issue of invalidation in criminal trial, it has not received sufficient attention and detailed study due to address the problem, which is divided into several problems, as it revolves around the validity and legitimacy of the procedure, the consequences that could result from the failure of its legal components, and the penalty imposed on the defective procedure and whether it affects the procedure itself in the case or affects the judgment as one of its procedures. These problems highlight

(¹)Jawad Al-Rahimi, Provisions of Invalidation in the Code of Criminal Procedure, The Legal Library, 2nd edition, Baghdad, 2006, p. 2.

the importance of research in its theoretical and practical aspects, and this is what the current study will address.

Third: Scientific research methodology

The inductive analytical approach was adopted, as we searched into the general principles of the theory of invalidation, especially since the theory of invalidation is one of the general theories in law, with its origins and applications in its various branches, and what this theory is based on is through extrapolation of the opinions of jurists in various legal schools of thought, as well as doing searches on how this theory is applied in various legislations so that we can evaluate invalidity in criminal procedures through the advantages and disadvantages revealed by practical application, and this is the main goal of this research in providing an analytical study for the purpose of answering the problem of this research.

Fourth: Research methodology

The research will be initiated according to the research plan prepared for it, which consists of two sections. In the first section, we will discuss what is the invalidity of criminal procedures, and in three demands, we will explain in the first requirement the definition of invalidity and in four branches. In the second section, we will discuss the basis of criminal protection for invalidity and two branches, and we have allocated the third requirement is to distinguish invalidity from similar legal systems and in four branches. As for the second topic, it is devoted to invalidation, its types and causes, and in three demands. In the first requirement, we will show the doctrines of invalidity in four branches, and the second requirement will be to the types of invalidity and in two branches. As for the third requirement we will discuss the reasons for invalidation in three branches. This is what we will address successively according to the plan prepared for it, as follows:

First topic

The nature of invalidity in criminal procedures

The first requirement

Definition of invalidity in criminal procedures

This topic will be explained in four sections. The first section is devoted to the definition of criminal principles, the second to the definition of invalidity in language, the third to the definition of invalidity in terminology, and the fourth to the definition of invalidity in criminal procedures of the criminal legislations, as follows: -

First Section

Definition of criminal principles

In Iraqi legislation, no clear definition of the Code of Criminal Procedure has been given, and it has been left to criminal legislation who defines the Code of Criminal Procedure as (a set of legal rules that must be followed to organize the conduct of procedures for investigating the crime and criminalizing its perpetrators, as well as defining the powers of the authorities and agencies that implement these rules)⁽²⁾

Second section

Definition of invalidity in language

Invalidity gives exactly the meaning of " against the truth" ⁽³⁾, and this explains in the saying of the Almighty God: (And who does not initiate falsehood, nor does he repeat it)⁽⁴⁾, and it is also said to something as " nullity" means in Arabic "Batel", , and invalidity, and a plural of vanities, and a vanity man is the one who hides the truth and they become invalid among people⁽⁵⁾ . The Almighty says: (Indeed, these are

⁽²⁾Jawad Al-Rahimi, Provisions of Invalidation in the Code of Criminal Procedure, previous source, p. 9.

⁽³⁾Majd al-Din Muhammad bin Yaquoub al-Fayrouzabadi, Al-Qamoos al-Muhit, 7th edition, Al-Resala Foundation, Beirut, 2012, p. 966.

⁽⁴⁾Surah Sheba: Verse 49

⁽⁵⁾Majd al-Din Muhammad bin Yaquoub al-Fayrouzabadi, Al-Qamoos al-Muhit, p.967.

disgraced from what they are in, and what they used to do is void), and invalidity is from the word "nullity", which is the lack of validity of a thing, and everything that is not reliable and can be returned to, and this includes the corruption of a thing or the lapse of its ruling ⁽⁶⁾, and It means the disappearance of the thing and its illegality in its origin⁽⁷⁾

Section Three

Invalidation in terminology

From the Latin word "abolito", which means to "delete or nullify, as well as to nullify a legal situation"⁽⁸⁾

Section Four

Invalidation in law and jurisprudence

According to many law resources, invalidation has been defined as "a penalty resulting from failure to observe and follow the provisions of the law related to any fundamental procedure"⁽⁹⁾, and it is also defined as "a procedural penalty resulting from the lack of the necessary elements for the validity of the legal act"⁽¹⁰⁾, and it is also known as "a penalty imposed by the legislator or the court rules without a text if the legal work lacks one of the formal conditions required for its legal validity. This procedure leads to the ineffectiveness of the legal work and a lack in its assumed legal value in the case of being invalid" ⁽¹¹⁾.

The researcher believes that the definition of "invalidation" is (a penalty imposed by the legislator through legal texts or imposed by the court when the text does not exist, and if the legal work lacks one of the formal conditions for its validity, and this leads to the loss of its supposed legal value). However, In all cases, invalidation is a penalty for failing to comply with all or some of the conditions of the criminal procedure's validity, and which gives a weak of the usual procedural effect .

The second requirement

The basis of criminal protection

Concerning the issue of invalidation of criminal procedures, we must know the basis of criminal protection for criminal procedures so that we can know the invalidity of criminal procedures to ensure the conduct of proper legal procedures and a fair trial. Therefore, this section involves two branches. We explain the legal basis for the invalidation of criminal procedures in the first section, and we will discuss the importance of invalidation of criminal procedures in the second section as follows:

Part One

The legal basis for criminal procedures

The legal text is by no means regarded the legal basis for criminal procedures, as the legislator places broad procedural powers among the authorities of investigation, prosecution, trial, and judgment enforcement whose application would affect individuals' freedoms, persons, secrets, and money. Therefore, the legislator must establish a balance between the right of the authorities to exercise their powers and the interests of individuals. This prevents deviation of the exercisers of these powers and authorities without

⁽⁶⁾Muhammad Rawas Qalaji, Academy of the Language of Jurists, Dar Al-Nafais, Beirut, 1996, p. 88.

⁽⁷⁾Abu Al-Hasan Ahmed bin Faris bin Zakaria, Dictionary of Language Standards, 2nd edition, Al-Jabal, Beirut, 2012, p. 258.

⁽⁸⁾Gerard Cornu, Dictionary of Legal Terms, 2nd edition, University Publishing Corporation, Beirut, 2009, pp. 26-27.

⁽⁹⁾Dr. Raouf Obaid, Principles of Criminal Procedure in Egyptian Law No. 150 of 1950, Cairo, 1979, p. 20, Article no. 331.

⁽¹⁰⁾Muhammad Kamel Ibrahim, The General Theory of Invalidation in the Code of Criminal Procedure, Dar Al-Nahda Al-Arabi, Cairo, 1989.

⁽¹¹⁾Dr. Abdel Hamid Al-Shawarbi, Procedural and Substantive Civil Invalidation, Mansha'at Al-Maaref, Alexandria, 1991, p. 9.

their arbitrariness, or at least without their neglect of essential procedures that relate directly to the interest of the group or to the interest of the opponents ⁽¹²⁾.

Substantive and procedural penal laws have stipulated penalties that affect those who carry out procedural work or affect the procedural work itself ⁽¹³⁾. Criminal legislation has established several penalties that affect procedural work, including the disciplinary penalty, that is, the disciplinary penalty. These penalties are imposed by the administrative body to which it is affiliated whoever carries out a procedure that violates the law. As stated in Articles (16-48-403) of the Lebanese Code of Criminal Procedure, as well as the criminal penalty, which represents the most severe type of penalties and which targets those who practice a procedure that violates the law for criminal punishment, and this is what Articles (42/2 - 48-53) stipulate from the Lebanese Code of Criminal Procedure due to disclosing the confidentiality of the investigation and violating the procedures followed in detention, as well as Articles (367-368-369-370) of the same law for violating arrest and search procedures . There is also a civil penalty, which stipulates the right to compensation for anyone who was harmed by someone who carried out a procedure that violated the provisions of the law, as well as a procedural penalty (invalidation), which does not extend to those carrying out the procedural work, but rather extends to the procedure itself, and this is the penalty that we mean in this research article. The importance of this penalty appears in the fact that the penal procedure is not an abstract act, but rather a purposeful act through which the law requires achieving a specific goal. If the procedure lacks the conditions imposed by the law, it loses its legal value, which entails its invalidity.

Since the rules of the Code of Criminal Procedure are the procedural rules of the criminal law, they are the legal rules that arrange the procedures that are followed when a crime occurs in all Inferences regarding the case as well as investigation into it, trial of its perpetrator, and imposition of a fair penalty on the criminal after it is proven that he committed it and is responsible for it, which entails achieving two basic interests: the interest of the society whose security has been disrupted, and the interest of individuals in ensuring their freedoms ⁽¹⁴⁾, and since it is like this, its legal basis is the legal text, which arranged the penalty on whoever violates these procedures.

Worthy, the rules of criminal procedure in general are the legal rules, and the legal rule is distinguished from other rules that govern the activity of individuals by imposing a penalty. Without the penalty element, the rule is stripped of its binding character and becomes merely advice or guidance. The rules of criminal procedure are distinguished from the rules of substantive law in that they include penalties. Of a special nature, they are procedural sanctions, in addition to other sanctions. These sanctions, which protect the rules of criminal procedural, aim to properly administer justice and achieve the purpose of the dispute, which is to impose punishment on the offender. All of these sanctions constitute a general theory in procedural law, which is the theory of punishment.

One of its most important applications is procedural sanctions, which are the theory of invalidity, lapse, and inadmissibility. Procedural sanctions differ from other sanctions. They are characterized by their objective effect, as they do not harm a person who initiated the procedural work, but rather affect the work itself. Unlike other sanctions, they have a personal effect, which means that they affect a person who initiated the procedural work. Whether in himself or his property,. Unlike other procedures that involve an element of pain and compensation, procedural sanctions lead to the procedural work being robbed of its legal effects,⁽¹⁵⁾

From what has mentioned above, criminal procedures are based on the legal text as legal rules stipulated by the legislator as procedural (apparent) legal rules.

Part Two

⁽¹²⁾Dr. Abdel Fattah Mustafa Al-Saifi, Explanation of the Lebanese Code of Criminal Procedure, Lectures for Fourth Year Students at the Faculty of Law at Beirut Arab University, p. 299

⁽¹³⁾Dr. Assem Shakib Saab, The invalidation of the criminal ruling in theory and practice, a comparative study, 1st edition, Al-Halabi Legal Publications, Beirut, 2007, p. 32.

⁽¹⁴⁾Jawad Al-Rahimi, Provisions of Invalidation in the Code of Criminal Procedure, previous source, p. 28.

⁽¹⁵⁾Dr. Ahmed Fathi Sorour, The Theory of Invalidation in the Code of Criminal Procedure, Egyptian Nahda Library, Cairo, 1959, p. 2.

The importance of invalidating criminal procedures

The importance of invalidation has become obvious after the rapid development and speed progress of societies have advanced and criminal procedures have developed as a result of the widening of the range of topics that it includes, and it has become of varying levels of importance so that it can confront the multiple assumptions related to diverse interests, in addition to the multiplication of cases heard by the courts, and a significant number of them have yet become clear. Its investigation and discussion depend on faulty reasons, which regarded a waste for time and effort.

Respectively, in order the judiciary can focus its research on lawsuits that are supported by sound legal justifications, and on the other hand, prevent transgression against the provisions contained in the legislation that must be followed, as they are interests that concern society and the individual alike, thinking has turned to avoiding these harmful consequences to establishing a penalty that results from violating the rules. Important legal matters so that they have a binding character, was the theory of invalidity, which is essentially based on the principle of giving penalty for defective legal work. Further, the importance of this theory has also increased until it has become one of the general theories in the law with its origins and applications in its various branches. The importance and seriousness of the theory of invalidation also appear to be doubled in the Code of Criminal Procedure, where the state organizes the criminal dispute to reach the imposition of punishment on the offender, and in this dispute the highest interest conflicts in retaliation of the offender. Yet, there is an urgent need to reconcile the two interests and provide adequate guarantees for individual freedoms in order to establish a fair trial, especially since most legislation regulates invalidity cases is in its laws and leaves no room for doubt, and the person performing the procedure should know in advance the fate to which his work may be exposed, so he should take into account the adjudications related to it.

However, the Iraqi legislator did not specify the theory of invalidity with texts regulated in the Code of Criminal Procedure. Rather, the provisions for invalidation were distributed in the aforementioned law, and the legislator left the other invalidity provisions that were not stipulated for the judgment of the judge to see the defect in the procedural work and assess the seriousness of the violation. This is what is called (the doctrine of invalidity). This doctrine is criticized for the fact that it leads to conflicting opinions and instability of judgments.⁽¹⁶⁾

According to what has mentioned above, it becomes clear that the importance of nullity rulings is summed up in the correct application of the law in a way that achieves justice, so that safety and reassurance prevail in the society, which is the aim that man seeks to achieve.

The third requirement

Distinguishing invalidity from similar legal systems

For the purpose of distinguishing invalidity in criminal procedures from similar legal systems, we must divide this requirement into four branches. The first one is discussing laps of punishment and how it differs from invalidation. The second branch deals with the inadmissibility, and the third is about the nonexistence, and in the fourth the position of Islamic law on invalidity:

Section One

Invalidation and laps of punishment

laps of punishment is defined as (a procedural penalty that results from not exercising the right to initiate a specific procedural action within the period specified by the legal system. This period is determined either by a date or by a specific incident)⁽¹⁷⁾ and lapse is the prevention of undertaking an act or a group of criminal actions for not observing the deadlines specified for that, i.e. Invalidation is a procedural penalty that deprives the individual of the right to perform a specific action, and the difference between invalidation and lapse is that invalidation refers to the action itself, while lapse responds to a characteristic of taking a

⁽¹⁶⁾Jawad Al-Rahimi, Provisions of Invalidation in the Code of Criminal Procedure, previous source, p. 10.

⁽¹⁷⁾Dr. Abdel Fattah Mustafa Al-Saifi, The General Theory of the Criminal Procedural Rule, Dar Al-Bahri Brothers, Beirut, 1974, p. 97.

specific action ⁽¹⁸⁾, and invalidation accepts correction in certain circumstances, but lapse does not. Correction is never accepted for laps. Invalidation is primarily determined by a ruling or order, while laps is determined by the force of law.

Section Two

Invalidation and non-acceptance

Non-acceptance can be defined as " not a procedural penalty focused on a specific procedure, but rather directed at refusing to decide on the subject of a specific request. Therefore, it does not address a procedure as much as it addresses the procedural relationship as a whole or at one of its stages".

However, through the definition, one can assume that there isn't much difference between the two terms. Both invalidation and inadmissibility almost coincide in the reason leading to each of them. In both cases, there is a flawed procedural action caused by a mismatch between the actual procedure and its legally prescribed model, that is, the procedure lacks one of its objective components or is stripped of one of the forms that guarantee its validity ⁽¹⁹⁾.

This gives the meaning that a case is going to contestation when things are going towards non-acceptance due to the lack of the necessary conditions for hearing the case, which are the capacity, interest, and right to prosecute the lawsuit as an independent right from the right with which it is prosecuted to request a report, such as the lack of right to the lawsuit ⁽²⁰⁾.

Whereas invalidation is a penalty imposed by the legislator or decided by the judge for failure to perform a certain procedure. The point of disagreement between them is that the lack of acceptance often affects procedural aspects of public order, that is, those aspects that the judge may raise on his own initiative, such as the prosecution's failure to obtain a complaint from the injured party. This takes place in legal systems that follow the public prosecution system, such as in Egypt.

Iraq, from another side, adopts the investigative judge system. In this case, the judge has the right to not accept the public lawsuit due to the absence of a complaint, without expecting the aggrieved individual to submit a prosecute in this regard, meaning that the judge has the right to reject the lawsuit due to the absence of a complaint from the aggrieved one.

Section Three

Invalidation and nonexistence

Nonexistence can be defined as "a penalty imposed on the procedure for violating the law or system in such a way that it loses all its regular or legal value" ⁽²¹⁾; ; this means its absence in a procedural work as its absence and the manifestation of this non-existence is the lack of validity, as invalidity is the consequence of a certain defect in the legal work, without affecting the existence of legal work . The procedural work is considered legally non-existent if the law does not allow it, such as the interrogation of the accused by a person who does not have the legal capacity to interrogate, or if the interrogation takes place before the criminal dispute arises, then procedural work is considered legally non-existent, and is distinguished from Invalidity means that the absence cannot be corrected because it does not exist in the world of law, while invalidity can be corrected and any litigant to the criminal case and the court can on its own initiative raise the absence. As for invalidity, its effect is specific and is represented by the investigating judge and some parties at times in specific cases.

⁽¹⁸⁾Dr. Alwani Muhammad Alwani, Explanation of the Algerian Code of Criminal Procedure, University House, Algeria, 2003, p. 2596.

⁽¹⁹⁾Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, 2nd edition, Dar Al-Nahda Al-Arabiya, Cairo, 1988, 344.

⁽²⁰⁾Elias Abu Abd, Procedural Defenses in the Principles of Criminal and Civil Trials, Zein Law Library, Lebanon, 2004, p. 161.

⁽²¹⁾Dr . Fawzia Abdel Sattar, Explanation of the Code of Criminal Procedure, Dar Al Nahda Al Arabiya, Cairo, 1986, p. 42.

Section Four

The position of Islamic law on invalidity

Our Islamic Sharia views invalidation (and adopting it, from a view characterized by comprehensiveness and moderation, and that the basis of the theory of invalidity in Islamic Sharia which is based on the violation of the orders and prohibitions contained in the legal texts in the Holy Qur'an and the recurring Sunnah of the Prophet, which is definitively proven) ⁽²²⁾. As Islamic Sharia takes the theory of invalidity and the basis of what is built on falsehood, is false by itself ⁽²³⁾, as it has given a direct and unambiguous indication, as God Almighty said in His Noble Book " O you who have believed, obey God and obey the Messenger and those in authority among you. And if you dispute over anything, then Return it to Allah and the Messenger"⁽²⁴⁾

The second topic

This section is devoted to explaining the doctrines of invalidity, its types, and its causes. It is, for the sake of completion, is divided into three subsections. The first will be for the doctrines of invalidation. The second will discuss the types of invalidation, and we will single out the third for the reasons for invalidation. They are going to be addressed successively:

The first requirement

The doctrine of invalidity

In criminal procedures ,the system of invalidation should be governed by rules that fulfill the purpose for which the law instituted this penalty. Invalidation, as a procedural penalty, is a tool by which the law proves its legal will, obligates people to observe its rules, and achieves by it the guarantees that it intended to provide in litigation until the rules of invalidation fulfill the purpose on which the penalty is based. Invalidation, therefore, must be based on a foundation of stability and specificity so that the procedural persons know what they are entitled to and what they are owed. This is how the nature of the penalty leads, and the circumstances of invalidation must be specified in a manner that is not excessive or negligent, so that it does not lead to wasting evidence for trivial reason and enable the accused, which is inconsistent with the nature of the dispute, to escape punishment, in addition to the complexity of the procedures and the prolongation of the criminal dispute that aims to achieve social defense by imposing punishment on the offender and protecting individual freedoms ⁽²⁵⁾. We will explain these doctrines briefly in four branches, as follows: :-

Branch One

The doctrine of legal invalidity

According to this type invalidation is governed by a legal text, i.e. , it is not possible except by an explicit text in the law (there is no invalidation without a text). In the event that the legislator does not decide a penalty for invalidation, the action taken is considered valid even if it was not carried out within the limits stipulated by the law. The legislator alone has the authority to impose the penalty. In this regard, the judge does not have the right to rule on invalidity as long as the legislator has not stipulated it, just as he does not have the right not to rule it when it is stipulated. The defect of this doctrine is that it is based on the legislator

⁽²²⁾Abdul Qader Odeh, Islamic criminal legislation compared to positive law, 4th edition, Al-Resala Foundation, Beirut, 1996, p. 238.

⁽²³⁾Saad bin Muhammad bin Dhafir, Criminal Procedures in Saudi Arabia, 1st edition, Dar Taibah, 1414 AH, p. 234

⁽²⁴⁾Surat An-Nisa: Verse 59.

⁽²⁵⁾Dr.. Ahmed Fathi Sorour, The Theory of Invalidation in the Code of Criminal Procedure, previous source, p. 112

predicting in advance the circumstances of invalidity, even though it is impossible for the legislator to agree on determining the circumstances of invalidity in a case devoid of excessiveness or negligence. In sum, this kind of invalidity depends on the legislator's formation of the text.

Branch Two

The doctrine of subjective invalidity

In this doctrine of invalidity, the legislator does not postulate specific cases of invalidity, as in legal invalidity, but rather invalidation results from the violation of any basic or fundamental rule, and the matter of its assessment is left to the judge. He is the only one who has the right to arrange invalidation according to the law being violated. This doctrine of invalidity is sometimes called "fundamental or fundamental invalidity". The advantage of this doctrine is that the legislator cannot limit in advance the circumstances of invalidity, and that for fear of the consequences resulting from this limitation, it includes leaving the matter to the judiciary until it assesses the seriousness of the violation.

and not to be obedient to rigid texts and sees a serious defect in the procedural work before him and is unable to move just because the law neglected to stipulate invalidation as a penalty for this defect. This doctrine raises a major problem, which is a problem between essential and non-essential actions²⁶, and in this problem shows the defects of this doctrine which are taken by the Egyptian and Iraqi law.

Section Three

The doctrine of compulsory invalidity (absolute)

It is also called the "formal doctrine", which stipulates that invalidation occurs as a result of violating all the procedural rules that regulate adversary procedures. The basis of this doctrine is that the law does not require taking into account the formalities except taking into account their importance, in order to fulfill the role of the dispute, so invalidation must be determined as a penalty for failing to comply with all of them.

This system was known in Roman law and feudal eras, where the procedures were subject to certain forms, the violation of which affected the subject matter of the case itself. The advantage of this doctrine is the clarity in determining the circumstances of invalidation, but it is tainted by the defect of excessive adherence to the forms in a way that leads to excessive enforcement of invalidation and the predominance of form on the subject ⁽²⁷⁾.

Section Four

The doctrine of invalidity in Iraqi law

The Iraqi legislator did not involve the Baghdadi Criminal Procedure Code (the cancelled code) any text related to invalidation. The explanatory memorandum to the law appended to the Baghdadi Criminal Procedure Code No. 63 of 1950 stated the following: "It has been confirmed from the application of this law that it is a practical law free of formalities that allows the judge to act freely ,completely without any invalidation of his procedures and with the condition that the rights of the defense are not violated also."

As for the current Code of Criminal Procedure, Article 249/F1 stipulates that "each of the public prosecution, the accused, the complainant, the civil plaintiff, and the civil official may appeal to the Court of Cassation all decrees, decisions, and arrangements issued by the misdemeanor court or the criminal court in a misdemeanor or felony if they have been committed. It was based on a violation of the law or an error in its application or interpretation, or if a fundamental error occurred in the due process, evaluation of evidence, or assessment of the penalty, and the error has affected the decree taken ."

⁽²⁶⁾Dr. Ahmed Fathi Sorour, The Theory of Invalidation in the Code of Criminal Procedure, previous source, p. 118.

⁽²⁷⁾Dr. Mamoun Muhammad Salama, Criminal Procedures in Libyan Legislation, vol. 2, 1st edition, Dar Al-Kutub Press, Beirut, 1971, p. 303.

From what has been mentioned above especially the quoted phrase “a fundamental error in the procedures”, it is clear that the legislator adopted self-invalidation, as it cannot be imagined that there is no procedural penalty for violating the basic rules in criminal procedures, since these rules are useless unless there is a penalty for violating them. This is a penalty decided by the court to which the appeal against the decision of the investigating authority or the decree is submitted.⁽²⁸⁾

In spite of this, criminal jurisprudence in Iraq has differed regarding the invalidity of the inspection. Some have argued that the inspection carried out by the investigating authorities other than the conditions stipulated by the law is considered absolutely invalid, and it is not permissible to adhere to what was stated in the report of that inspection or to the things discovered in it as evidences of a crime, and the court may not rely on it in its judgment. However, it is impossible to depend on the testimony of the person who carried out the false inspection, nor should be relied on the procedures or statements he mentioned in his report or investigation related to that false inspection.

Some other legislators believe that the inspection conducted without taking into account these provisions is considered to be of relative invalidity, as long as the legislator has established the general provisions related to inspection and obliges them to be followed, whether this is from the authority that was authorized to issue his orders or from the authority authorized to implement them. And Courts are not excused from applying this principle on the pretext of the absence of a special text. The annulment is regulated in a matter that affects people’s public freedoms protected by the Constitution and other laws, especially since the rules of the Code of Criminal Procedure are formal rules whose purpose is to ensure the proper administration of justice and to ensure the public interest in the criminal judiciary, which does not prevent the court from adopting the broad interpretation and the principle of the conclusion intended from the first chapter ⁽²⁹⁾, and the Iraqi legislator did not mention it in the Code of Criminal Procedure a special text that shows us the general rule regarding the invalidity of penal procedures, which stipulates that they are invalid because they violate the conditions and forms stipulated, and the matter is left to the judiciary until the seriousness of the violation is assessed .

The second requirement

Types of invalidation

Two types of invalidity are going to be discussed in this section: the absolute invalidity and the relative invalidity. Each one of them has different provisions that make it special and these provisions are set up and by the jurisprudence ⁽³⁰⁾.

Some legislators refuse totally the idea of dividing invalidity ⁽³¹⁾, and rather refuse to split it into absolute and relative invalidity ⁽³²⁾ . And those who reject this idea proceed from considering that its basis is a traditional distinction in civil law jurisprudence and does not fit with the rules of procedural law, and it seems that this rejection is based on making a distinction between Absolute invalidity and the procedures related to the public system ⁽³³⁾, or it may be based on the ambiguity of the concept of absolute and relative invalidity, and for clarification it is advisable to replace them with another distinction based on the public interest and the private interest ⁽³⁴⁾, and we will explain this in two sections: The first section deals with the absolute invalidity and we will dedicate the second to the relative invalidity:

⁽²⁸⁾Jawad Al-Rahimi, Provisions of Invalidation in the Code of Criminal Procedure, previous source, p. 50.

⁽²⁹⁾Dr.. Saleh Abdel-Zahra Al-Hassoun, Inspection Provisions and Its Effects in Iraqi Law, without mentioning the year of publication, p. 351.

⁽³⁰⁾Dr. Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, previous source, p. 348.

⁽³¹⁾Elias Abu Eid, Principles of Criminal Trials between Text, Ijtihad, and Jurisprudence, Comparative Study, Part 2, Al-Halabi Legal Publications, Beirut, 2003, p. 496.

⁽³²⁾Dr. Suleiman Abdel Moneim, Principles of Criminal Procedure in Legislation, Jurisprudence and Judiciary, University Foundation, Beirut, 1997, p. 110.

⁽³³⁾Dr. Fathi Wali, Dr. Ahmed Maher Zaghoul, The Theory of Invalidation in the Law of Procedures, 2nd edition, Modern Printing House, 1997, p. 16.

⁽³⁴⁾Dr. Suleiman Abdel Moneim, Principles of Criminal Procedure in Legislation, Jurisprudence and Judiciary, previous source, p. 138.

First Section

Absolute invalidity

It is this kind of invalidity whose provisions are applied when the fundamental procedures that protect the public interest are violated due to their connection to public order. Its status and provisions are going to be explained as follows:

A- Cases of absolute invalidity

Absolute invalidity can be summed up when it violates the rules related to the formation of the court, its jurisdiction to adjudicate the case, and its specific jurisdiction ⁽³⁵⁾. And also if the procedural violation is focused on the lack of one of its components in the procedural work due to lack of observance of the procedural form in a way that undermines the proper administration of justice (such as not conducting the trial in public and not observing the clarity of the procedures or failure to give reasons for the rulings ⁽³⁶⁾, or replacing the investigating judge with another without taking into account the legal principles), and this is considered a fundamental violation related to public order and therefore is absolutely invalid ⁽³⁷⁾.

B- Provisions of absolute invalidity

The characteristics of the provisions of absolute invalidity are embodied in the following matters:

- 1- Absolute invalidity can be adhered to at every stage of the trial.
- 2- The court may take the decree on its own initiative without a request from one of the opponents.
- 3- It can be upheld before the Court of Cassation.
- 4- Every stakeholder can use it as evidence in his or her report.

These judgments go back to the basic idea that invalidation is decided in the interest of society, whether it is a direct interest of society or a private interest of the accused whose importance has risen to the level of the direct interest of society. Accordingly, it is not possible to explicitly deviate from invoking it, nor to express it through an implicit deduction derived from not invoking it in some stages of the case.⁽³⁸⁾.

Second section

Relative invalidity

Relative invalidity is not related to public order, and therefore its cases are not like cases of absolute invalidity. Relative invalidity is the invalidity that is undermined by a procedure that violates a rule that protects an interest that the judiciary believes is less important than absolute invalidity ⁽³⁹⁾. The most important provisions and conditions of this kind of invalidity are going to be tackled in this section:

A- Provisions of relative invalidity

- 1- Relative invalidity was not decided for the benefit of the society, but rather for the specific interest of the opponents or one of them. Its incitement is limited to the side concerned with violating the legal decree, and it is not permissible to adhere to the invalidity except for those who it was decided in his or her favor ⁽⁴⁰⁾, like the rules of inspection, which are only available to the accused whose house or person was the

⁽³⁵⁾Text of Article 332 of the Egyptian Code of Criminal Procedure ((These cases may result from violating some of the provisions explicitly stipulated by the legislator))

⁽³⁶⁾Dr. Suleiman Abdel Moneim, Principles of Criminal Procedure in Legislation, Jurisprudence, and Judiciary, previous source, p. 139.

⁽³⁷⁾Dr. Elias Abu Eid, Principles of Criminal Trials between Text, Ijtihad, and Jurisprudence, previous source, p. 498.

⁽³⁸⁾Dr. Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, previous source, p. 350

⁽³⁹⁾Dr. Mahmoud Naguib Hosni, Explanation of the Code of Criminal Procedure, previous source, p. 386

⁽⁴⁰⁾Lebanese civil cassation, G5-Resolution 38, dated 3/29/2001, Al-Adl Magazine, first issue, 2002, p. 56.

subject of search. Therefore, it is acceptable to adhere to the defense only by the one whose properties have been searched and not the rest of the suspect.

2- Since relative invalidity is up to the suspect's interest to raise the claim of invalidity of the procedure, he is within his right not to need it, and he also has the right to waive invoking it explicitly or implicitly, and implicitly means not raising it during the stages of the lawsuit ⁽⁴¹⁾

3- The court does not have the right to raise the claim of relative invalidity if the interested person does not raise it ⁽⁴²⁾. If the interested person does not raise the claim of relative invalidity in the first stages of the lawsuit, he does not have the right to raise it before the Court of Cassation, that is, when the interested person does not plead relative invalidity in the first stage of the lawsuit. He does not have the right to claim relative invalidity before the Court of Cassation for the first time in a claim that he had not made.

B- Conditions of relative invalidity

There are three conditions for the relative validity to be insisted on :

1- That the opponent who insists on it has a direct interest in the procedural rules and does not follow them ⁽⁴³⁾

2- That the opponent has not caused or contributed to the invalidation of the procedure, whether his contribution was intentional or unintentional, like for example the absence of the accused during the inspection because he was not called. This procedure is regarded Invalid. As for his refusal to attend is not considered a reason for invalidating the procedure . So he is not permitted to cling to its invalidity ⁽⁴⁴⁾.

3- Relative invalidity must be pleaded before discussing the subject of the case ⁽⁴⁵⁾. Therefore, it was decided that "the application paper must be invalidated because it does not include a statement of the charge before entering into the subject of the case, otherwise the right to it will be forfeited" ⁽⁴⁶⁾.

The third requirement

Reasons for invalidation

The criminal procedural work is, in fact, a legal work. The reasons for invalidation depend on studying the elements of this criminal procedural work as a legal work. Every legal work requires that there be the will and capacity to carry it out, and the location and reason, as well as the forms for the formal legal works that the law requires for their validity. To be formulated in the form in which it joins, these are the elements that must be present for the validity of the legal work, and at the same time these elements represent the basis on which the reasons for invalidity are based ⁽⁴⁷⁾, they are the lack of the necessary elements for the validity of the legal work.

Since the procedural work is a formal work, its validity is required that there be formal and other substantive conditions, so we will discuss in this requirement and in three branches the reasons for invalidation. The first branch is for violating the rules of jurisdiction, the second is for violating the substantive rules, and the third is for violating the formal rules. :

First division

The reason for invalidation is to violate the rules of jurisdiction

⁽⁴¹⁾Dr. Suleiman Abdel Moneim, Principles of Criminal Procedure, previous source, p. 140.

⁽⁴²⁾Lebanese Cassation - Part 2 - Resolution 71 dated 10/25/1994 (N.Q.L.) No. 10 of 1994.

⁽⁴³⁾Dr. Ahmed Kamel Abu Al-Saud, The Golden Code / The Theory of Invalidation of Judgments in Criminal Legislation, Al-Infatfat Press, Alexandria, 1992, p. 105.

⁽⁴⁴⁾Dr. Ahmed Kamel Abu Al-Saud, The Golden Code / The Theory of Invalidation of Judgments in Criminal Legislation, previous source, p. 109.

⁽⁴⁵⁾Dr. Elias Abu Eid, Principles of Criminal Trials, previous source, p. 502

⁽⁴⁶⁾Egyptian Criminal Cassation - May 29, 1951, Collection of Cassation Rulings - Volume 2 - No. 433, p. 502

⁽⁴⁷⁾Dr. Maamoun Muhammad Salama, Criminal Procedures, Part 2, previous source, pp. 302-313

The rules of jurisdiction are that the court hears a case that is not within its jurisdiction, and they are three rules: -

A- Personal jurisdiction Rules

B- Specific jurisdiction Rules

C- Spatial jurisdiction Rules

A- Personal jurisdiction Rules :

The court has jurisdiction when trying the person of the accused,. This means that the juvenile court has jurisdiction to try the juvenile, and regular courts have jurisdiction to try non-juveniles, and otherwise is not true, as it is not permissible to try a juvenile in regular courts or adults in a juvenile court, and this would lead to the invalidation of the procedural work.

B- Qualitative specificity Rules:

It gives the meaning that the nature of the crime and its seriousness decides the jurisdiction of the court. If the crime is a misdemeanor, then the case for this crime is heard before the misdemeanor court. However, if the crime is a felony, then the case for this crime is heard before the criminal court.

C- Spatial jurisdiction Rules

Spatial jurisdiction means the place where the crime occurred, and there are three criteria to determine this:

1-The place where the crime is committed:

2- The place where the accused is located.

3- The place where the accused is arrested.

Careful examining of the place where the crime was committed is for the purpose of arriving at the truth, due to the presence of traces of the crime, evidence, witnesses, all the evidence and circumstances of the crime, in addition to that, is to achieve deterrence . The Iraqi legislator has followed this procedure and taken the direction seriously.

Worth to mention that the investigation procedures are not invalidated if the investigating judge conducts an investigation outside his jurisdiction, because they have been regulated by law based on the provisions of Article 53 of the Code of Criminal Procedure No. 23 of 1971, as amended.

Second division

The reason for invalidation is to violate the objective rules of

All the objective rules that depend on the validity of the procedure are considered essential, as the law requires, for the validity of the procedure, that it must be carried out by a person with a certain capacity, which is expressed as "procedural capacity". This means that the failure of the objective conditions affects the purpose of the procedure and thus results in its invalidity. An example of this is permission to search without the presence of a crime prior to the issuance of the permit is regarded invalid. The search of someone other than the accused in circumstances other than those stipulated by law is invalid, and the permission to search the accused's home without sufficient evidence to accuse him and without new investigations invalidates the permission.

The question is, regarding defects in the will, do they invalidate the procedure? An example of this is the testimony taking place under the influence of coercion, or the issuance of a search warrant under the influence of error, or the filing or abandonment of the complaint under the influence of a defect of will. Opinion has differed in this regard in criminal jurisprudence, as jurisprudence believes that it is necessary for the validity of the procedure to be issued by free and conscious will, otherwise the absence of this will invalidates the procedure.

From another hand, other legislators went to distinguish between the various defects of the will and physical coercion, and believes that physical coercion negates the will and nullifies the procedure in its material nature. In fact, the procedural work must be free from any defect, otherwise the procedure is also invalid.

Section Three

The reason for invalidation is to violate the formal rules

Formal rules are related to the form of the law. They mean those rules in which the law requires that the procedure be formulated. They are not related to the essence and content of the procedure, but rather to the form it should be in. An example of this is the rules for carrying out the search, such as the presence of the accused or witnesses, the signing of the investigation report by the person responsible for it, and the witness taking the legal oath before hearing his testimony, the investigating judge mentioned the articles of accusation, a description of the charge, the name and address of the accused in the summons paper, the referral order, and other formal rules. Here, a distinction must be made between the fundamental rules and the regulatory rules that are intended to guide and direct, and the criterion is the legislator's will to stipulate the procedure. If the formalities required by the legislator do not go together with the procedure and make it lose its effectiveness in achieving its goal, the form is essential, and if they do not have this effect, then these rules are among the rules of guidance and instruction. For example, it is regarded an essential and fundamental rule that results in the invalidity of the procedure (search) when two witnesses are present during the search of the accused's home in the absence of his presence by the judicial police member when he is not delegated to conduct the search, . And likewise as for the witness taking the legal oath before hearing him, this form would not be observed, thus calling into question the value of the testimony as evidence on which the court can rely.

Meanwhile, it is not regarded essential when the one who is responsible to write the report of the record doesn't sign it and it doesn't result to invalidity as long as it is written in the writer's handwriting, and failure to sign it does not deprive the record of its legal value in proving what is contained in it. As for the signature of the president of the court on the minutes of the session and the ruling, it is an essential form required by the legislator in order for the report or decree to produce its effects in terms of being an argument in relation to what was stated in it.

From what has been discussed above, it can be concluded that the form of the procedure is essential if it is linked to the goal in achieving it, and it is not essential if its purpose is organization and regulation ⁽⁴⁸⁾.

Conclusion

The preparation of this study leads to a number of , we reached a conclusions and necessary recommendations that we deem essential for the purpose of completing it, as follows.

First: conclusions

- 1-The study showed that invalidation only applies to defective penal procedures.
- 2- It also clarified that failure to comply with any formal procedure leads to the invalidation of that penal procedure and thus leads to the invalidation of the legal action.
- 3- It has also been shown that invalidation is a penalty for violating the formal legal rules.
- 4-The study showed that the defect occurring in the formal procedure of legal work can be addressed by mostly correcting it, which leads to the validity of the legal work without its irrationality.
- 5- It also became clear that the theory of invalidation of criminal procedures aims to correct legal action and achieve the correct administration of justice.

⁽⁴⁸⁾Dr. Maamoun Muhammad Salama, Criminal Procedures, Part 2, previous source, pp. 304-312

6- This study also made clear that most criminal legislation will not stipulate the invalidation of criminal procedures and leaves the matter to the judge's discretion in most cases, which leads to its discretion being sometimes subject to the whims of the judge.

7- This study also made clear that the invalidation of criminal procedures is of great importance in the course of justice.

8- It has also been shown that the invalidation of criminal procedures is a guarantee of protecting the rights of individuals and society.

9- It has been shown through this study that the flawed legal procedure must be invalidated if it relates to public order.

10- The study also clarified that it is permissible to explicitly or implicitly waive the invalidity of the criminal procedure to the individual with an interest in it, and this does not extend to the rest of the accused.

11- It has also become clear that the relative invalidity that relates to individuals must be raised in the early stages of the lawsuit and it is not permissible to adhere to it when making a distinction for the first time.

12- The procedural work is one of the important works as it is a legal work in determining the validity of the procedure or not, and this is what this study reached.

13- This study has made clear that the criminal procedure is considered the basic determinant of the validity of the criminal case proceeding from the notification until its expiration and implementation.

Second: Recommendations

1-The study recommends activating penalties for invalidation of criminal procedures in Iraqi law.

2- Due to the great importance of the issue of invalidation in criminal procedures, the study recommends specifying the basic rules related to the invalidation of criminal procedures through legal texts in the Iraqi Code of Criminal Procedure and under specific sections that begin with news and end with implementation, provided that they meet all procedural legal rules.

3- The study recommends that everyone with an interest should be made aware of the invalidity of the flawed criminal procedure by the investigator or the court in the initial stages of the case so that he can retain his right upon cassation.

4- The study also recommends activating the theory of invalidity in Iraqi law and specifying this in its own legal texts that indicate cases of invalidity of criminal procedures.

5- Since procedural work is the basis for achieving the course of justice in a criminal case to guarantee the rights of the individual, society, and the public interest, the study recommends that this must be specified in special texts.

6-The study recommends that the Iraqi legislator clarify the procedural work with legislation that exclusively concerns it in the Iraqi Code of Criminal Procedure.

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