

The Effect of the Procedural Legal System on Initiating Criminal Proceedings

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Abstract

The means and method of initiating a criminal case shall not depart from the influence of the adopted procedural criminal system, in view of the correlation between them, and having successively in criminal proceedings three legal systems oscillated between the absence of the State and the expansion of its authority, the balance in the relationship between the victim and the accused in the accusatory and prospecting systems is imbalanced on the one hand and negligence on the other, the necessity of reconciling the interest of society and the accused necessitated the adoption of a mixed system to reflect the legislative development in criminal procedures, on the other hand, the Islamic criminal legislator did not need to go through these phases in order to straighten its procedural system after classifying the crimes according to the rights they affect, the features of the Islamic procedural system were characterized by a special subjectivity that distinguishes it from others, if the procedural law prevailing in most countries of the world has given the right to initiate criminal proceedings in the hands of the Public Prosecution in its capacity as the representative of the public right.

Keywords: Legal System, Criminal Proceedings.

INTRODUCTION

The means and method of initiating a criminal case shall not depart from the influence of the adopted procedural criminal system, in view of the correlation between them, and having successively in criminal proceedings three legal systems oscillated between the absence of the State and the expansion of its authority, the balance in the relationship between the victim and the accused in the accusatory and prospecting systems is imbalanced on the one hand and negligence on the other, the necessity of reconciling the interest of society and the accused necessitated the adoption of a mixed system to reflect the legislative development in criminal procedures, on the other hand, the Islamic criminal legislator did not need to go through these phases in order to straighten its procedural system after classifying the crimes according to the rights they affect, the features of the Islamic procedural system were characterized by a special subjectivity that distinguishes it from others, if the procedural law prevailing in most countries of the world has given the right to initiate criminal proceedings in the hands of the Public Prosecution in its capacity as the representative of the public right, it suspended the initiation of this lawsuit on the complaint issued by the victim in some crimes of a special nature according to the philosophy of the legislator in this or that state, we find that the Iraqi legislator has expanded the bodies that initiate the criminal case in addition to the

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Public Prosecution, as well as suspending the initiation of some crimes on the victim's complaint, in order to explain more about the multiplicity of initiating criminal cases and their impact on the nature of the procedural system, we will divide the study into the following sections:

Section I: Initiation of Criminal Case in the Indictment System (Individual)

This system represents the first vanguard of criminal procedure systems, which are based in its organization on the portrayal of criminal litigation as a personal dispute between two adversaries before an impartial judge who exercises a negative role in determining the rule of law for one of the litigants, by examining the evidence presented by the two parties and giving preference to one of them over the other without distinction between criminal and civil procedures in the case, the role of the defendant in it does not differ from the role of the plaintiff in the civil lawsuit. The accusatory system began on the central idea of giving the individual the right to charge and punish the offender for a crime that harmed him, for individual revenge against him was the only means of criminal punishment, so he himself took retribution for himself, or his heirs inherited this right, then the individual revenge turned into a more sophisticated system, which is the individual accusation after the conflict became governed by rules regulating it with the judge remaining away from the management of the case.

This system is characterized by a number of characteristics, including:

1. The individual victim is the original owner of the right to accuse, initiate and initiate criminal proceedings, he is submitted to the judiciary, he submits his complaint, supports his accusation himself, presents his witnesses, and discusses the witnesses of the accused.
2. The burden of proving the charge shall be on the victim or the victim of the crime, which requires him to gather sufficient evidence to convict the accused.
3. Publicity, orality and confrontation are the dominant feature of criminal litigation procedures, which reflected the nature of the social situation at the time.
4. Limiting the role of the judge before the litigants, limited in his job to managing the litigation and direct its progress and listen to its parties without interfering in it, he judges only according to the truth presented by the opponents.
5. Establishing important guarantees for the accused by enabling him to participate in all stages of criminal proceedings, he was granted ample freedom in self-defense.

However, this system was not without disadvantages, including the imposition of publicity in the preliminary investigation, which paves the way for the loss of indictment evidence before it is discovered, restricting the positive role of the criminal judge, and limiting the accusation to the victim, who may fall under the influence of the offender and refrain from initiating the criminal case against him, this makes this system inconsistent with the modern organization of the state and the monopolization of the public authority to charge and manage the criminal case.

The accusation function was confined to the hands of the victim did not last long until the circle of accusation expanded at a later stage to share this right with his family and tribe, then it became really common to the general public, so the individual accusation initially turned into the popular accusation in the end, the beginning of the emergence of the idea of counting crime as an assault that harms the whole society, it was really to give the victim in particular and citizens in general the accusation of movement and guidance with the demand for punishment.

Section II: Initiation of Criminal Proceedings in the (Judicial) Exploration System

This system was based on taking away the power of accusation from individuals and confining it to the hands of the state, so to it alone the authority to take all criminal

proceedings from initiating the case until deciding on it, with the prohibition of delegating it to individuals in the exercise of this authority, on the other hand, the judge was allowed to initiate the criminal case, which now combines the functions of accusation and judgment, judges are no longer selected from the litigants but assume public and permanent functions of the State, which reflects the strengthening of the legal status of the State under this stage of criminal proceedings and with it, criminal litigation is no longer a personal dispute between its parties, the accused is no longer a real party to the proceedings, but rather the object of these proceedings taken against him without giving him the opportunity to collect evidence for proof, since the truth is an end sought by the investigator by any means, the judge has lost his impartiality in assessing the evidence and balancing the arguments of the litigants, he was allowed to combine three powers: indictment, investigation and sentencing, which led to the emergence of a principle under this system, namely that each judge is a prosecutor .

Having been concerned with a number of characteristics in this procedural system, including:

- 1- Restricting the power to initiate criminal proceedings, investigate and rule on them in the hands of the judiciary, and to him the accusation and the issuance of the judgment even if the complaint is from an unknown as well as narrowing the opportunity for the accused to defend him while enabling the judge to know the truth away from the requests of the litigants .
- 2- Restriction of the rules of criminal evidence with the system of legal evidence that confiscated the judge's conviction of innocence and conviction, it led to the acquittal of the accused for not presenting evidence despite his conviction or conviction when certain evidence was gathered against him despite his lack of conviction with the permissibility of the use of coercion to induce the accused to confess, hence, recognition emerged as the master of legal evidence, but the scope of procedures related to evidence expanded by finding more than one stage for collecting evidence, so the stage of evidence and the stage of preliminary investigation arose before referring the case to the court .
- 3- Confidentiality in criminal proceedings with recording them in written records in a non-facet manner about the litigants.

Section III: Initiation of Criminal Case in Public Order (Mixed)

This system came as a compromise between the accusatory and prospecting system, taking from the advantages of both, exposing their shortcomings , took from the public accusation the codification and secrecy of the preliminary investigation procedures and the prevention of what the offender deliberately disguises the truth, it is the individual accusation orally and publicly of the conduct of the judicial trial proceedings, and lest malicious lawsuits be based on anonymous communications, in order to ensure that the facts are not lost, if the reins are left in the hands of the disputing individuals and what is likely to be unable to follow them up or indifference to the procedures of proof, the matter ends up with the survival of the perpetrators, so it was in the establishment of the Public Prosecution representing the community in initiating lawsuits and initiating treatment of these gaps .

This system is characterized by some characteristics, including:

- 1- The Public Prosecution (Public Prosecution) monopolizes the initiation of the criminal case and initiates it in the original, with the possibility of individuals (the victim and the victim of the crime) taking over the task of prosecution sometimes to avoid the risks of the Public Prosecution not paying attention to the indictment function , it is forbidden to initiate proceedings by those who have nothing to do with the crime.
- 2- The separation of the power of accusation and judgment, as the judge appointed by the public authority may not initiate and decide on the criminal case , but he is

absolutely free to form his doctrine from various evidences without being bound by a specific form or predetermined evidence .

3- Flexibility and inconsistency in adopting a well-defined procedural form in criminal legislation, the nature of the relationship between the individual and the State determines the predominant character of this mixed system , the features of the accusatory system may prevail in some forms, or in others it may favor elements derived from the excavation system .

Section IV: Initiation of Criminal Proceedings in Accordance with the Islamic Procedural Law

The Islamic procedural system differs from the previous positive procedural systems in adopting the approach of dividing crimes based on the procedural provisions resulting from the criminal case in moving, direct and terminating without starting from the principle of dividing the case into criminal and civil, as is the case with mixed procedural systems in their various forms , which made it a self-contained procedural system that is not similar to the mixed system born after two procedural systems that tried to reconcile, the appearance of the features of one of these two systems in it does not make it accusatory in one way and excavation in the other, it can be said that the Islamic criminal procedural system is dual for the following reasons:

1- The difference between the Islamic procedural system and the positive individual accusatory system, the judge chooses the two litigants in the latter system and appeals to him to exercise a negative role in managing the personal dispute between the parties without ruling justly according to the available evidence, but according to the truth presented by them, this is contrary to the Islamic system, judges are appointed by the authority, and the investigation of justice in judgment is an obligation imposed on them, and the evidence of evidence is determined in its resources and strength in advance independent of the will of the litigants .

2- The Islamic procedural system differs from the prospecting system, on the one hand, the former expanded the circle of the initiators of the criminal case, depending on the nature of the rights affected by the crime, in crimes against the public right, such as general crimes limit , most public crimes may be initiated by the general public on the basis that the lawsuit is not a condition in the crimes of the general limit because the victim is a group of Muslims or the system of their state , this is inconsistent with the general accusation.

3- The existence of the characteristics of the excavation system at the investigation stage and the features of the accusatory system at the trial stage does not make the Islamic system a mixed compromise system that has evolved through the ladder of advancement similar to contemporary procedural legislation that made the investigation stage excavative and the trial accusatory, but started from the place where the crime occurred, if it is an individual status, it gives the victim the aggrieved victim, his agent, guardian or heirs after him the right to initiate criminal proceedings as in the crime of murder and slander, if he wishes to move it and if he wishes to leave it and waive it, however, if it is a public legal status, the person acting on behalf of the group has the right to move it, whether they are official officials, members of the Public Prosecution or members of the community who have legal capacity .

4- The Islamic procedural system is flexible and stable at the same time, the division of crimes into limit, retribution, punishments, and the variety of rights associated with them gave flexibility to its procedural provisions starting with the ways to initiate the lawsuit, passing through the different investigation procedures according to the types of accused, down to the evidence and its strength, the ruling to ward off suspicions in the limits, the effect of recourse in the confession according to the type of crime, down to the provisions of amnesty and waiver , on the other hand, the link between its rules and the

purpose of criminal justice through the preservation of rights and the maintenance of freedoms enriches the need to go through two stages of integration: accusatory and prospective, the availability of some features of this or that system does not make it both accusatory or prospective, as some jurisprudence argues , rather, the name is in line with the existence of some procedural similarities in terms of initiating the case and some investigation and trial procedures only , it is also not correct to call it the characteristic of an individual accusatory system supported by generality and described the Anglo-Saxon system as individual with the general and Latin with the general with the individual one.

Section V: Diversity of Methods of Initiating Criminal Proceedings in Iraqi Law

Procedural legislation varied in its position on the criminal case in terms of moving and initiating it between confining it to the hands of the Public Prosecution as the representative authority of society based on a hypothetical depiction based on the occurrence of the crime on it, and the participation of others in this authority in certain cases, it also differed in its organization of the location of the victim or the victim of the crime who was close or excluded from the criminal litigation between depriving him of initiating the criminal case, removing him from it and keeping him a civil party affected by the crime, or granting him restricted authority to initiate the case, or introducing him as an original partner with other parties in the initiation authority of the criminal case .

The observer of the Iraqi procedural legislator is aware of his influence by the individual accusatory system, although he tends to the general accusation system the verse affected by the first is what the Code of Criminal Procedure No. 23 of 1971 began in its first article, which ruled “The criminal case shall be initiated by an oral or written complaint submitted to the investigating judge, the investigator, any official at the police station, any member of the judicial police who is affected by the crime, his legal representative, or any person who knew of its occurrence, or by notification submitted to any of them by the Public Prosecution unless otherwise provided by law, in the case of flagrante delicto, a complaint may be submitted to any police officers and commissioners who are present”, in confirmation of its influence on the public accusation system, Article II of the same law stipulates that “The lawsuit may not be suspended, suspended from its course, waived, judgment issued therein, or suspended its implementation, except in the cases set forth in the law.” The Public Prosecution no longer has the power to initiate criminal proceedings, nor is the victim a sole partner in this authority, but the exercise of this power has been distributed to more than one party until it includes any individual outside the criminal litigation who is aware of the occurrence of a crime in which the initiation of criminal proceedings does not depend on a complaint from the victim or on the permission or request of a competent authority , as well as the courts for hearing offences , administrative bodies and other bodies under the laws in force .

The Iraqi procedural system has been criticized by some jurisprudence from three aspects :

- 1- The lack of an explicit indication in the Code of Criminal Procedure to oblige the Public Prosecution to initiate criminal proceedings, which means that he has the discretion to move it or not.
- 2- Giving the victim of the crime the authority to initiate criminal proceedings is a remnant of the effects of the individual accusatory system, where the initiation of the criminal case and the punishment of the offender was dependent on the will of the victim to move it and claim punishment and compensation, this is no longer compatible with the modern trend in procedural legislation in separating criminal and civil lawsuits, and the deportation of the victim from the criminal case that is controlled by the Public Prosecution, and limit it to the civil lawsuit to repair the damage in accordance with the rules of civil liability only.

3- Granting individuals the authority to initiate proceedings in parallel with the Public Prosecution in all crimes is a violation of the course of justice, it may happen that individuals rely on the public prosecution to move it or the public prosecution depends on individuals, which may lead to the failure to initiate the lawsuit at all, even systems that relied on individual accusation, such as English law and the Maltese Code of Procedure, did not allow an individual to initiate criminal proceedings except for minor offences.

We see the failure to oblige the Public Prosecution to initiate criminal proceedings as a deficiency in the Iraqi Code of Criminal Procedure, article 5 of the Public Prosecution Law in force enumerates its functions and what it may do without implying a binding character, if the person affected by the crime does not move it, and does not inform anyone who is aware of it, with the absence of legal obligation on the Public Prosecution, public rights remain without legal protection, and this is contrary to the philosophy of the legislator in entrusting the representation of the public right to the Public Prosecution Service, and to avoid the risks of not initiating proceedings on the course of criminal justice from individuals relying on the Public Prosecution and the reluctance of the Public Prosecution to do so, the Iraqi legislator must also include a formula stating that the Public Prosecution Service is obliged to inform obligatorily upon learning of the occurrence of the crime during the performance of official work and because of it or outside it in crimes in which the case does not depend on the complaint, as for describing the Iraqi procedural system as a remnant of the past, one of the effects of the individual accusatory system that is inconsistent with contemporary legislative development as it allowed the victim of the crime to initiate a lawsuit, this criticism stems from a philosophical vision that does not recognize in advance the victim as a party to the criminal litigation based on the assumption that the crime occurred on society, it is a representation, a remnant of the public accusation system that is inconsistent with the requirements of criminal justice, which require the inclusion of the victim as an original party to the case, especially in crimes affecting his life and the safety of his members, which necessitates the addition of the term "victim" in addition to the term "victim of the crime in the first article of the Code of Criminal Procedure, it may happen that the victim is not harmed, or the victim is not the victim, the apparent text does not help the victim who is not affected from initiating the criminal case except for knowledge of the occurrence of the crime, in particular, the legislator clearly distinguished between the status of the victim and the victim of the crime in more than one place in the law, this entails in advance the distinction between the means of initiating a lawsuit between a complaint and a report, the first is compatible with the one who committed the crime, whether the character of the damage was met or separated from it, as for the second, his behavior is consistent with those who knew of the crime and the civilly affected by it and the Public Prosecution, this is what the legislator did not pay attention to when he launched the complaint in Article (1/a) of the Code of Criminal Procedure as a way to initiate the case for all these parties, in Article (47) of the same law, reporting crimes to the same parties is released, this necessitates the allocation of the complaint and notification according to the context of its proportionality to the body initiating the criminal case .

One of the laws that gave more than one party to initiate criminal proceedings is the Sudanese Code of Criminal Procedure of 1991, which specifies the ways of initiating criminal proceedings by communication and complaint, the report of the crime shall be filed by those in charge of maintaining security and public order, including the police, criminal, public prosecution, judges of criminal courts, members of the regular forces and others, and from anyone who knew about it if it is related to the public right, such as crimes limit and crimes of condolences related to the public right, unless the law provides for the suspension of initiating a lawsuit on a complaint from a specific person or the permission of a private body, the complaint shall be filed by the victim who committed the crime against him, whether it affects his body, property, honor or within the scope of

his responsibility, whoever acts on his behalf, if he is a minor or a person with a disability, his guardian may file a complaint on his behalf .

In the face of this expanded trend of the parties initiating the criminal case, a wide range of laws adopted the idea of the Public Prosecution monopolizing the criminal case in motion and directness, Article 7 of the UAE Code of Criminal Procedure stipulates that “The Public Prosecution shall have exclusive competence to file and initiate criminal proceedings and shall not be filed by others except in the cases set forth in the law.” The exception related to the cases set forth in the law relates to crimes in which the case is pending on a complaint by the victim or his representative .

As for the Saudi legislator, he differentiated between public and private penal rights and regulated the powers of initiating and initiating proceedings between the Public Prosecution and the victim, while regulating the relationship between these two categories of rights, Article (15) of the Law of Summary Procedures stipulates that “The Public Prosecution shall be competent - in accordance with its statute - to institute criminal proceedings and initiate them before the competent courts.” While Article (16) of this law stipulates that “The victim – or his representative – and his successor shall have the right to institute criminal proceedings in all cases to which a private right relates, and initiate this lawsuit before the competent court, and the court in this case shall inform the Public Prosecutor of the presence, and file the lawsuit and initiate it by the victim or his heir what is related to the special criminal case, the public criminal case is not the case entrusted with filing and initiating it with the Public Prosecution . In the same vein, Article (11) of the Iranian Criminal Procedure Code in force stipulates that “Commenting on the accused and filing a lawsuit for the public right in the custody of the Attorney General, the initiation of proceedings and the request for the defendant's comment on the private right shall be done by the complainant or the plaintiff of the civil right “ .

It is noted that laws that have been influenced by Islamic law, such as Saudi, Iranian and Yemeni law, have granted the heirs of the victim (the deceased), they are the guardians of blood the authority to initiate criminal proceedings expressly in crimes affecting his private rights or common rights predominantly personal rights, the victim, his representative and his heir shall be given the authority to initiate criminal proceedings in all crimes to which they relate without prejudice to the right of the Public Prosecution to initiate criminal proceedings in relation to the general penal right.

CONCLUSION

1. The procedural criminal laws have not adopted a single method in regulating the initiation and filing of criminal proceedings before the competent bodies, at a time when most of these laws have tended to limit the initiation of criminal proceedings to the Public Prosecution as a representative of society without giving this right to the victim except in narrow cases, other laws adopted a different approach, giving the authority to initiate criminal proceedings to more than one party, such as the victim, the Public Prosecution and individuals or employees who knew of its occurrence.

2. The difference in the legal regulation of the methods of filing a criminal case and the difference of the parties entitled to initiate it is due to the nature of the procedural system adopted by the criminal legislator in these or that countries, between the individual accusatory system, the judicial exploration system, the mixed system, and the Islamic criminal system, procedural laws were affected, according to the determinants of these procedural systems and their vision of the relationship between the accused and the victim.

3. The general procedural system (mixed) is based on a set of legal foundations, including: separation between the powers of indictment and judgment, the judge who decides on the criminal case cannot initiate the case before it, but he is absolutely free to

form his belief from evidence without being restricted by predetermined evidence and the confidentiality of the preliminary investigation procedures with the publicity of the judicial trial procedures, and the limitation of the initiation of criminal proceedings to the Public Prosecution in terms of origin.

4. Criminal laws that take the source of Islamic law have expanded the bodies that file criminal proceedings, as a result of being influenced by the Islamic procedural system, which is based on dividing crimes into crimes that affect the rights of individuals and crimes that affect the public right, the Public Prosecution initiates criminal proceedings in crimes that affect the public right, individuals also initiate criminal proceedings before the courts for crimes affecting their personal rights.

5. The Iraqi criminal legislator is unique among the procedural laws by expanding the bodies that may initiate criminal proceedings, in addition to the public prosecution and the victim of the crime or his representative, granting any individual who knew of the occurrence of the crime the right to initiate criminal proceedings, even if he was outside the criminal litigation in crimes in which the initiation of the criminal case does not depend on a complaint from the victim, with the prohibition of stopping the lawsuit, disrupting its progress or waiving it, except in the cases specified by law, thus mixing the nature of the individual accusatory system and the exploration system.

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