



## **Iraqi Judicial Applications and International Standards for the Accused's Right to Defense**

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### **Abstract**

The right to defend the accused is one of the basic guarantees that every accused must have based on the principle of innocence in the accused, taking into account the reconciliation of society's interest in achieving justice, reaching the perpetrators and bringing them to the courts. And among the international standards related to the issue of the right to defend the accused.

### **Keywords**

Judicial applications, the right of defense, the accused, international standards

**JEL Classifications:** J11, F43

### **1. Introduction**

#### **First: The Topic of the Research and Its Importance**

The right of defense is a natural right of the human being, hence the keenness to respect and guarantee it, whether in texts or in work, in addition to the constitutional value enjoyed by the right of defense has also been enshrined in international declarations and covenants, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights And the

Arab Charter on Human Rights, and on the judicial level, the courts have been concerned with the right of defense, and we find this through their decisions.

The importance of the issue is evident because the right of defense is a natural right as well as one of the guarantees of a fair trial, and it is a genuine right that occupies a leading position among the general individual rights.

### **Second: The Problem of the Topic**

We aim from this study to shed light on the judicial treatments, especially the decisions issued by the Court of Cassation and the Federal Supreme Court, and the extent of their commitment to applying international standards in their rulings to be a judicial model to be emulated.

### **Third: Research Methodology**

In this research, we will rely on the analytical approach by analyzing the national texts related to the accused's right to defense and international texts on the same subject and matching them with Iraqi judicial decisions.

### **Fourth, The Structure of The Research**

Based on the foregoing, we will research this subject on two demands, the first: to show the exercise of the accused's right to defense, and the second to show the extent to which judicial applications are consistent with international standards for the accused's right to defense.

#### **The First Requirement: Exercising the Accused's Right to Defense**

In order to take note of this requirement in all its aspects, we will divide it into two sections. We dedicate the first section to the pillars of the accused's right to defense, and we dedicate the second section to explaining the accused's right to the assistance of a lawyer.

#### **First Branch: Pillars of the Accused's Right to Defense**

The right to defend the accused is a basic and essential pillar for achieving a fair trial, and this right was guaranteed by the Constitution of the Republic of Iraq for the year 2005 in Clause (Fourth) of Article 19, as it stipulated that "the right to defense is sacred and guaranteed at all stages of investigation and trial." One of the most important the guarantees related to the right of the defense are the right to be informed of the accusation, the right to be informed of the investigation and the right of the accused to remain silent, and we will clarify that successively.

##### **First: The Right to Be Informed of the Accusation**

It is considered one of the most important guarantees for the confession to be issued by a free and voluntary will, that the accused be informed of the

accusation against him and confront him with the evidence existing before him, so that the accused can prepare his defense by refuting the accusation against him, and refuting the suspicions and the evidence against him in a timely and appropriate manner in his interest. of the accusation, that the accused shall be notified of the accusation against him sufficiently before his interrogation after ascertaining his identity, i.e. informing him of all the acts attributed to him and the evidence available against him.

The importance of this guarantee lies in the fact that it is one of the things necessary for the validity of the statements and confessions made by the accused later, and it gives him the opportunity to prepare his defense himself or to seek the assistance of a lawyer, because the accused cannot present his defense and discuss the evidence against him without knowing what it is. The charge against him (Al-Mulla, 1986).

The Iraqi Code of Criminal Procedure No. (23) of 1971 stipulates this in paragraph (a) of Article (123), as it stipulates that "the investigative judge or investigator shall interrogate the accused within twenty-four hours of his presence after verifying his identity and briefing him." Taking note of the crime attributed to him, he records his statements about it with an explanation of the evidence he has to deny it, and he may re-examine the accused as he deems necessary to clarify the truth.

### **Second: The Right to See the Investigation**

In order to achieve the purpose of the lawyer's presence, he must be aware of the accusation attributed to the accused, the evidence and presumptions against him, and all the procedures that have been taken. Therefore, the legal logic requires that the lawyer be allowed to view the investigation file, in order to be able to defend his client to the fullest (Al-Nabrawi, 1968). Article (57) of the Code of Criminal Procedure stipulates that "a- The accused, the complainant, the civil plaintiff, the civilly responsible for the act of the accused and their agents may attend the investigation procedures, and the judge or investigator may prevent any of them from attending if necessary for reasons recorded in the record. Provided that they are allowed to review the investigation as soon as this necessity has ceased, and they are not allowed to speak unless they are given permission, and if not, this must be recorded in the minutes. C - No one other than those mentioned above may attend the investigation unless authorized by the judge.

### **Third: The Right of the Accused to Remain Silent**

The Iraqi legislator stipulated in paragraph (B/123) Criminal Principles that "before conducting an investigation with the accused, the investigating judge must inform the accused of the following: that he has the right to remain silent, and no presumption can be drawn from the exercise of this right against him," as stipulated in paragraph (B/126). ) of the same law stipulates that "the accused shall not be

compelled to answer the questions that are directed to him." Also, Article (179) stipulates that "the court may direct to the accused whatever questions it deems appropriate to reveal the truth before or after the accusation is brought against him, and his refusal to answer shall not be considered as evidence against him." "

By reviewing these texts, we find that they explicitly or implicitly refer to the accused's right to silence. This right aims to protect the interest of the accused in defending himself, because his silence is a form of freedom of defense. By extrapolating the above texts, we find that they are mentioned under the section on interrogation, which is one of the investigation procedures, and the right to silence is more comprehensive than restricting it to this case only, as it may be included in arrest and detention. In order for the legislator to be successful in clarifying this right in line with international standards, explicit texts must be included that grant the accused the right of silence, which represents one of the forms of the accused's right to defend himself, whether in the investigation, arrest or interrogation stage.

### **Second Branch: The Right of the Accused to Have a Lawyer**

The right of defense comes at the forefront of the rights enjoyed by the accused before the judiciary, and this right may be exercised by the accused personally or by proxy through a lawyer chosen by the court or appointed by the court.

#### **First: The Concept of the Accused's Right to a Lawyer and Its Importance**

The right of the accused to seek the assistance of a lawyer is his inherent right, for the presence of the lawyer with the accused is a guarantee of the safety of the procedures taken by the authority. The truth, and the lawyer is a watchdog over the questions that are directed to the accused by the competent authority so that they do not resort to prohibited means or deceptive questions. A defense of the accused also (Al-Nabrawi, 1968), as paragraph (B/123) of the Code of Criminal Procedure stipulates that "before conducting an investigation with the accused, the investigative judge must inform the accused of the following: ... Second - that he has the right to be represented by Accept a lawyer, and if he does not have the ability to appoint a lawyer, the court will appoint a seconded lawyer for him, without charging the accused with his fees." C- The investigative judge or investigator must decide the issue of the accused's desire to appoint a lawyer before starting the investigation, and if the accused chooses to appoint a lawyer, he has no right to The investigation or investigator shall not initiate any procedure until appointing the delegated lawyer." The Iraqi constitution also guarantees this right, as clause (Eleven) of Article (19) stipulates that "the court shall assign a lawyer to defend the accused of a felony or misdemeanor for a person who does not have A lawyer will defend him, at the expense of the state.

The importance of the accused's use of a lawyer is evident in that the accused is unable to provide everything that would lead to proving his innocence, especially since he faces a more knowledgeable and qualified person, namely the Public Prosecution, so he needs a lawyer to tighten his hand in the face of the accusation authority, and the assistance of With a lawyer that would assist the ruling judiciary in arriving at the truth through the defenses they presented, which collectively constitute the doctrine of the court.

### **Second: The Scope of the Accused's Use of a Lawyer**

Paragraph (11/19) of the Iraqi constitution stipulates: "The court assigns a lawyer to defend a person accused of a felony or misdemeanor who does not have a lawyer to defend him and at the expense of the state." According to the text, the scope of hiring a lawyer is as follows:

A - Hiring a lawyer in misdemeanours: The law did not require in misdemeanors and violations that the accused have a defender to help him, rather it was left to the discretion of the accused that when the accused entrusted a lawyer with the task of defense, the court must listen to his pleading and give him the opportunity to carry out his mission. The issue of the lawyer's presence in these cases is considered permissive and not obligatory, meaning that it depends on the choice of the accused, since if the latter does not seek the assistance of a lawyer, the court may proceed with the case without a defender and there is no invalidity in its procedures.

#### **B - Hiring a criminal lawyer**

The Iraqi legislator stipulated in Article 144 the Criminal Procedure Procedures that:

"A- The head of the Criminal Court shall delegate a lawyer for the accused in felonies, if not, and appoint a lawyer on his behalf. The court determines the lawyer's fees when deciding on the case. The decision to delegate shall be considered as a power of attorney. If the lawyer presents a legitimate excuse for not accepting the delegation, the president shall assign another lawyer.

b- The delegated lawyer must attend the pleading and defend the accused or delegate someone to take his place from among the lawyers, otherwise the court will impose a fine on him, which will be collected from him in implementation of a memorandum issued by the head of the court to the Presidency of Execution, without prejudice to his disciplinary trial in accordance with the Law of Advocacy. And it may exempt him from the fine at any time if it is proven that it was impossible for him to attend the session himself or for someone else to act on his behalf.

It is clear from the text that the legislator necessitated the presence of a lawyer with the accused of a felony before the criminal court due to the seriousness of the felony and the penalties resulting from it, and gave the trial court the right to appoint a lawyer to defend him. If the defense does not entail his right to the presence of a lawyer, the court shall assign an attorney to him.

## **The Second Requirement: the Extent to which Iraqi Judicial Applications are Consistent with International Standards for the Accused's Right to Defense**

To shed light on the extent to which Iraqi judicial applications are consistent with international standards for the accused's right to defense, we must divide this requirement into two branches as follows:

### **First Branch: The Right of the Accused to Defend Himself under International Conventions**

Among the most important international conventions that stipulate the right of the accused to a defense are the following:

#### **First: The Universal Declaration of Human Rights (Assembly, 1948):**

The Universal Declaration of Human Rights also expressed the guarantee of the right of the accused to a defense and not to violate it when it decided that people are equal before the law and have the right to enjoy equal protection without any discrimination, and every person has the right to resort to the competent national courts to seek redress from any violation of his rights. Every person, on full equality with others, has the right to have his case heard by an independent and impartial court, in a fair and public view, to determine his rights and obligations and any criminal charge against him. which must be imposed on it (Al-Qabili, 1998). From here, it becomes clear the extent of the interest of the Universal Declaration of the Right to Defense, and although it did not reach the rank of binding because it is considered more political than legal, it has a significant impact on the international and national levels, as it is the source of many international covenants related to human rights, in addition to some Countries have adopted its provisions in their constitutions and internal legislation.

#### **Second: The International Convention (International Covenant) on Political and Civil Rights**

This covenant has formulated a general framework for treating the accused well in order to ensure that his right to defense is not infringed, and the covenant has highlighted the defensive guarantees that must be guaranteed to the accused, stating that every accused of committing a crime is considered innocent until proven guilty by law (Al-Qabili, 1998). The accused shall be informed of what is attributed to him, by informing him quickly and in detail, in a language he understands, and the nature and reasons for the accusation against him (Al-Qabili, 1998).

Among the guarantees established in the Covenant to protect the right of defense is to establish the right of the accused to attend proceedings to defend

himself or to have the assistance of a lawyer of his choice. In addition to obligating the court to warn him of his right to have a defender next to him, and if the accused is unable to bring a lawyer, the court must - in the interest of justice - provide him with a lawyer without charging him a fee for that when he does not have the ability to pay his wages (Al-Qabili, 1998) and in order not to suspend the fate of the accused, it was decided to submit to To be promptly brought to court and to be tried without undue delay (Al-Qabili, 1998).

### **Third: The Arab Charter on Human Rights**

This charter did not deviate from the principles stated in the draft Arab Convention on Human Rights in terms of consecrating the right of defense by stipulating that all people are equal before the judiciary and the right to litigation is guaranteed to every person on the territory of the state (Al-Qabili, 1998), and this draft also adopted the principle of the presumption of innocence by stipulating that The accused is innocent until proven guilty in a legal trial in which the necessary guarantees for his defense are secured (Al-Qabili, 1998).

### **Second Branch: Compatibility of Iraqi Judicial Applications with International Standards**

To find out the compatibility, it is necessary to analyze the texts of international covenants as well as the local texts and know the extent of their application in the Iraqi judiciary, as follows.

#### **First: Interpretation of International Texts (International Standards)**

The International Covenant on Civil and Political Rights stipulates: "B\_ That he be given sufficient time and facilities to prepare his defense and to contact a lawyer of his own choosing." D- He shall be tried in his presence, and the accused shall defend himself or through a lawyer of his choice, and that he shall be notified of his right to have someone to defend him if he has no one to defend him, or the court shall provide him whenever the interests of justice require that with a lawyer to defend him, without charging him for that. If he does not have sufficient means for this wage (Al-Qabili, 1998).

We also find texts for this right of defense in the Arab Charter on Human Rights, which stipulates 3- His right to be tried in his presence, before his natural judge, and his right to defend himself personally or through a lawyer whom he chooses and communicates with him freely, and in confidentiality "as stipulated" 4- His right to the free assistance of a lawyer to defend him if he is unable to do so himself, or if the interests of justice so require.

Through the interpretation of these texts, we find the right of defense is a sacred right, and there is no realistic translation of any of the fair trial guarantees

without the existence of a firm and firm right for the accused to defend himself before the public prosecution in the actions attributed to him. If proven against him, he will fall under execution The punishment.

Since the origin is innocence, this means assigning the Public Prosecution Office to prove that the accused committed the crime ascribed to him. However, this does not mean that the accused should not defend himself, that he use all legal means that question the evidence of the public prosecution, and that he defend himself by submitting the charges against him in court (Al-Shara, 2007).

Hiring a lawyer is an essential way to ensure the protection of human rights guaranteed to those accused of criminal acts, especially their right to a fair trial, because whoever is accused of committing a criminal act falls under the burden of taking investigative measures, and then trial procedures and therefore must be given the right to confront police and prosecution actions The public and then the judiciary and to grant legal aid in order to protect and defend his rights, and that this legal aid remains in place at all stages until the issuance of the final judgment against the accused. International standards have devoted to this right and described determinants of it in order to implement it (Al-Mazuri), including:

- The right of the accused to be defended by a lawyer and to choose that lawyer
- The right to appoint a lawyer to defend him
- The right to free legal aid
- His right to the assistance of an experienced and competent lawyer, and not to be harassed by lawyers.

### **Second: Analysis of Local Texts from the Perspective of International Standards:**

Article (19/ Clause 11) of the Iraqi constitution for the year 2005 stipulates the following: The court shall appoint a lawyer to defend the accused of a felony or misdemeanor who does not have a lawyer to defend him and at the expense of the state.

Article 123 of the Iraqi Code of Criminal Procedure stipulates that "B- Before conducting the investigation, the investigating judge must inform the accused of the following: First: He has the right to remain silent, and no presumption against him can be deduced from this right. Second: He has the right to be represented By a lawyer, even if he does not have the ability to appoint a lawyer, the court shall appoint a seconded lawyer for him without charging the accused with his fees." C - The investigative judge or investigator must decide the issue of the accused's desire to appoint a lawyer before starting the investigation. Or the investigator to initiate any procedure until appointing the delegated attorney.

Article (144) Criminal Procedures stipulates: "The head of the criminal court shall appoint a lawyer for the accused of felonies if the attorney is not a lawyer on his behalf. The Execution Presidency without prejudice to his disciplinary trial in



accordance with the Law of Advocacy, and it may exempt him from the fine at any time if it is proven that it was impossible for him to attend the session himself or to delegate someone else on his behalf.

By analyzing the national texts, we find that giving the accused the right to appoint a lawyer to defend him or assigning a lawyer for this purpose by the court without charging him his fees by stipulating that in the hierarchy of legislation, and gradually with the texts dealing with the freedom of the citizen that attached great importance to protecting the individual and sought to organize it according to Laws and decisions are binding on all relevant authorities, whether they are related to the investigation or not, and emphasize the observance of the individual's right to defend himself against the accusations or complaints submitted by others, and this was in line with the right of sacred defense.

The Iraqi judiciary has implemented this principle, among the judicial decisions that confirm this:

(The lawyer's failure to attend with the accused during his interrogation requires overturning the decision by referring him to the competent court) and this was stated in the decision of the Criminal Court / Babylon in its discriminatory capacity in No. 670/T/2006 dated 3/9/2006. And it violated the law... In addition, the accused's statements were required to be written down by the investigating judge and in the presence of a lawyer, so he decided to overturn the referral decision)

And in another decision to the Federal Court of Cassation, No. 326, General Assembly 2012, which includes: (The failure of the court to assign a lawyer to defend him when he did not appoint a lawyer, is a waste of legal guarantees related to public order and the right of defense, which was decided in the interest of the accused under the law and the constitution, and that makes it The court's procedures were marred by a fundamental error in the fundamental procedures that require cassation).

## **Epilogue**

Through research on this topic, we reached a number of conclusions and suggestions, the most important of which are:

### **First, The Conclusions**

1- The Iraqi legislator did not skimp on the issue of freedoms and rights, especially the right of defense, by extending it to many texts, whether at the level of constitutions or penal and fundamentalist laws.

2 - The right of defense is a basic pillar of the fair trial, which is the highest guarantee of its guarantees, undisputedly, because an accusation that is not matched by a defense is considered a conviction not only an accusation. The right of defense is a sacred right and there is no realistic translation of any of the guarantees of a fair trial without the existence of a firm and solid right for the

accused to defend himself before the public prosecution for the actions attributed to him.

3- One of the most important pillars of exercising the right of defense is the use of a lawyer, as it is a culmination of the importance of hiring a lawyer as a pillar of defense for the accused and in support of not violating him, and in respect of the principle of equality between citizens before the judiciary.

4- The applicability of the Iraqi judiciary to the application of this right, and judicial decisions confirms this.

### **Second: Suggestions**

1 - In order to achieve justice, we call for equality between misdemeanors and violations by stipulating the necessity to seek the assistance of a lawyer in misdemeanours, as in felonies, if the accused is unable to bring a lawyer due to his financial circumstances, and the state guarantees him his expenses.

2- We see through the aforementioned texts related to the accused's right to remain silent under the section of interrogation, which is one of the investigation procedures. In order for the legislator to be successful in clarifying this right in line with international standards, explicit texts must be included that grant the accused the right of silence, which represents a form of the right of defense, whether he is in the investigation, arrest or interrogation stage.

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