

The Legal Presence of the Accused in the Provisions of Iraqi Law (A comparative study)

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ABSTRACT

While the Iraqi Code of Criminal Procedure No. 23 of 1971, as amended, seeks, in line with comparative laws, to provide sufficient guarantees for the accused and protect his rights during the investigation and trial phases leading up to the issuance of a judicial ruling, it also strives to expedite the trial and prevent the disruption of the trial process due to the absence or evasion of the accused from attending trial sessions. Thus, the concept of constructive presence emerged to achieve this balance between the guarantees of the accused and the speed in resolving criminal cases and preventing their delay. This raises the question of the Iraqi legislator's position on the concept of constructive presence and its applications compared to comparative legislations that have adopted this concept. This is what the researcher attempts to answer in this study.

Keywords: Legal presence, plea of invalidity of criminal proceedings, Iraqi criminal law, Article 151 of Law No. 23 of 1971 as amended.

Introduction

The presence of the accused in trial proceedings is mandatory whenever the trial is in person and in accordance with the Iraqi Code of Criminal Procedure No. 23 of 1971 as amended. Through examining the provisions of the Iraqi Code of Criminal Procedure, we find that it is more restrictive in providing legal guarantees for the accused compared to comparable positive legislations. This restriction and emphasis is further reinforced by what is stated in the Iraqi Constitution, which stipulates that the right to defense is sacred and guaranteed at all stages of investigation and trial.¹⁾To such an extent that the presence of the accused's lawyer in the trial proceedings does not negate the accused's presence, so that he may defend himself alongside his lawyer's defense as well. In the event of his inability to attend, he must present a legitimate excuse through his lawyer or one of his relatives, submitting this excuse in writing. If the court accepts it, it sets another date for the trial and notifies the accused, the concerned parties, and the witnesses.²⁾However, if the court is not convinced by the excuse, it decides to consider the trial as being in absentia for the accused, so that he may, if he observes the time limit for objecting to the judgment in absentia, defend himself.³⁾These guarantees, enshrined in law and subsequently in the Iraqi Constitution, indicate the importance of the accused's presence during trial proceedings. However, for practical reasons, the legislator is lenient regarding the accused's absence from trial proceedings, allowing the court to proceed with the trial despite the accused's absence, ultimately leading to the pronouncement of the verdict. This is done to prevent delays in the proceedings, and is known as the presumed presence of the accused. The Iraqi legislator regulated this in Article 151 of the Code of Criminal Procedure No. 23 of 1971, as amended.

First: The importance of the study:The motive behind considering the accused present despite his absence, and conducting a trial in his presence, is to prevent procrastination in considering the case and to reduce the disadvantages of objecting to the judgment in absentia. These are practical considerations adopted by comparative positive legislations, including Iraqi legislation, although the positions of those legislations varied between those who expanded its scope at the expense of the guarantees of the accused, and those who narrowed it until its meaning approached the actual presence of the accused, as is the case with the Iraqi legislator. This should be studied and placed in the balance of scientific research, and its practical advantage and the gaps that affect it should be examined.

Second: The aim of the study:The study aims to shed light on the concept and provisions of constructive presence in Iraqi legislation, as well as its applications, not to mention the effects resulting from violating its provisions. Through comparison with other positive legislations, we can identify gaps in the regulation of constructive presence as well as its advantages in Iraqi law.

Third: The problem addressed in the study:The problem addressed in this study is as follows:

1-Legal literature concerned with criminal procedures used to use the term "procedural penalty" for judgments of presumed attendance as a procedural penalty against the accused for his obstinacy in not attending despite his certain knowledge of

the date of the session. He was absent and did not present his defense and did not attend the stages of the trial when he was able to do so. So his penalty was to be considered as if he were the accused present. Is this the case in the provisions of Iraqi legislation, which has surpassed comparative legislations in its emphasis on the presence of the accused in all stages of the trial and the presence of his lawyer does not suffice in his place, and otherwise the trial is postponed or considered in absentia against him?

2- What is the nature of the legal presence in the provisions of Iraqi law compared to other legislations such as French and Egyptian, what is the legal basis for its adoption by the Iraqi judiciary, and the scope of its applications in Iraqi legislation and comparative legislations?

3- What are the rules that govern the legal presence of the accused, and what is the effect of violating those rules?

Fourth: Study Methodology: In our study, we will adopt the inductive method in the provisions of Iraqi law and the analytical method for the principles that we derive from induction.

Fifth: Study Plan: We will address this topic in three sections. The first will be dedicated to discussing the concept of the defendant's constructive presence. The second will be dedicated to discussing its legal basis and applications. The third and final section will be dedicated to discussing the effects of constructive presence, whether at the level of the rules that govern constructive presence or the effects resulting from violating them. The conclusion will be the end of our journey with the conclusions and recommendations we have reached.

First topic

What is the nature of legal presence?

First requirement: The concept of the defendant's constructive presence

We will dedicate two sections to studying the concept of constructive presence. In the first, we will address the definition of constructive presence, and the second will be a topic for its characteristics.

Section One: Definition of Legal Presence

First: Legal presence (in terms of language):

Presence, linguistically, is the opposite of absence and disappearance; Presence: a noun derived from the verb "to attend" (حضر) and its related nouns "presence" (حضوراً)

and "civilization" (جدارة).⁴⁾In language, consideration refers to something that is not fixed in reality, and is based on assumption and estimation.⁵⁾

As for the word "accused" in the Arabic language: it is a noun derived from the word "accusation," and its origin is from "illusion," as it is said, "I accused so-and-so," meaning I brought the accusation upon him, and "I accused him," meaning I suspected what was attributed to him.⁶⁾

Second: Legal presence, technically speaking:By reviewing most of the legal literature concerned with the Code of Criminal Procedure No. 23 of 1971 as amended, when it deals with the subject of constructive presence, we find that it deals with the rulings without giving it a specific definition. Despite this, and by recalling and remembering the rulings concerned with constructive presence in our minds, we can define it as: (Granting the description of presence to the criminal procedures of the defendant who is absent without a legitimate excuse after he has presented his defense before the court and before the pronouncement of the judgment and the legal effects that result from this in the cases specified by the legislator).

While comparative legal literature defined it as: (In reality, it is a default judgment, but the law wanted to mitigate the defects and disadvantages of default judgments, such as prolonging the dispute and opening the door to appeal by opposition, so it established an independent system called the constructive judgment in person or the default judgment, which is similar to the judgment in person. It is neither a purely in-person judgment nor a default judgment in the true sense of the word, but rather it takes from this and subtracts from that to settle on a specific concept of its own)⁷⁾.

Or it is: (It is a ruling issued in the absence of the accused or the opponent, but it is considered to be in his presence, i.e., it is considered as if it had been issued in his face.)⁸⁾

Thus, while we find that the concept of constructive presence does not require the defendant's defense, we find it to be an element that the Iraqi judiciary cannot ignore, otherwise the invalidity of its procedures will be in sight.

Branch Two: Characteristics of nominal presence

The legal requirement of the defendant's presence as a legal procedure has a set of characteristics that can be summarized as follows:

1-Legal attendance is an exceptional measure from the general rule, therefore it is not permissible to expand its interpretation or to use it as a basis for analogy:The principle of a trial is that it should be in person, and this is perhaps one of the most necessary rules for achieving a fair trial. The personal appearance of the accused before the court is a right for which the court is obligated to take the necessary steps to inform him, within a sufficient time, of the date and place of the trial, because this presence is in the interest of the accused, which is to allow him to refute the evidence of the prosecution and present his defense.⁹⁾Therefore, the court may not base its ruling on a procedure taken in the absence of the accused and without his knowledge, otherwise it will be invalid.¹⁰⁾This is confirmed by Article 212 of the Iraqi Code of Criminal Procedure, which states: "The court may not base its judgment on evidence that was not presented for discussion or referred to in the session, nor on

a document submitted by one of the litigants without allowing the other litigants to review it. The judge may not rule on the case based on his personal knowledge.” Since the presence of the defendant is the basis of the trial, and the exception is the presumption of presence despite the defendant’s absence, this exception cannot be expanded upon, nor can cases be included by analogy to the case regulated by the legislator in Article 151.¹¹⁾

2- A constructive presence is a non-conclusive legal procedure in a lawsuit: Article (249/C) of the Iraqi Code of Criminal Procedure states: (No appeal by way of cassation is accepted against decisions issued in matters of jurisdiction, preparatory and administrative decisions, and any other decision that is not final in the case, unless it results in preventing the continuation of the case. This excludes decisions of arrest, detention, and release with or without bail.)¹²⁾ Since the procedures for constructive attendance do not have any effect until a judgment is issued in the presence of the absent defendant, the issue of constructive attendance is not raised until that judgment is issued.

3-The concept of "presumed presence" is a procedure used in misdemeanors and violations in comparative legislation, and in all types of crimes under Iraqi law: By reviewing a number of comparative legislations that regulate the provisions of constructive presence, we find that they have limited it to misdemeanor and petty offenses, excluding felonies.¹³⁾ However, the Iraqi legislator, through the text of Article 151 of the Code of Criminal Procedure, has provided an absolute text, and thus it applies to all crimes.¹⁴⁾

However, from a practical standpoint, the application of presumed attendance can only be conceived of in crimes for which attendance may be ordered without detention. As for crimes that require detention, especially crimes punishable by death or life imprisonment, absence can only be conceived of as escape, and the latter has its own specific legal provisions.¹⁵⁾

4- The presence of a judge or judge helps to facilitate judicial procedures and expedite the achievement of justice. Accordingly, the legislator adopted a middle ground between the legal guarantees for the accused and the need to expedite the resolution of the criminal case. Consequently, the constructive presence is a necessity created by the legislator to prevent procrastination and delay, whether in relation to issuing the judgment or in reaching a final and conclusive judgment. Thus, regulating constructive presence in Iraqi law and adopting its narrow scope cannot be considered as a penalty imposed on the accused, but rather as an additional guarantee to expedite the trial proceedings and accelerate the achievement of justice.¹⁶⁾

5-The presumptive presence is a procedural penalty that, in principle, takes place during the trial stage: By referring to the provisions of Article 151 of the Iraqi Code of Criminal Procedure, we cannot say, under this article, that the provisions of constructive presence are a procedural penalty, considering that the aforementioned article guarantees all the guarantees for the accused, and the court cannot resort to it unless the accused presents his defense. Through the practical reality of the Iraqi judiciary, the accused's defense is not presented until the trial is nearing its end and reaches its conclusion, by which time the accused has fulfilled all his legal guarantees.

As for the rest of the comparative legislations, and through reviewing the provisions of constructive presence, which we will address in the second section of this research, we can say that it is indeed a procedural penalty resulting from the accused's deliberate or negligent failure to attend the trial, so he is treated, even if he does not present his defense, as an accused present.¹⁷⁾ Not to mention his deprivation of the right to object to the default judgment in all legislations that adopted the provisions of constructive presence, including the Iraqi one. However, at the level of the latter, it is a matter required by justice, considering that the accused was present throughout the trial sessions until he presented his defense, and nothing remained of them that would violate his legal guarantees, foremost among them his right to defense.

Second requirement

The nature of the defendant's legal presence

Before discussing the nature of constructive presence, we must review the legal texts concerned with presence in general and constructive presence in particular: Article 147 of the Iraqi Code of Criminal Procedure states: (A - The trial of the accused who is present shall be conducted in person, while the trial of the fugitive accused and the accused who is absent without a legitimate excuse despite being notified shall be conducted in absentia. B - If the accused does not appear and has not been notified in person, his trial shall not be conducted until he is notified.)¹⁸⁾

Article 151 of the aforementioned law states: (The accused who is absent after presenting his defense and before the decision is issued, without informing the court of his legitimate excuse, shall be considered as the accused present, and the court may, before issuing the decision, order the arrest of the accused and bring him before it to inform him of it).

From the two texts above, we find that Article 151 came as an exception to the provisions of Article 147, both in terms of effect and nature. How?

While Article 147 stipulates that an unlawful absence results in a trial in absentia for the accused, this is a general ruling restricted by Article 151, which excludes from it the unlawful absence in which the accused has presented his defense. The aforementioned ruling was included by the legislator for practical considerations, given that the accused does not present his defense until the trial is about to end. This is confirmed by the provisions of Article 167 of the Iraqi Code of Criminal Procedure, which states: (The trial begins by calling the accused and the rest of the litigants, then the identity of the accused is recorded, the referral decision is read, and the court hears the testimony of the complainant and the statements of the civil plaintiff, then the witnesses of the prosecution individually, and orders the reading of reports, statements and other documents, then it hears the statement of the accused and the statements and requests of the complainant, the civil plaintiff, the civilly responsible party and the public prosecution.)

Article 181, Paragraph C states: (c) If, after taking the aforementioned measures, the court finds that the evidence warrants suspicion that the accused committed a crime within its jurisdiction, it shall charge him with the appropriate offense, read it to him, explain it, and ask him whether he admits or denies it. If the accused is charged, the

defense stage comes later, as confirmed by Paragraph D of the same article, which states: (If the accused confesses to the charge against him, and the court is convinced of the validity of his confession and that he understands its consequences, it shall hear his defense and issue its judgment in the case without the need for further evidence. However, if he denies the charge, or does not present a defense, or requests to be tried, or the court finds his confession flawed, or that he does not understand its consequences, or that the crime is punishable by death, then he shall be tried for it, and his defense witnesses and the remaining evidence he requested to be heard to refute the charge shall be heard, unless the court finds that his request is impossible to implement or that it is intended to delay the resolution of the case without justification. Misleading the judiciary. Upon completing all of that, it listens to the comments of the opposing parties, the public prosecutor, and the defendant's defense. Then it announces the conclusion of the trial and issues its verdict in the same session or in a session it designates at a near date.

Paragraph (e) of the same article came to confirm that the defendant's defense is the last thing to be heard, stating: (The defendant shall be the last to speak in every judicial investigation or trial)¹⁹⁾.

Therefore, what distinguishes constructive attendance from face-to-face attendance is the stage after recording the defendant's statement and the latter's defense of himself against the evidence presented against him. This stage, according to Article 167, only occurs when the trial is about to end, as we mentioned, and practically and as a general rule, nothing remains except the pronouncement of the verdict. Thus, we see that the nature of constructive attendance is that it is considered to be face-to-face attendance, not absentee attendance.²⁰⁾ Our evidence for this is as follows:

1- In terms of the procedures followed, the accused, according to Article 167 of the Iraqi Code of Criminal Procedure, does not give his statement except after the completion of all criminal procedures and before the charge is brought. This means that the accused has completed his guarantee of hearing the evidence presented against him and giving him the opportunity to defend himself fully, otherwise the judgment is considered to be in absentia against him and not in personam.

2- Article 151 of the Code of Criminal Procedure was introduced to align with the provisions of the Code of Civil Procedure, which serves as the procedural reference in the absence of a text, while taking into account the difference in the nature and character of both laws in terms of guarantees and procedures. Article 55/1 of the Code of Civil Procedure states: "A hearing is considered to be in person if the opponent is present at any session, even if he is absent afterward."

3- The Egyptian Court of Cassation stated in one of its rulings: "If it is established that the trial of the accused before the court of first instance took place in his presence at a specific session in which he presented his defense, and then a decision was issued to postpone the pronouncement of the verdict for the first time in his presence, then the verdict issued in the case shall be in his presence even if the accused did not attend the session in which it was pronounced."²¹⁾

These pieces of evidence confirm the in-person nature of the defendant's constructive presence in Iraqi law. As for comparative positive legislation, especially French and

Egyptian, the absentee nature of constructive presence is prominent, particularly with regard to cases that have broadened the applications of constructive presence.²²⁾.

Second topic

The legal basis for the presumed presence of the accused and its applications

The judiciary cannot resort to the provisions of constructive presence unless it finds a legal basis that allows it to deviate from the general principle, which is the presence of the accused at all trial sessions. Otherwise, the trial is conducted in absentia against him. Since the legal text is the basis for applying the provisions of constructive presence, the latter in its applications differs according to the position of the legislator and his legislative policy. This will become clear when we address the applications of constructive presence in the second section, after we have devoted the first to talking about its legal basis.

First requirement

The legal basis for the defendant's presumed presence

By referring to the legal basis for constructive presence in the Iraqi Code of Criminal Procedure, we find that Article 151 of the law is the only article that regulates the constructive presence of the accused and the effect resulting from it, with its text: (The accused who is absent after presenting his defense and before the decision is issued, without informing the court of his legitimate excuse, is considered as the accused present, and before issuing the decision, it may order the arrest of the accused and bring him before it to inform him of it.)

The Iraqi Court of Cassation confirmed this in one of its rulings by stating: (If the accused fails to appear after the Public Prosecution has submitted its arguments in the case, the trial being conducted against him is considered to be in his presence and not in absentia...)²³⁾.

The determining factor in describing a judgment as being in the presence or absence of the parties is the reality of the facts, not the characterization given by the court. The determining factor in describing a judgment as being in the presence of the parties is the court sessions and the extent of the parties' attendance or absence, not what the court attributes to that judgment. The trial court cannot, by interpretation, bestow the characterization of a judgment in the presence of the parties on a decision it issued without any of the parties attending any of the trial sessions, or vice versa. What is relied upon in this regard is what is established in the minutes of the trial sessions in the case. The court's description of a judgment in absentia as being in the presence of the parties, contrary to what is established in the session minutes, does not make it a judgment in the presence of the parties. Therefore, it remains subject to appeal by way

of objection to the judgment in absentia, despite its description as being in the presence of the parties.²⁴⁾

As for comparative legislation, at the level of French legislation, it was regulated by the provisions of Articles 410, 557, and 560 of the Code of Criminal Procedure.²⁵⁾ While its provisions have been adopted by a number of Arab countries, for example, Egypt under Articles 238, 239, and 240 of the Code of Criminal Procedure⁽²⁶⁾ Jordan, in Article 170 of the Criminal Procedure Code⁽²⁷⁾ The United Arab Emirates, in Article 189 of the Criminal Procedure Code⁽²⁸⁾ Algeria, according to Article 345 of the Code of Criminal Procedure⁽²⁹⁾.

According to the French Court of Cassation, when discussing the position of the European Convention on Human Rights regarding the provisions of constructive presence in relation to French procedural law, and within the framework of discussing the provisions of Article 410 thereof, which can be said to have embodied the broadest scope of applications of constructive presence, the Court says: (Article 410 of the Code of Procedure does not conflict with Article 6 of the European Convention on Human Rights, as the accused who is legally required to appear in person, if he does not appear and does not present an acceptable excuse, shall be judged in his presence)³⁰⁾.

Referring to Article 6 of the European Convention on Human Rights, we find that it states: (1- Everyone, in the determination of his civil rights and obligations, or of a criminal charge against him, has the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal constituted in accordance with law. The judgment shall be rendered in public. Journalists and the public may be barred from attending all or some of the hearings as required by public order, morals, or national security in a democratic society, or where the interests of minors or the protection of the private lives of the parties so require, and also if the court deems it absolutely necessary in special circumstances where publicity would be detrimental to justice.

2- Every person accused of a crime is presumed innocent until proven guilty according to the law.

3- Every person accused of a crime has the following rights as a minimum:

A-(b) To inform him immediately, in a language he understands, and in detail, of the nature and cause of the charge against him. (c) To grant him sufficient time and appropriate facilities to prepare his defense. (d) To present his defense himself, or with the assistance of a lawyer of his own choosing, and if he does not have sufficient means to pay for such legal assistance, it must be provided to him free of charge whenever justice so requires. (d) To direct questions to the prosecution witnesses, and to enable him to call defense witnesses and direct questions to them under the same rules as to the prosecution witnesses. (e) To be assisted by an interpreter free of charge if he does not understand or speak the language used in the court.³¹⁾

Article 6 of the aforementioned European Convention corresponds to the provisions of Article 14 of the International Covenant on Civil and Political Rights, which states: (1. All persons are equal before the courts and tribunals. Everyone is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by

law in the determination of any criminal charge against him or of his rights and obligations in a civil suit. The press and the public may be excluded from all or part of the proceedings for reasons of public morals, public order, or national security in a democratic society, or for the requirements of the privacy of the parties to the proceedings, or to the minimum extent necessary by the court when publicity would prejudice the interests of justice. However, any judgment in a criminal case or in a civil suit shall be rendered in public, unless the case concerns minors whose interests require otherwise, or the proceedings concern disputes between spouses or the custody of children.)

2. Every person accused of committing a crime has the right to be considered innocent until proven guilty according to law.

3. Everyone accused of a crime is entitled, during the proceedings of his or her case, to the following minimum guarantees on an equal footing:

(a)(a) To be informed promptly and in detail, and in a language he understands, of the nature and grounds for the charge against him; (b) To be given sufficient time and facilities to prepare his defense and to contact a lawyer of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence and to defend himself in person or through a lawyer of his own choosing, and to be informed of his right to have someone to defend him if he does not have someone to defend him, and to be provided by the court, whenever the interests of justice so require, with a lawyer to defend him, without charging him for this if he does not have sufficient means to pay for it; (e) To examine the witnesses of the prosecution, himself or through another, and to obtain permission to call witnesses for the defense under the same conditions as those applicable in the case of witnesses of the prosecution; (f) To be provided free of charge with an interpreter if he does not understand or speak the language used in the court; (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juveniles, care should be taken to ensure that the procedures are appropriate to their age and conducive to the need to work on their rehabilitation.

5. Everyone convicted of a crime has the right, in accordance with the law, to appeal to a higher court to have his conviction and sentence reviewed.

6. When a person has been convicted of a crime by a final judgment, and then this judgment is overturned or a special pardon is granted on the basis of a new fact or a newly discovered fact that provides conclusive evidence of a judicial error, the person who was punished as a result of that conviction must be compensated, in accordance with the law, unless it is proven that he bears, wholly or partially, the responsibility for not disclosing the unknown fact in a timely manner.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and criminal procedure of each country.³²⁾

Second requirement

Applications for the defendant's presumed presence

If we were to compare the position of the Iraqi legislator in the Code of Criminal Procedure No. 23 of 1971, as amended, with a number of comparative legislations, we

would find beyond any doubt that the Iraqi has narrowed the scope of applications of the presumed presence of the accused to such an extent that we cannot say that it is a penalty for failure to appear, as described in the relevant legal literature when studying the provisions of presumed presence in other comparative positive legislations such as the French and Egyptian ⁽³³⁾Rather, it is a factor – according to the researcher – that expedites the course of the trial, leading to the issuance of the verdict and the achievement of justice, so that the trial does not remain captive to postponements due to the defendant’s failure to attend and prevent the issuance of the verdict after the evidence has been proven. This will be confirmed for us through reviewing the applications of constructive attendance, whether at the level of those who expanded its scope, or those who moderated its organization, and finally those who narrowed it.

First branch: Expanding the applications of virtual attendance

In this case, we find that the comparative legislator, as is the case with the French and Egyptian, has acted arbitrarily to the point where it can be said that it affects an important guarantee of the accused, which is the accused's presence before the court to be informed of the facts and evidence attributed to him so that he can then defend himself. It can also be said that this case is indeed a procedural penalty against defendants who fail to appear, and this case includes three forms which we will present in succession:

First: The accused failed to appear if he was personally served with the summons:In this case, the accused must have been personally served with the summons and the service must have been valid, and he must have failed to appear without a legitimate excuse. If this is the case, the court will treat him as if he were present.³⁴⁾This is confirmed by Article 410 of the French Code of Criminal Procedure.³⁵⁾Article 238 of the Egyptian Code of Criminal Procedure states: “If the party summoned to appear according to the law does not appear on the day specified in the summons and does not send a representative in cases where this is permissible, judgment may be rendered in his absence after reviewing the documents, unless the summons was delivered to him personally and the court finds that there is no justification for his absence, in which case the judgment shall be considered as if he were present...” Article 345 of the Algerian Code of Criminal Procedure states: “The accused who is personally notified of the summons must appear unless he presents to the court before which he is summoned an excuse that it deems acceptable. Otherwise, the trial of the accused who is personally notified of the summons and who fails to appear without presenting an acceptable excuse shall be considered as if he were present.”

It is clear from the foregoing that if the aforementioned conditions are met in this case, a judgment in absentia shall be issued against the absent defendant by force of law without any discretionary power of the court in this matter.³⁶⁾

Second: The accused failed to appear despite having certain knowledge of the summons:In this case, the French legislator is unique in regulating it, and according to it, in the event of the deliberate absence of the accused, if it is proven that he had certain knowledge of the date of the session through his being summoned and notified

by the summons paper in accordance with the methods of notification specified in Articles 557, 558, 560 of the French Code of Criminal Procedure, a judgment in absentia shall be issued against the accused after the conditions that must be observed in this case have been met, including the failure to provide an acceptable excuse for his absence.³⁷⁾

Third: The accused failed to appear despite being notified again at his residence: This situation was regulated by the Egyptian legislator in Article 238, in its second section, which states: (... The court may, instead of ruling in absentia, postpone the case to a subsequent session and order the re-notification of the opponent at his residence, with the warning that if he fails to attend this session, the ruling issued against him shall be considered to be in his presence. If he does not attend and it becomes clear to the court that there is no justification for his absence, the ruling shall be considered to be in his presence.)

In this case, the notification must have been properly served on the accused. This article does not stipulate that the accused be notified personally; it is sufficient that the notification be made at the accused's residence. If the accused does not appear on the day specified for the session, the court has the discretion to decide whether to try him in absentia or postpone the case to a later session and decide to re-notify the accused at his residence, warning him that if he fails to appear at the specified session, the judgment issued against him will be a judgment in his presence. Consequently, if he does not actually appear and the court finds that there is no justification for his absence, the judgment issued will be a judgment in his presence, bearing in mind that as soon as the conditions mentioned in the aforementioned article are met, the judgment is considered a judgment in his presence by force of law.³⁸⁾

Section Two: Moderation in the Applications of Legal Presence

In this case, it can be said that it is more moderate than the previous cases, and in this case, two images appear. The first is when the accused attends one of the trial sessions and then withdraws from it or attends one session and is absent from the other sessions. The second image is represented by the multiplicity of accused persons and the attendance of some of them and the absence of others.

First: The accused attends the session and withdraws from it, or attends one session but not the sessions that follow: This is what the Egyptian law stipulated in Article 239 of the Criminal Procedure Code, which states: "The judgment is considered to be in the presence of any of the litigants who attends when the case is called, even if he leaves the session afterward or fails to attend the sessions to which the case is adjourned without providing an acceptable excuse." Likewise, the Jordanian law in Article 170 of the Jordanian Criminal Procedure Code states: "If the plaintiff in the personal right or the suspect attends and then withdraws from it for any reason whatsoever, or if he is absent from the trial after attending one of its sessions, the trial is considered to be in his presence, and the appeal period begins from the date he is notified of the judgment in accordance with the provisions of the applicable Civil Procedure Code."

In this case, the accused has been properly notified to appear before the court, and he appeared at the scheduled hearing, then was absent afterward, either during the same

hearing or after attending the entire hearing and then being absent from subsequent hearings. The rationale behind this is the legislator's presumption that the accused has certain knowledge of the hearing date set by the court. However, it should be noted that if the accused's withdrawal from the trial after attending the hearing is due to a legitimate excuse, then the case should be postponed to a later hearing. Otherwise, the judgment should be issued in his absence, as long as there is a legitimate excuse for the withdrawal, considering that the legitimacy of the absence is not consistent with the penalty prescribed by the legislator for the absent accused. This is with regard to absence during the same hearing.³⁹⁾

In the second case, i.e., absence from subsequent sessions, the principle is that he is presumed to know the date of the subsequent session, and he is therefore obligated to attend the subsequent session as long as the trial sessions are consecutive. Thus, in both cases, if its conditions are met, the judgment is a judgment in absentia by force of law.⁴⁰⁾

Second: The number of defendants, some of whom were present while others were absent: Article 240 of the Egyptian Criminal Procedure Code states: (If a lawsuit is filed against several persons for a single incident, and some of them attend while others fail to appear despite being summoned according to the law, the court shall postpone the case to a subsequent session and order that those who failed to appear be re-notified at their residence, with the warning that if they fail to appear at this session, the judgment issued shall be considered to be in their presence. If they do not appear and it becomes clear to the court that there is no justification for their absence, the judgment shall be considered to be in their presence with respect to them).

The same applies to the Criminal Procedure Law in the United Arab Emirates, in Article 189, Section Two, which states: (... If a lawsuit is filed against several persons for a single incident, and some of them appeared before the court while others did not, the court must postpone the hearing of the case to a subsequent session to re-notify those who did not appear, and the judgment in the case shall be considered to be in the presence of all of them.)

Based on an examination of the provisions of the aforementioned articles and in accordance with this case, the following conditions must be met in order for a judgment to be issued against the absent defendant in absentia⁽⁴¹⁾:

- 1- That there are multiple defendants in a single incident, whether they are defendants or civil officials.
- 2- To prove that their attendance was a valid assignment.
- 3- Some of them attend, while others stay away.
- 4- The court may postpone the hearing to a later session and order that those who failed to attend be notified again, and warn them that if they fail to attend a second time, the judgment issued in their absence will be considered as if it were in their presence. According to the text, the court is legally obligated to postpone the case and re-notify them, and the court has no discretionary power in this matter.
- 5- Does the absent defendant not provide an acceptable excuse justifying his absence?

According to some legal scholars, the wisdom behind regulating this situation, whereby the case is postponed and the remaining defendants are notified and subsequently considered – after the conditions are met – as being present by default, is to avoid conflicting default judgments that are subject to appeal by way of objection to the default judgment. This is because, in the event that the case is not postponed and the absent defendants are notified again, the court is obligated to issue judgments in the presence of the defendants present, and in absentia judgments against the remaining absent defendants. Consequently, the methods of appeal differ between the two categories: between those who enjoy the right to appeal by way of objection as being absent and those who are deprived of it as being present. Therefore, it is more appropriate, according to the legislator, to consider all of them as being present in reality and by default as a penalty for the absence of some defendants and not others in the same incident for which a criminal case was filed.⁴²⁾

Third branch: Restrictions in applications of constructive presence

In this case, Iraqi law is the best representative of it, as stated in Article 151 of the Code of Criminal Procedure No. 23 of 1971, as amended. This is the only case that was mentioned for constructive presence in Iraqi law, and according to it, the legislator considered the absent defendant to be as present when he was absent from attending the trial sessions, when: (1) he presents his defense and before the decision is issued in the case, (2) he does not have any legitimate excuse for his absence.

But in this regard, the following question arises: What is the ruling if the accused presents his defense but does not finish it, and the trial session is postponed to another date, and the accused fails to attend? Does the provision of Article 151 apply to him, so that he is treated as a defendant who is present by default, or is he treated as an absent defendant? In our opinion, and through the wording of the provisions of Article 151, the legislator requires the completion of the defense in order for the provisions of presence by default to apply to him, and our evidence for this is that the legislator, in the wording of Article 151, stated: (The accused who is absent after presenting his defense... is considered as a defendant who is present), and his use of the phrase “after presenting the defense” indicates the completion and the transition to the stage after presenting the defense.

Third topic

Effects of the defendant's legal presence

The importance of the legal presence as a procedure regulated by the Iraqi legislator is highlighted by the effects resulting from it, whether with regard to the effects related to the criminal court and its parties, or those related to the criminal procedures and their validity, which we will address in this section in turn.

First requirement

Effects of constructive presence on the trial court and the accused

Section One: Effects of constructive presence with respect to the court

By examining the provisions of Article 151 of the Code of Criminal Procedure, we find that it mandates that an absent defendant who has presented his defense without informing the court of his legitimate excuse for absence be considered as if he were present. Thus, the text does not leave the discretionary power to the court to confer the status of constructive presence on the defendant according to the circumstances of each case. Rather, as soon as the conditions stipulated in the aforementioned Article 151 are met, the defendant's position is – by law – that of a present defendant. This is the first effect. As for the second effect, it is represented by proceeding with the trial and not stopping or postponing the case, and when the judgment is issued, it is considered to be in the presence of the defendant. Finally, the third effect, which is permissible for the court, is represented by granting the court discretionary power to issue an order to arrest the defendant and bring him before it to inform him of the judgment decision, after it has been pronounced.

Section Two: Effects of constructive presence on the accused

The accused enjoys a significant legal position in criminal proceedings, and many of these proceedings are designed to protect them. Several constitutional and legal provisions affirm this protection, in addition to those emphasized by human rights conventions, which guarantee the right to a fair trial with all the necessary safeguards for the accused.⁴³ We find that it emphasizes that it should be quick so that the accused is not under the sway of accusation and investigation for a long period of time.⁴⁴ By reviewing the provisions of the Iraqi Code of Criminal Procedure, we find that it best embodies this relationship between the guarantee of the accused and the speed of the trial proceedings leading to the pronouncement of the verdict. Therefore, there is nothing in the provisions of Article 151 that materially affects the rights of the accused, after the aforementioned article stipulated that the accused must have presented his defense before the court in order for the accused to be satisfied with his guarantees. It should be noted that giving the description of presence to the absent accused does not affect the position of the rest of the absent or fugitive accused who are not covered by the provisions of Article 151 of the Code of Criminal Procedure, and therefore they enjoy the right to object to the default judgment as one of the means of appeal.⁴⁵ Unlike the person who meets the conditions and provisions of Article 151, he is treated as the defendant present in all proceedings of the case, and if he objects to the default judgment, his appeal will be dismissed.

Second requirement

The effects of constructive presence on the validity of criminal proceedings

It is known that the penalty is an important and undeniable effect when a legal rule is violated, whatever its subject matter and its position within the legal system in general. Therefore, it is important to ask about the effect that may result if the procedures stipulated in Article 151 of the Code of Criminal Procedure are not observed. If invalidity is that desired effect, then what is the concept and scope of that invalidity, and what is the position of the Iraqi legislator regarding it?

First branch: The concept of invalidity

Invalidity is defined as: a procedural penalty applied to a procedural act that violates certain procedural rules, thus producing its legal effects.⁴⁶⁾

It is: (a procedural penalty that applies to a procedural act that violates some procedural rules, resulting in the loss of its legal effects)⁴⁷⁾.

It is: (a legal description attached to a procedural act if it deviates from the prescribed legal pattern, such that it is not suitable to produce the effects that the law would impose on it if its elements were complete)⁴⁸⁾.

It is: (The procedural penalty that aims to deprive the essential act of its effectiveness in producing its legal effects, due to its violation of its substantive and formal legal provisions)⁴⁹⁾.

And other definitions, although their wording differs, refer to the same content. Through reviewing a number of positive procedural laws, we find that they are influenced by one of two doctrines: the first, known as the doctrine of legal nullity (i.e., no nullity without a legal text), which establishes nullity only according to the circumstances stipulated by law.⁵⁰⁾ The second doctrine is known as the doctrine of inherent nullity, according to which nullity results from a procedural act when it violates a fundamental rule, without specifying particular cases, but rather leaving it to the discretionary power of the court to determine which are fundamental and consequently result in nullity.⁵¹⁾

Thus, each of these two doctrines has its own distinguishing features. At the level of legal invalidity, despite its clarity, ease of reference, and exclusion of the court's discretionary power, given that it explicitly regulates invalidity and indicates the penalty resulting from the violation, it is criticized that no matter how knowledgeable and astute the legislator may be, he cannot enumerate all the important cases that necessitate invalidity, which leads the judge to refrain from imposing invalidity even if its reasons are available for a case not stipulated by the legislator.⁵²⁾

As for the doctrine of self-nullity, despite its advantages that allow for avoiding the criticisms leveled against the aforementioned legal nullity, given the discretionary power granted to the judge to determine the extent of the substantiveness of the procedural rule that was violated and thus imposes nullity on the violation of the substantive ones but not the others, this discretionary power itself has not escaped criticism in the case of its misuse by the judge, not to mention the absence of the standard by which it is determined whether the violated procedural rule is substantive or not.⁵³⁾

The latter criticism prompted some legal scholars to find that criterion by which the essentiality of the procedural rule is determined, such as the criterion of public interest. This is a criterion that can be used to distinguish the essential procedural rule from the non-essential one, although this criterion is also not without ambiguity, and the question arises as to which is concerned with the public interest and which is not.⁵⁴⁾

Therefore, based on what has been presented, we must ask ourselves: what is the position of the Iraqi legislator regarding the theory of invalidity in general?

Section Two: Provisions for Pleading Invalidity in Iraqi Law

The plea of invalidity or its automatic raising by the court with regard to the procedures of constructive attendance requires a review of those procedures which, if observed, would result in invalidity. By referring to the procedures of constructive attendance, there is no need to emphasize the brevity of the provisions of this article in a manner inconsistent with the rules of constructive attendance. Nevertheless, the procedures that should be observed are the same as those concerned with the face-to-face trial.⁵⁵⁾ As for nullity, and through reviewing the provisions of the Code of Criminal Procedure, we find that the legislator did not explicitly regulate nullity as a penalty resulting from violating the rules of that law, thus leaving the provisions of nullity to general principles and to the discretionary power of the judge, meaning that he adopted the concept of inherent nullity.⁵⁶⁾ A review of the general principles of the Code of Criminal Procedure and the provisions of Article 249 of the Code of Criminal Procedure, which stipulates: (a) The Public Prosecutor, the accused, the complainant, the civil claimant, and the civilly liable party may appeal to the Court of Cassation against judgments, decisions, and measures issued by the Misdemeanor Court or the Felony Court in a misdemeanor or felony case if they were based on a violation of the law, an error in its application or interpretation, or if a fundamental error occurred in the procedural steps, the assessment of evidence, or the determination of the penalty, and the error affected the judgment. (b) An error in procedures shall not be considered if it is not detrimental to the defense of the accused.

(c) Appeals are not admissible individually against decisions issued in matters of jurisdiction, preparatory and administrative decisions, and any other decision that is not final in the case, unless it results in preventing the continuation of the case. This excludes decisions of arrest, detention, and release on bail or without bail. Thus, we find that the Iraqi legislator's criterion for determining invalidity is that it pertains to a fundamental error in procedural rules, in the assessment of evidence, or in the determination of the penalty, and that the error affected the judgment and harmed the defendant's right to defense.⁵⁷⁾ The judicial body concerned with considering the appeal against the invalidity is the Court of Cassation, and the Court of Appeal in its capacity as an appellate body with respect to the decisions of the misdemeanor court. As for the cases in which invalidity is raised, they are as we mentioned in one of the two cases:

First: The plea of invalidity before the Court of Cassation or the Court of Appeal in its capacity as a court of cassation: The parties to the criminal case, in accordance with the provisions of Article 249/A of the Code of Criminal Procedure, are the Public Prosecutor, the complainant, the civil claimant, the accused, and the civilly liable party.⁵⁸⁾ The legally specified time limits for appeals must be observed, which are 30 days starting from the day following the taking of the action, decision or judgment; otherwise, the appeal will be rejected on procedural grounds.⁵⁹⁾

Second: Automatic review by the Court of Cassation or the Court of Appeal in its capacity as a court of cassation: The law, under Article 265/B, permits the Court of Cassation to request any criminal case to scrutinize and review the decisions or procedures issued therein, and it may then issue the cassation decisions it is

authorized to make, as stated in its text: (In addition to the provisions of paragraph A of Article 265, the Criminal Court may bring any case mentioned in the aforementioned paragraph or any investigation report in a crime in accordance with the provisions stipulated in Article 264). In the event that it is proven to the court that there is a fundamental violation of a procedural rule related to considering the absent defendant as present, the judgment or decision issued in the case shall be overturned and the case returned to its court for reconsideration of the case.⁶⁰

Conclusion

Through the study, we arrived at a set of conclusions and a number of proposals regarding the provisions of Article 151, as well as recommendations related to the application of the provisions of this article, as follows:

First: Conclusions:

1-What distinguishes the concept of constructive presence in Iraqi legislation from other legislations is the narrowing of its scope with regard to the guarantees of the accused by requiring the accused to present his defense in order to be covered by the provisions of constructive presence. Otherwise, the trial is considered in absentia for the absent accused. However, it has broadened its scope with regard to the crimes for which constructive presence may be applied. Through the text of Article 151 of the Code of Criminal Procedure, we find that the text is absolute and thus applies to all crimes (felonies, misdemeanors, and violations). Despite this, from a practical standpoint, it is not conceivable to apply constructive presence except to crimes for which it is permissible to summon the accused without detention. As for crimes that require detention, especially crimes punishable by death or life imprisonment, absence can only be conceived as flight, and the latter has its own specific legal provisions. As for comparative legislations, the applications of constructive presence are limited to misdemeanor and violation crimes.

2-The presumed presence is an exceptional procedure from the general rule, so it is not permissible to expand its interpretation or to make analogies to it: The principle in the trial is that it be in person, and it is perhaps one of the most necessary rules towards achieving a fair trial. Since the trial is about presence, and the exception is the presumption of presence despite the absence of the accused, this exception cannot be expanded upon, nor can cases be included by analogy to the case regulated by the legislator in Article 151.

3-The constructive presence is a non-decisive judicial procedure in the case, and according to Article 249, Paragraph C of the Iraqi Code of Criminal Procedure, it is not permissible to appeal this procedure individually unless a final judgment is issued against the accused, at which point the issue of the extent to which the court has observed the conditions and provisions of constructive presence is raised.

4-While comparative legal literature confirms that presumptive attendance is a procedural penalty for an accused person who deliberately fails to attend trial sessions, according to the researcher, it is a factor in facilitating judicial procedures and expediting the achievement of justice in the provisions of Iraqi law. Presumptive

attendance cannot be described as a penalty because the accused has fulfilled all his legal guarantees that he can obtain during the trial.

5-What distinguishes constructive attendance from face-to-face attendance in the provisions of Iraqi law is the stage after recording the statement of the accused and the latter's defense of himself in the face of the evidence presented against him. According to Article 167, this stage only occurs when the trial is about to end and nothing remains of it practically and as a general rule except the pronouncement of the verdict. Thus, we see that the nature of constructive attendance is that it is a face-to-face attendance, not an absence-to-face attendance, while through the provisions of constructive attendance in comparative legislations, especially those that expand its applications, its nature is absentee.

6-The Iraqi judiciary finds its answer in applying the provisions of constructive presence in Article 151 of the Code of Criminal Procedure, which states: "The accused who is absent after presenting his defense and before the decision is issued, without informing the court of his legitimate excuse, shall be considered as the accused present, and the court, before issuing the decision, may order the arrest of the accused and bring him before it to inform him of it."

7-The key to describing a judgment as being in the presence or absence of the parties is the reality of the facts, not what the court states as a characteristic. The key to describing the presence of the parties in a judgment is related to the trial sessions and the extent of the presence or absence of the parties, and not what the court attributes to that judgment as being in the presence or absence. The court of first instance cannot make an effort and attribute the characteristic of a judgment in the presence of the parties to a decision it issued without one of the parties attending any of the trial sessions, or vice versa.

8-The Iraqi legislator authorized the court, if the conditions of Article 151 of the Code of Criminal Procedure concerning constructive attendance are met, to issue an arrest warrant for the accused and bring him before it to inform him of the verdict after it has been pronounced.

9-Nullity is the procedural penalty that is relied upon in the court's violation of the conditions and provisions of constructive attendance. Although the Iraqi legislator did not explicitly adopt the provisions of nullity in the Code of Criminal Procedure, by referring to the general principles and extrapolating the provisions of the aforementioned law, we find that the legislator has adopted the doctrine of inherent nullity and has adopted the criterion of breach of the essential procedures affecting the issuance of the judicial ruling and the defendant's defense in determining what is subject to nullity and what is not, which is what was confirmed by Article 249 of the aforementioned law.

Second: Proposals:

1-As it has been said that the best of things is the middle way. While we do not encourage adopting what expands the scope of the provisions of constructive presence to the extent that it negatively affects the guarantees of the accused, nor do we support restricting its application to the point that it suggests the concept of the actual presence of the accused and its benefit is negated and its use is reduced, and

accordingly we propose amending Article 151 of the Code of Criminal Procedure to add to it the case of the accused's attendance at trial sessions and his absence from the rest of the sessions or in the same session if the accused has presented his defense during the investigation stage and its adoption in the trial and its reading in the trial session.

2-The adoption of the provisions for constructive attendance is a result of the need for it for practical considerations. Thus, another case can be adopted by the Iraqi legislator, which is the multiplicity of defendants, where some appear and others are absent. This results in a discrepancy in the rulings between those who are included in the appeal against the default judgment and those who do not enjoy this right. As a result of these negative effects on achieving justice, we suggest that the Iraqi legislator add this case by amending the provisions of Article 151 of the Code of Criminal Procedure, provided that this case is restricted to the fact that the defendant has given his statement during the investigation stage and has previously presented his defense, so that it is read in the trial session and adopted in the ruling, similar to the provisions that the Iraqi legislator organized regarding testimony in Article 172 of the aforementioned law, which stated: (...the court may decide to read the testimony that was previously given in the record of collecting evidence or during the preliminary investigation or before it or before another criminal court in the same case and consider it as testimony given before it.)

3-Felony crimes require more comprehensive guarantees compared to misdemeanors and violations, and therefore we call on the Iraqi legislator, in line with comparative legislations, to limit the provisions of constructive presence to misdemeanors and violations, excluding felonies.

4-In connection with the above proposals (1, 2, 3), we propose to the Iraqi legislature to amend Article 151 of the Code of Criminal Procedure No. 21 of 1971, as amended, so that this article is worded as follows or similarly:

Article 151 (as proposed): In misdemeanor and petty offenses:

1- The judgment is considered to be in the presence of any of the litigants who attends when the case is called, even if they leave the session afterward or fail to attend the sessions to which the case is adjourned without providing an acceptable excuse.

2- Since the lawsuit was filed against several people for a single incident, and some of them appeared before the court while others did not, the court must postpone the hearing to a later session to re-notify those who did not appear. The judgment in the lawsuit is considered to be in the presence of all of them.

3- The court reads aloud the statements of the accused during the preliminary investigation stage for those who were absent during the trial stage and to whom the provisions of paragraphs (1-2) of this article apply, and considers it as a statement given before it.

Third: Recommendations:

1-We recommend that the Iraqi legislator adopt explicit provisions in the Code of Criminal Procedure for nullity and combine the doctrines of inherent and legal nullity, by avoiding the defects of both and acquiring the advantages they possess.

2-We recommend that the Iraqi judiciary apply the provisions of constructive attendance if the text remains as it is, in order to expedite the course of judicial procedures and to refrain from what many of them have become accustomed to in postponing trial sessions until the accused is present despite having submitted his defense, or forcing him to attend in a way that offends his dignity and infringes upon his freedom, while Article 151 of the Code of Civil Procedure has drawn a clear path for the judiciary to proceed accordingly and to confer the status of presence upon the accused who submitted his defense and was absent from attending the remaining sessions.

Footnotes and References

1))See the text of Article 145 of the Iraqi Code of Criminal Procedure No. 21 of 1971, as amended.

(2)See: the text of Article 146 of the Iraqi Code of Criminal Procedure No. 21 of 1971, as amended.

(3)See: the text of Articles: 243-244-245-246-247-248 of the Iraqi Code of Criminal Procedure No. 21 of 1971, as amended.

(4) Abu al-Fadl Jamal al-Din Muhammad (Ibn Manzur): "Lisan al-Arab", Volume 4, Dar Sader, 2003, p. 196.

5))Abdul Wahid Karam: "Dictionary of Legal Terms", Dar Al-Kutub Al-Qanuniyya, 2013, p. 289.

6))Abu al-Fadl Jamal al-Din Muhammad (Ibn Manzur): "Lisan al-Arab", Volume 1, Dar Sader, 2003, p. 38.

7))Mustafa Muhammad Abdul-Muhsin: "Criminal Judgment: Principles and Assumptions", n.p., Egypt, 2003, p. 367.

8))See: Sameh Fikry Hassan: "The Presence of the Accused Before Criminal Courts," a research paper published at the following link, accessed on 26/8/2018, at 0012 p.:<https://www.mohamah.net/law/>

9))The Supreme Constitutional Court of Egypt states that: "The right to defense is a principle encompassing a set of fundamental guarantees which, in their entirety, ensure a concept of justice that generally conforms to contemporary standards applied in civilized countries." (Supreme Constitutional Court of Egypt ruling of January 14, 2007, in Case No. 124 of the 25th Constitutional Judicial Year, Collection of Constitutional Court Rulings, Part One, p. 149). Regarding the defendant's right to defense, see: Dr. Hassan Sadiq Al-Marsafawi: Guarantees of Trial in Arab Legislations, Institute of Arab Research and Studies, League of Arab States, Cairo, 1973; Dr. Ahmed Fathi Sorour: Constitutional Legitimacy and Human Rights in Criminal Procedures, Dar Al-Nahda Al-Arabiya, Cairo, 1995, p. 39 et seq.

10))See: Jamal Muhammad Mustafa: "Explanation of the Code of Criminal Procedure," Al-Zaman Press, Baghdad, 2005, p. 142 and beyond; Dr. Baraa Munther Kamal Abdul Latif: "Explanation of the Code of Criminal Procedure," Lebanese Foundation for Academic Books,

Beirut, 2014, pp. 320-321; Dr. Abbas Al-Hassani: "Explanation of the New Code of Criminal Procedure," Volume Two, Al-Irshad Press, Baghdad, n.d., p. 150 and beyond.

11))Regarding the interpretation of penal texts, see: Dr. Ali Adel Kashif Al-Ghita and Ghosoun Ali Abdul Zahra: Interpretation of Penal Texts under the Principle of Penal Legality, a research paper published in the Kufa Journal of Legal and Political Sciences, Volume 6, Issue 15, 2013, p. 100 and beyond.

12))One application of the provisions of this article is generally found in the ruling of the Kurdistan Region Court of Cassation, which stated: "Whereas... preparatory decisions do not prevent the continuation of the case, and such decisions are not subject to appeal by way of cassation pursuant to the provisions of paragraph (c) of Article (249) of the Criminal Procedure Code, therefore, the Criminal Court was required to reject the appeal submitted by the aforementioned defendant's lawyer on procedural grounds and not to address the merits of the case." See: Decision 47/Cassation/ issued by the Presidency of the Kurdistan Region Court of Cassation - Criminal Division, dated 19/2/2008, available at the following link:<http://www.iraqld.iq/VerdictsTextResults.aspx>

Similarly, the Federal Court of Appeal of Dhi Qar, acting in its capacity as a court of cassation, stated: "Upon review and deliberation, it was found that the appeal was directed against a preliminary decision that cannot be appealed individually, based on the provisions of Article 249/C of the Code of Criminal Procedure No. 23 of 1971, as amended. Therefore, it was decided to dismiss the appeal on procedural grounds." See: Decision 252/T/H/2012, issued by the Federal Court of Appeal of Dhi Qar, dated May 31, 2012, available at the following link:<http://www.iraqld.iq/VerdictsTextResults.aspx>

13))See: Dr. Nizam Tawfiq Al-Majali: "The rule of personal attendance of the complainant (suspect or accused) for trial proceedings and the effect of his absence on criminal judgments - a comparative study", research published in the Journal of the College of Law/Al-Nahrain University, Volume 12, Issue 8, 2005; Mustafa Muhammad Abdul-Muhsin: previous reference, p. 368.

14))Article 151 states: "The accused who is absent after presenting his defense and before the decision is issued, without informing the court of his legitimate excuse, shall be considered as the accused who is present. The court, before issuing the decision, may order the arrest of the accused and bring him before it to inform him of it." With this text, it did not specify the accused in terms of the seriousness of the crime.

15))Article 99 of the Iraqi Code of Criminal Procedure stipulates: "The accused shall be brought in by issuing an arrest warrant if the crime is punishable by imprisonment for a period exceeding one year, unless the judge deems it appropriate to bring him in by means of a summons. However, it is not permissible to issue a summons if the crime is punishable by death or life imprisonment." By referring to the provisions of Article (147/A) of the same law, which stipulates: "The trial of the accused who is present shall be conducted in his presence, while the trial of the fugitive accused and the accused who is absent without a legitimate excuse, despite being notified, shall be conducted in his absence," we find that it has regulated the provisions for the fugitive accused, and thus he is excluded from the provisions of constructive presence, unless the detained accused fled after the completion of the procedures against him and presented his defense before the court and the conditions of Article 151 apply to him. In the researcher's opinion, he can be included in the provisions of Article 151, that is, he shall be considered as a "constructive" accused, despite the Iraqi legislator's silence on addressing this situation.

16))Regarding the accused's right to a speedy trial in criminal proceedings, see: Dr. Adel Yousef Al-Shukri: "Guarantees of the Accused in a Fair Trial in Light of International Covenants, Instruments, and Declarations Concerning Human Rights: A Comparative Study with the Provisions of International Criminal Law and Criminal Legislation," Zein Legal Publications, Beirut, 1st ed., 2018, p. 452 et seq.; Judge Lafteh Hamel Al-Ajili: "The Right to Speedy Trial in Criminal Procedures," 1st ed., Al-Halabi Legal Publications, Beirut, 2011; Dr. Aqeel Yousef Muqabala: "The Right of the Accused to a Speedy Trial," a paper presented to the Seventh Annual Conference of the Scientific Society of Arab Law Faculties entitled: Facilitating Litigation Procedures in Arab Legislations, Morocco, 2007, p. 110 et seq.; Dr. Fathia Mohammed Fourari: "The Accused's Right to a Trial Within a Reasonable Period - A Comparative Study in the Anglo-American and Latin Systems," a paper published in the Journal of Law, issued by the Scientific Publishing Council of Kuwait University, Issue 3, Year 30, September 2006.

17))Dr. Kamel Al-Saeed: Explanation of the Code of Criminal Procedure - A Comparative Study, Dar Al-Thaqafa, 2001, p. 20.

18))Regarding the provisions of Article 147 of the Iraqi Code of Criminal Procedure, see: Judge Ashti Ahmed Ahmed: "Trial in Absentia in Criminal Cases", a promotion research paper submitted to the Judicial Council in the Kurdistan Region of Iraq, p. 5 and beyond.

19))Among the judicial applications is the ruling issued by the Presidency of the Federal Court of Appeal of Baghdad - Al-Karkh, in its capacity as a court of cassation, which stated: "Upon reviewing the appealed judgment, it was found to be correct but contrary to the law for the following reasons: ... The court did not hear the defendant's final statements, nor did it announce the conclusion of the trial in accordance with paragraphs (d) and (e) of Article (181) of the aforementioned law, and it proceeded to issue the decision without doing so. Therefore, it was decided to overturn the appealed judgment and return the case file to the lower court for a new trial. The decision was issued unanimously." See: Judgment No. (213/212/Misdemeanors/2012), issued on: 09-09-2012, published on the Iraqi Legislation Database website at the following link:

<http://www.iraqlid.iq/VerdictsTextResults.aspx>

20))In contrast to this view, see: Dr. Youssef Mustafa Rasoul: "The Legal Truth and its Applications in the Code of Criminal Procedure - An Analytical Study," a paper presented to the Third International Conference on Legal Issues (ILIC 2018), organized by the College of Law, Ishik University, in Erbil, on 5/10/2018.

21))The Egyptian Court of Cassation, No. 1303 of the 29th year, session of 11/28/1959, and No. 1282 of the 35th year, session of 12/6/1965, mentioned by: Dr. Muawad Abdel-Tawab: Criminal Judgments and Orders, University Press, Cairo, 1988, pp. 17-18.

22))Mustafa Muhammad Abdul-Muhsin: Previous reference, p. 367.

(23)The discriminatory decision No. 1349 / Criminal / 84 / 85 dated 10/3/1986.

(24)Abbas Qasim Mahdi Al-Daouqi: "Judicial Reasoning: Its Concept, Cases, and Scope - A Comparative Study with Islamic Jurisprudence", 1st ed., National Center for Legal Publications, Cairo, 2015, p. 339 and beyond.

(25)("Penal Procédure Code", published on the same site:

http://codes.droit.org/CodV3/procedure_penale.pdf

26))See: Egyptian Criminal Procedure Code No. 150 of 1950 and its amendments, available at the following link:

<https://manshurat.org/node/14676>

27))See: Jordanian Criminal Procedure Law No. 9 of 1961 and its amendments, available at the following link:

<http://www.jiacc.gov.jo/documents/83092324-6665-4984-9c61-0bada77eed4c.pdf>

28))See: UAE Criminal Procedure Law No. 35 of 1992 and its amendments: available at the following link:

<http://www.dji.gov.ae/Lists/DJIBooks/Attachments/38/Egraat%20%20Gazaai.print.pdf>

29))The Algerian Code of Criminal Procedure of 1966 and its amendments are available at the following link:

<https://www.joradp.dz/trv/appenal.pdf>

(30) Cass crim:21 juin 1995. Semaine juridique 1995-2347P cass, crim.10 mail 1995. Semaine juridique 1995-2000.

31))See: University of Minnesota Publications - Human Rights Library: "Convention for the Protection of Human Rights within the Council of Europe, Rome, November 4, 1950," available at the following link:

<http://hrlibrary.umn.edu/arab/euhrcom.html>

32))See: University of Minnesota Publications - Human Rights Library: "The International Covenant on Civil and Political Rights of December 16, 1966, entered into force on March 23, 1976, in accordance with the provisions of Article 49," available at the following link:

<http://hrlibrary.umn.edu/arab/b003.html>

33))Bouzaq Reda: "Guarantees for the accused absent from the trial session in Algerian and comparative legislation," Master's thesis submitted to Larbi Tesbi University, Faculty of Law and Political Science, 2016, p. 24.

34))Dr. Omar Al-Saeed Ramadan: Principles of Criminal Procedure Law: Rules of Trial, 2nd ed., Dar Al-Nahda Al-Arabiya, Cairo, 1984, p. 140.

(35)"Penal Procédure Code" Published on the following page:

http://codes.droit.org/CodV3/procedure_penale.pdf

See also: Jean Pradel: Questions related to the French procédure, please publish on the relevant site:

http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2014/01/garanties_du_prevenu_etude-fr.pdf

36))Dr. Nizam Tawfiq: Previous reference, p. 51.

37))See: Professor John Bradell: "The Rights of the Accused," research published at the following link (accessed on 9/27/2018, at [time]).3:40 PM):

<http://jusoor.org/NewsManager/templates/?a=51&z=10>

38))See: Dr. Ahmed Fathi Sorour: "The Mediator in Criminal Procedure Law", Dar Al-Nahda Al-Arabiya, Cairo, 2016, p. 822 and beyond; Dr. Hassan Sadiq Al-Marsafawi: "Al-Marsafawi in Criminal Procedure Law", Mansha'at Al-Maaref, Alexandria, 2007, p. 714 and beyond; Dr. Fawzia Abdel-Sattar: "Explanation of Criminal Procedure Law", Cairo University Press, University Book, Cairo, 1986, p. 594.

39))Dr. Ramsis Behnam: "Criminal Procedures: Foundations and Analysis", Atlas Press, Cairo, 1984, p. 630.

40))Dr. Nizam Tawfiq Al-Majali: Previous reference, p. 54.

(41)See: Mamoun Salama: "Criminal Procedures in Egyptian Legislation", Cairo University Press, University Book, Cairo, Vol. 2, 1977, p. 167; Dr. Omar Al-Saeed Ramadan: Previous reference, p. 485; Dr. Mahmoud Mahmoud Mustafa: "The Development of the Criminal

Procedure Law in Egypt and Other Arab Countries”, 2nd ed., Cairo University Press, Cairo, 1985, p. 173.

42))See: Dr. Muhammad Zaki Abu Amer: “The Flaw of Error in Criminal Judgment”, University Press, Alexandria, 1985, p. 93 and beyond; Dr. Mahmoud Mahmoud Mustafa: “Explanation of the Criminal Procedure Law”, 12th ed., Cairo University and University Book, Cairo, 1988, p. 491 and beyond.

43))Among those guarantees related to the conduct of the trial are: the presence of the accused, the public nature of the trial, the principle of publicity, the right of the accused to defend himself, and the right to seek the assistance of a lawyer.

See:Dr. Saddam Hussein Yassin Al-Obaidi, Judge Awad Hussein Yassin Al-Obaidi: The Judiciary and its Guarantees for Human Rights in Islamic Law and the Law - An Analytical and Fundamental Study, 1st Edition, Zain Al-Huquqi Publications, Beirut, 2018, p. 265 and beyond;Marzouk Mohamed: "The Right to a Fair Trial," PhD thesis submitted to Abou Bekr Belkhabed University, Tlemcen, Faculty of Law and Political Science, 2016; Gharib Taher: "Guarantees of a Fair Trial in the Code of Criminal Procedure," Bachelor's thesis, submitted to the Faculty of Law and Political Science, Kasdi Merbah University, Ouargla, Algeria, 2014; Nouredine Daoudi: "Guarantees of the Accused During the Trial - A Comparative Study between Islamic Law and the Algerian Code of Criminal Procedure," Master's thesis, submitted to the University of Shahid Hamma Lakhdar, Faculty of Social and Human Sciences, 2015; Chahira Bou Lahia: "Constitutional Guarantees for the Accused During the Trial," PhD thesis, submitted to Mohamed Khider University of Biskra, Faculty of Law and Political Science, 2016; Mabrouk Ltida: "Guarantees of the Accused During the Trial in Light of the Algerian Code of Criminal Procedure," Master's thesis, University of Algiers, Faculty of Law; Khairi Khader Hussein: “Guarantees for the accused during the stages of arrest and interrogation within the stages of investigation in Iraqi law,” research paper submitted to the Judicial Council in the Kurdistan Region of Iraq, p. 5 and beyond.

44))According to the judge in the Supreme Court of the United States of AmericaIn one of his court rulings, Powel argues that the defendant's right to a speedy trial aims to protect three rights and interests:

- 1- Preventing the arbitrary detention of the accused for a long period before trial.
- 2- To reduce the effects of fear and anxiety that afflict the accused before he is charged.
- 3- Limiting the possibility of infringing on the rights of the defense.

Referred to by: Dr. Aqeel Yousef Muqabala: Previous reference, p. 113.

45))See: Professor Abdul Amir Al-Akeeli, Z. Salim Ibrahim Harba: "Explanation of the Code of Criminal Procedure, Part Two," Legal Library, Baghdad, p. 199 et seq.; Dr. Hussein Abdul Sahib Abdul Karim and Dr. Tamim Taher Ahmed."Explanation of the Code of Criminal Procedure"Legal Library, Baghdad, p. 336 and beyond.

(46)D. Ahmed Fathi Sorour: previous reference, p. 363

(47)Mustafa Radwan: “The Public Prosecution and Administrative Control: Jurisprudence and Judiciary”, Al-Maaref Establishment, Alexandria, 1972, p. 115.

(48)Dr. Hassan Allam: "A Summary of Algerian Judicial Law," National Publishing and Distribution Company, Algeria, 1972, p. 215

(49)Abdul Sattar Salem Al-Kubaisi: “Guarantees of the accused before and during the trial, a comparative study”, PhD thesis submitted to the Faculty of Law - Cairo University, 1981, p. 1013.

(50)Ahmed Abu Al-Wafa: Civil and Commercial Pleadings, 1st ed., Dar Al-Maaref Press, Egypt, 1952, p. 363.

Among the legislations that adopted the doctrine of legal nullity are the Italian legislation of 1865, and the French Code of Criminal Procedure of 1808. See: Dr. Ahmed Hassouni Jassim Al-Ithawi: "The nullity of criminal investigation procedures in the preliminary investigation stage", 1st ed., Legal Library, Baghdad, 2012, p. 155.

(51) See: Ahmed Abu Al-Wafa: The aforementioned reference, p. 362; Dr. Ramzi Saif: "The Intermediate Guide to Explaining the Civil and Commercial Procedure Law," Dar Al-Nahda Al-Arabiya, Cairo, 1967, p. 443; Dr. Ibrahim Al-Najani Ahmed: "The Theory of Nullity and its Impact on Legal Rights in Sudanese Procedural and Criminal Laws," 1st ed., Publications of Naif Arab University for Security Sciences, Riyadh, 2012, pp. 23-24; Muhammad Dheeb Mahmoud Nimr: "The rules of nullity in criminal proceedings - a comparative study between Palestinian and Jordanian law" Master's thesis, submitted to Middle East University, Faculty of Law, 2013, p. 44. Among the legal systems that have adopted the principle of self-nullity are German, Austrian, Lebanese, Algerian, and Moroccan law. See: Dr. Ahmed Hassouni Jassim Al-Ithawi, op. cit., p. 156.

(52) Dr. Salah Al-Din Al-Nahi: "A Concise Guide to Civil and Commercial Proceedings - A Comparative Study", Al-Ahliya Printing and Publishing Company (LLC), p. 403.

(53) Merle and Andre Roger: "Vitu, traite de droit criminel", old editions, 1967, p. 994.

(54) See: Abdul Sattar Salem Al-Kubaisi: Previous reference, 1014; Muhammad Sami Al-Nabrawi: Interrogating the Accused, Dar Al-Nahda Al-Arabiya, Cairo, 1968, p. 547; Medhat Sami Lotfi: "Modern Trends in the Project of Codifying Criminal Procedures", a research paper published in a book entitled: Modern Horizons in Organizing Criminal Justice, issued by the National Center for Social and Criminal Research, Cairo, 1971, pp. 61-62.

(55) See: Dr. Fakhri Abdul-Razzaq Al-Hadithi: "Explanation of the Code of Criminal Procedure," Al-Sanhuri Library, Baghdad, 2015, p. 307 et seq.; Dr. Baraa Munther Kamal Abdul-Latif: "Explanation of the Code of Criminal Procedure," Lebanese Foundation, Beirut, 2014, p. 259 et seq.; Dr. Waadi Suleiman Al-Mazrouri: "Explanation of the Code of Criminal Procedure (Theoretically and Practically)," 2nd ed., Nabay Library, Erbil, 2015, p. 211 et seq.; Saeed Hasaballah Abdullah: "Explanation of the Code of Criminal Procedure," Dar Al-Hikma for Printing and Publishing, 1990, p. 245 et seq.; Salman Obeid Abdullah Al-Zubaidi: "Explanation of the Code of Criminal Procedure No. 32 of 1971," 1st ed., Publisher: Sabah Sadiq Jaafar Al-Anbari, Baghdad, 2015, p. 245 et seq.

(56) See: Dr. Ahmed Hassouni Jassim Al-Aithawi: The previous reference, pp. 171-174.

(57) Among the judicial applications is the ruling of the Iraqi Court of Cassation, which stated: (Whereas Article 249/B of the Code of Criminal Procedure stipulates that "a procedural error is not considered if it does not prejudice the defendant's defense," and whereas the decision of the Wasit Criminal Court concerning the released defendants K and A, and the subsequent ruling of the Court of Cassation, do not prejudice them, and based on the provisions of Article 259/A-2 of the Code of Criminal Procedure, it was decided to uphold the decision to dismiss the charges and release them due to insufficient evidence. The decision was issued unanimously). See: Federal Cassation Judgment No. 68, issued on 27/10/2010, published on the Iraqi Legislation Database website at the following link:

<http://www.iraqlid.iq/VerdictsTextResults.aspx>

(58) Among the judicial applications is the ruling issued by the Presidency of the Wasit Federal Court of Appeals – Cassation Panel, which stated: "Upon review and deliberation, it was found that the appellant is neither a complainant nor a civil claimant, nor is he civilly liable. Therefore, he is not entitled to appeal the contested decision. The Court decided to reject the appeal on procedural grounds, based on the provisions of Article 249 of the Code of

Criminal Procedure. The decision was issued unanimously.” See: Judgment No. (48/T/Misdemeanors/2012), issued on May 22, 2011, published on the Iraqi Legislation Database website at the following link:

<http://www.iraql.d.iq/VerdictsTextResults.aspx>

59))Judge Adnan Zeidan Hassoun Al-Anbaki:"Methods of appealing criminal judgments andmReinforced by discriminatory decisions"Al-Sanhuri Library, Beirut, 2016, p. 55.

(60)Dr. Abbas Al-Hassani: Previous reference, pp. 235-236.