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THE CONCEPT OF THE RIGHT TO APPEAL CRIMINAL COURT JUDGMENTS AND ITS IMPACT ON ACHIEVING A FAIR TRIAL - A COMPARATIVE STUDY

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Abstract:
In this research, we will address the appeal of judgments passed against the accused and their relationship with his trial. Before addressing the relationship of the appeal of judgments to the right of the accused to a fair trial, we must indicate the description of the appeal, its concept, as well as the judgments and their types. Therefore, we divided this research into two sections. In the first section, we will address the concept of the right to appeal judgments and its description. In the first subsection, we will address the meaning of the right of the accused to appeal judgments. The second subsection addresses the legislative regulation of the right to appeal judgments. As for the second section, it addresses the relationship of appealing judgments with the right of the accused to a fair trial, in which we will address in its first subsection the ordinary methods for the means of appeal, and in the second subsection the extraordinary methods of the means of appeal, which we will address respectively, God willing.

Keywords: the right to appeal; criminal court judgments; fair trial

1. Introduction

In the name of God, prayers be upon the most honorable creation of God, our Prophet Mohamed, his family, companions, and those who follow him.

There is no doubt that the issue of appealing judgments is an important issue that raises many questions, especially against defendants. This is done through the nature of the procedures followed for this process, which is the appeal, its description, legal nature, and its effects on the convicted person.

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2. Subject- Matter of the Research

The right of appeal is one of the significant topics, particularly if it is related to the right of the defendant to a fair trial. By knowing this right, which is the right of appeal of judgments, the convicted person is able to know the appeal dates in order to address the weaknesses or causation blemishing the judgment. This because if he does not appeal the judgment within specific dates, this judgment shall be considered final and the convicted person shall not be entitled to appeal. Therefore, appeal is considered one of the significant topics because it may adjust the legal status of the convicted from an accused into an innocent person.

3. Research Methodology

This research is based on the comparative analytical inductive approach, by referring to the general rules in the Criminal Procedures Law, Criminal Law and Procedures Law.

This research also relies in its study on the analytical approach, which is an analytical study of the legislative texts to indicate their addressing of this matter, as well as indicate the opinions of the jurisprudence and court judgments in this matter.

Finally, the study approach follows the comparative method whereby we address a number of the Arab and foreign laws to indicate the extent of difference or agreement of the various legislations in their understanding of a significant matter such as appealing judgments.

3.1 Research Problem

This research addresses several topics of paramount significance, by presenting several questions and answering them, including the definition and description of appeal in general, types of appeal and the difference or similarity of legislations in this respect.

However, the significant question in this research is whether the appeal achieves a fair trial to the accused or not?

3.2 Research Plan

We will divide this research according to the following plan: dividing the research into two sections as follows:

First section: concept of the right of appeal of judgment and its description. This is divided into two subsections as follows:

First subsection: meaning of the defendant's right to appeal judgments

Second subsection: legislative regulation of the defendant's right to appeal judgments.

Second section: relationship of the appeal of judgments with the defendant's right to a fair trial. This is divided into two subsections as follows:

First subsection: ordinary means of the methods of appeal.

Second subsection: extraordinary means of the methods of appeal.

We will address these topics respectively, God willing.

4. Concept of the Right of Appeal of Judgment and its Description

4.1 Meaning of the Accused's Right to Appeal Judgments

The right to appeal judgments is considered among the guarantees which ensure the effectiveness of the right of defense as it aims at rectifying the errors and defects which may blemish the criminal judgment, in order to establish justice which is pending on the soundness of such judgments. The criminal judgment is vulnerable to involve a wrong indictment, which results in the accused not receiving a fair trial because the court has substituted indictment instead of the rule, which is innocence.

The trial may have been conducted without the court's consideration of the guarantees required by the law for the accused. It may not have heard his claims or investigate his substantial defenses, or generally, did not permit him the opportunity to defend himself efficiently. Therefore, in light of such assumptions, the significance of the accused's right to appeal emerges, which jurists considered as among the principles governing the criminal procedures. Meanwhile, human rights international treaties consider it as among the rights related to defense.[ii]

The right of appealing judgments has acquired a special attention, as it is considered as main means for controlling the implementation of the accused's right to a fair trial in general. Further, it is closely related to the right of defense in particular. This connection is manifested through the legal means determined for the appeal and the effects established from each of such means. These means are multiple and each one of them aim at addressing a certain set of errors and aimed overall at establishing justice, whereby the passed judgment is the title of the truth.

Appealing judgments means re-examining the judgment once again after passing it. Usually, the appeal is filed before a court of a higher degree. However, in the event of appeal by objection, the appeal is filed before the same court passing the judgment.

The reason for determining the appeal in the judgment is underlined by the desire to correct the errors, as it is possible that the judge makes a mistake as he is a human being and is not immune against error. Therefore, it is necessary to rectify this error by a court of a higher degree. This is because human justice is not immune against error. Further, appealing judgments enables the accused to exercise his right to litigation in two degrees, whereby no independent court may decide his fate which increases his assurance and strengthens his assurance of the judgment.[iii]

Jurisprudence established a differentiation between the ordinary methods of appeal (opposition – appeal) and the extraordinary methods of appeal (cassation-Revision), with respect to the reasons, the court's authority and the implementation of the judgment. In terms of the reasons, the reasons of the appeal by the ordinary appeal

[ii] Dr. Ala'a Mohamed Al Sawi, Convict's Right to a Fair Trial, Dar Al Nahda Al Arabiya, year 2001, page 749.
[iii] Dr. Mubarak Abdulaziz Al Nuwaibit, Explanation of the General Principles of the Kuwaiti Criminal Procedures and Trials Law, year 1998, 1st edition, without a publisher, page 631.

methods are unspecified and unrestricted by reasons determined by the law. This is contrary to the appeal by the extraordinary methods of appeal, the reasons of which are determined by the law. In terms of the authority of the court, the ordinary appeal method has a transfer effect of the case before the court hearing the case, which hears the case as if it is heard by the Court of First Instance. Meanwhile, the authority of the court hearing the case, in the event of extraordinary appeal for hearing the case is confined through the reasons of the appeal determined by the law only. In terms of the implementation of the appealed judgment, the ordinary methods of appeal, as per the rule, may prevent the implementation of the judgment while the objection for cassation does not prevent the implementation of the challenged judgment. [iv]

We must point out here that there are general conditions for the methods of appeal of judgments, whether they are ordinary or extraordinary, as follows:

- Only judgments may be appealed. As for orders and decrees, the rule is that they may not be appealed unless by exception. Therefore, the decision to adjourn the case, schedule it for judgment, withdraw from hearing it, exiting a person from the hearing, confronting a new accused or a new incident, may not be appealed. Therefore, the Egyptian Court of Cassation ruled that "errors which occur in the referral order may not be presented to the Court of Cassation. Rather, they are presented to the court to which the case is referred in order to decide it. If it does not rectify them, then the case may be filed to the Court of Cassation, but on the basis that they are errors which occurred in the judgment itself and not in the referral order."[v]
- The appeal should be filed by a litigant in the case who has an interest to file the appeal, in the sense that his intention of the appeal is to repeal or amend the judgment's ruling against his interest. Further, it should be filed against a litigant in the case, and that the judgment has ruled for awarding him all or some of his claims.[vi]

Some raised a question on whether it is admissible to depart from the methods of appeal in judgments outlined by the law by filing an original annulment case?

To answer this question, an opinion of the jurisprudence observed the inadmissibility of determining such methods which the legislator has restricted their exercise by laying down conditions and determining procedures for them, as well as laid down dates for filing them, by filing the original annulment case. In this respect, they argued that this case is inadmissible in criminal matters as they constitute a revision of the judgment has become conclusive by having exhausted the ordinary and extraordinary methods of appeal so that it has gained the power of the adjudicated matter, which means it has become the title of the truth. Filing the original nullity case would make the case filed again before a court of first instance while the final judgment was passed by a higher court, so the original nullity case may not allow the Court of First

[iv] Dr. Ahmad Fathy Soror, Al Waseet in the Criminal Procedures Law, Dar Al Nahda Al Arabiya, year 1993, page 888.
[v] Cassation, 6 January 1969, Cassation Judgments Volume, year 20, No.1, page 1.
[vi] Dr. Edward Ghali Al Zahabi, Criminal Procedures in the Egyptian Legislation, year 1990, Ghareeb Library, page 792.

Instance to review judgments passed by the Court of Cassation, which leads to disturbance of criminal justice, which is not acceptable.[vii]

Another opinion of jurisprudence has stated the permissibility of the original nullity case in the absence of the judgment because it is a negative determination case without the need for an explicit provision to do so, and the court competent in this case becomes the court that passed the judgment itself.[viii]

Judicial rulings have tended to deny the existence of such a case. However, the Civil Chamber of the Court of Cassation in Egypt established that this case may be filed in the event of absence and not annulment. Further, the Criminal Chamber of the Egyptian Court of Cassation permitted this case in one event only, which is the lack of authority of the panel issuing the judgment, if it is issued by the Court of Cassation itself.[ix]

We, in turn, support the opinion that it is not permissible to file the original nullity case for the same arguments. However, we tend to recommend the legislator to enact a law to establish a committee within the Court of Cassation in the State of Kuwait. This committee should be concerned with examining errors made by the court even if these errors were made by the Court of Cassation itself, to indicate whether there were errors or not. The committee may repeal the judgment if there are gross legal errors such as non-existence, for example. The way to this committee is not through filing a case, but through a complaint letter submitted to the same committee by the litigant who has the interest in such complaint.

4.2 Legislative Regulation of the Accused's Right to Appeal Judgments

The right to appeal judgments went through historical stages before being in the current regulation. The ancient Egyptians believed that justice is the basis of the prosperity of the society. Therefore, they addressed attention to the proper selection of the judges to ensure establishing justice. Hence, clergymen were keen to integrate the judicial function within their terms of reference, based on the belief of the close relations between secular laws and religious Laws. Hence, the judiciary was a priestly function. Theoretically, the judicial authority was in the king's hands, but it was practically exercised by authorization from him by other persons of the religious class, except some significant cases. Accordingly, the idea of appealing judgments was confined to a narrow scope, particularly the judgments of the minister's court, which were exposed to reconsideration. It was unlikely to resort to the king to seek his pardon as a way to appeal judgments whose divinity was believed from the source side. For this reason, they were

[vii] Mahmoud Najeeb Hosny, Explanation of the Criminal Procedures Law, Dar Al Nahda Al Arabiya, year 1988, page 1000.

[viii] Dr. Ahmad Fathy Soror, Cassation in Criminal Matters, Dar Al Nahda Al Arabiya, year 1988, page 301.

[ix] Cassation, 2 October 1963, Cassation Judgments Volume, year 13, No.149, page 596, cassation dated 6 March 1972, Cassation Judgments Volume, year 23, No.69, page 296, Civil Cassation dated 19 April 1956, Cassation Judgments Volume, year 7, page 528.

immune from being commented upon, on the basis that the judgments of Gods are not liable to being wrong.[x]

During the era of Hammurabi, the idea of appealing judgments took a different approach than the character known to the pharaohs, as the idea of appealing rulings crystallized during his reign in a desire to lift injustice in order to achieve justice. As it was stated in his introduction, "*He is the king of justice and that he has established a just law on earth so that the strong will not oppress the weak and so that the orphan and the widow may obtain justice*." Hammurabi was concerned with achieving equality before the courts and called upon everyone who was wronged to come to him to defend him (as a form of appeal against judgments), and he also stressed the need to punish the judge who ruled contrary to the justice in the case he considered. [xi]

In light of the Roman Law, the litigants agreed in advance, expressly or implicitly, on the judgment passed by the judge to whom the dispute was submitted, and his judgment was not subject to appeal. However, the litigants in the republican era were permitted to request the lifting of errors that blemished the judgments passed in their cases, by presenting them to a body made up of senior advisors of the same degree of the judges passing the judgment or the superior in order to obtain their objection to the implementation of his judgment. Further, the citizen who was sentenced to execution was also entitled to invite the people as being the true judge in order to review the case and reconsider the ruling passed in it. During the imperial era, it was permitted to appeal the rulings of the lower judiciary before the higher judiciary in order to purify them from the defects that had been attached to them in order to reach the desired justice.[xii]

Accordingly, the ruler was exercising his jurisdiction in a special court in Alexandria. Criminal hearings were called (dikasterion), and the judgments of his deputies were appealed to him in that court. The ruler and his deputies were required to adhere to imperial legal principles. Therefore, it was permissible for the litigants to file appeals to the imperial ruler in Rome to seek his justice.[xiii]

Under the old French Law, judicial rulings did not accept comment by saying that they express the divine will that refuses to make mistakes. However, with the emergence of the monarchy, separate courts were created in the provinces that were tasked with examining justice affairs and monitoring the integrity of the provisions affecting in particular the monarchy, and the king singled out some close to him. By considering grievances against court rulings, and after a period of time has passed, appeals from district judges 'decisions are permitted before the King himself, seeking his justice.

[x] Dr. Abdulraheem Seddqi Mohamed, Criminal Law of the Pharaohs, Egyptian General Authority for Books, year 1986, page 86.
[xi] Dr. Hatem Bakar, Protection of the Convict's Right in a Fair Trial, year 1997, Maaref Establishment in Alexandria, page 285.
[xii] Dr. Mohamed Zaky Abu Amer, the Defect of Error in the Criminal Judgment, Faculty of Law, Alexandria, year 1974, page 417.
[xiii] Dr. Omar Mamdooh Mustafa, Origins of the History of Law, Culture Publishing Press, Alexandria, year 1952, page 286.

In 1302, by order of the Paris Parliament, a permanent court was established to undertake justice affairs in its name and under its supervision, while it reserved the right to review the judgments of the Paris Parliament and the judgments passed by the final courts with the assistance of its council. It was devoted to pardon through what it called as the (les letters proposition), which is the origin of the system of revision (les letters de revision) that replaced it in 1670. Under the impact of the belief that no errors are possible in the rulings of the jury, the latter was canceled, and then it was reinstated by the enactment of the Crimes Investigation law of year 1895.[xiv]

Then modern legislations were laid down and regulated the right of appeal in their legislations for the protection of the right of the accused to a fair trial in order to reach criminal justice for everyone. The French Legislator regulated the right of appeal in its law under Articles 467, 622, 487 and 545 of the Criminal Procedures Law. This process takes two types of appeal methods, being the ordinary methods (opposition- appeal) and extraordinary methods (cassation- revision.)

In the aforesaid French Law, the accused relies upon appeal to confront the judgment passed against him in absentia by the Police or Appealed Misdemeanors Court. Further, the juvenile accused may appeal the judgment passed against him in absentia by the Juveniles Court according to article 1/24 of the French Juveniles Law of 1945. For the appeal, the accused may undertake the same, which refers the entire case to the Court of Appeal for hearing it again substantively and legally. According to the French Procedures Law, the judgments passed by the Misdemeanors Court. Likewise, the accused may appeal the judgment passed against him by the Police Court if the punishment ruled against him exceeds five days of imprisonment or a fine exceeding sixty francs.[xv]

The juvenile may appeal the judgments passed against him by the Police Court according to article 4/21 of the French Juveniles Law. Further, he is entitled to appeal the judgments passed against him by the Juveniles Court according to article 3/24 of the aforesaid French Juveniles Law.[xvi]

For the appeal by cassation according to the French Law, it is confined to confront the legal errors and gave the accused the right of filing the same according to the French Law, when he exhausts the ordinary means. The law has outlined its cases exclusively as follows upon contravening the rules of establishing the court, contravening its competencies, or when the judgment exceeds the decision in the case, is devoid of reasons or blemished with a shortcoming, as well as when the judgment rules for a matter which the litigant did not claim.[xvii]

For the revision according to the French Law, it is an extraordinary way guaranteed by the law to prove the innocence of the accused from an act considered as a crime or misdemeanor, for which a judgment possessing the power of the matter ruled is passed for indicting him, which is blemished with an error in the assessment of facts,

[xiv] André Laïque .Arlette le bigre . Histoire du droit pénal .T.11.procédure pénale Cujas.1975, p.145.
[xv] Jean Pradel. Droit pénal ,T.11. Procedure penal .5ed, Paris, 1990. p.598.
[xvi] Jean Pradel. Op.cit.607-608
[xvii] Jean Pradel. Op.cit.622-623 .

according to article 622 of the French Procedures Law, which sufficed the mere wrong indictment and does not stipulate that the judgment required to be revised includes a punishment.

In the English Law, it is known that criminal trials according to the English Law are always judgments after trial, and that the judgments in absentia are very limited and in minor crimes, in which the law only permits the accused to appeal against the judgment passed against him in absentia, provided there is an annulment in connection with the procedures of notifying him with the charge and that the accused raises in this respect a substantial pleading.[xviii]

The English Law adopted the appeal, and its primary function is to protect the innocent from bearing the risk of being indicted for a crime he did not commit and avoiding the guilty an unfair punishment for the crimes proved to be committed by him. Therefore, the prosecution may not appeal the acquittal decision issued by the trial court except in rare and specific cases. The English Law has expanded the accused's right to appeal, has provided several methods to do so and facilitated its methods. On one hand, it permitted to appeal the judgments passed against him by the Summary Court to the Crown Court in order to re-examine the case in its substantive and legal aspects.[xix]

Article 8 of the English Appeals Act of 1968 guaranteed that when an accused is convicted based on an indictment or following the Corner investigation, he can appeal the indictment issued by the jury for not being convinced of their opinion or for breaching confidence in the judgment they issued, or when it is in violation of the law, provided that he obtains permission from the Court of Appeal or the court that has issued the judgment when the appeal is based on substantive matters. The permission is granted whenever its conditions exist, and it may not be withheld due to the sheer sufficiency of the evidentiary proof while ensuring the right of the accused to challenge the refusal decision before the Court of Appeal with its full panel.[xx]

In addition, the accused may exercise his right to appeal even if he admits his guilt or due to his misunderstanding of the charge against him or as a result of the absence of a lawyer to defend him. Further, the English Law facilitates the appeal as it guarantees the coverage of its expenses whenever the appellant is in need, to facilitate the exercise of his right to appeal in order to support his right to a fair trial. It has also given him the right to request release in order to be able to perform his full role in defending himself and permitted him to appeal the decision which does not respond to this request.[xxi]

The English Law gave the accused the right to appeal the judgment issued against him by the Criminal Court of Appeal before the House of Lords provided that he obtains a certificate from the Attorney General stating that "*the judgment of the Court of Appeal contains legal points of exceptional importance, and it is in the public interest that the appeal is reviewed in order to obtain a final opinion.*" This method represents an appeal by cassation,

[xviii] Dr. Hatem Bakar, op. cit., page 293.

[xix] Rupert Cross. The English sentencing system, 1975, p.99

[xx] Abdulsatar Al Kabisi, Convict's Guarantees Before and During Trial, a PHD thesis, Cairo University, Faculty of Law, year 1981, page 990.

[xxi] A. Wars by, Appealing Against conviction by right law review, 1982, pp.643.

and in order to proceed with it, the contested court must certify that there are important legal points that have been included in the decision subject of appeal. In addition, the accused may appeal against the denial of the certificate before the House of Lords within 14 days from the date of passing it.[xxii]

Further, the English Law also permits the accused other means of appeal, called additional or indirect means, when he has exhausted the direct methods or neglected to pursue them, provided that the judgment passed in the case relinquished justice in a good manner is clear. This method is what is known as the petition of the Minister of Interior in implementation of the prerogative of the Crown with regard to clemency for the accused. The petition is subject to several possibilities, as it may allow the case to be returned to the Court of Appeal for consideration again, the Minister of Interior may undertake to review it himself or with the help of others, and he may refer the matter to the Queen seeking her pardon. On the other hand, it is permissible for a person deprived of his freedom without a legal justification to resort to the judiciary to study his case and clarify the right to it through what is called the Writ of Hapeas Corpus.[xxiii]

The American Law permits the accused according to the federal system and the States system to proceed with his right in the appeal against the indictment judgments to ensure the safety and justice of the criminal procedures, in observance of the rules of the Constitution and the procedural Laws. There is no suspicion that the appeal is intended to correct judgments of the defects blemishing them to prevent the severity of the punishment, and to ensure the standardization of the criteria for passing them.[xxiv]

The accused may exercise his right of appeal through three methods, namely upholding, appropriate appeal, and requesting the case file according to an order directed by the higher court to the lower court. Accordingly, the accused is entitled to appeal before the appellate court, and may appeal the latter's judgments before American Supreme Court, according to article 27 of the Federal Procedures Rules. The appeal addresses the case from two aspects, substantive and legal. To evade the risk of trial of the accused for one incident more than once, the indicting authority may not appeal the decision issued by the jury in favor of the accused.[xxv]

The accused may request revision of the case upon ruling for indicting him by what is known as a revision case. The revision may be performed by the court of the State which issued the judgment in the case or through the feral court. The State court revision takes place after the issuing of the indictment judgment following the exhaustion of the direct appeal procedures, whereby the accused may proceed the case by appearing before the court in order to raise the factual issues that were discovered or emerged after the completion of his trial, that would question the validity of finding him guilty. However, it is required that the facts were not known during the original trial and it was not possible to reach them with the amount of care that is supposed to be given in similar

[xxii] See article 1/14 of the English Appeal Act of 1968.
[xxiii] Roger Arguil; Criminal procedure, London, 1969, p.184-186.
[xxiv] Kenneth M. Welles Paul B . Weston, Criminal procedure and trial practice. New Jersey, 1977, p.192.
[xxv] Kenneth M. Welles Paul B. Weston, op.cit., p.193-194

cases. If the accused succeeds in this method, he will have a new trial before the same court that accused him for the first time.[xxvi]

Further, according to the American Constitution as per the fourth amendment of 1868, the accused prisoner in the State prison may request a revision of his indictment judgment by claiming the breach of his federal constitutional right in connection with the validity of arresting and detaining him, before the federal court.

If the grounds of this method are valid, it leads to repealing the punishment ruled or its mitigation, because it raises factual matters in addition to legal matters. It combines between the cassation and revision methods permitted by the Latin type legal systems. This ability is based on the foundation that the constitutional rights may not be wasted as a result of omission and coincident, as equity means may not be missed for the accused, based on the conviction with the theoretical rule for the stability of the trusteeship against injustice.[xxvii]

The Egyptian Legislator regulated the right of the accused to challenge criminal judgments in the Egyptian Criminal Procedures Law, particularly Articles 398-401, where it addressed in these Articles the provisions of the objection, regulated the appeal systems in Articles 402-419 and regulating the revision in Articles 441-453. The Egyptian Legislator has dedicated Law No.57/1959 for objection by cassation.

Further, the Kuwaiti Legislator has also regulated the right of the accused to appeal criminal judgments in the Kuwaiti Criminal Trials and Procedures Law, whereby it allocated Articles 187-198 for objection, and regulated appeal in Articles 199-213. The Kuwaiti Legislator allocated Law No.40 of 1972 for objection by cassation.[xxviii]

Recently, the Kuwaiti Legislator has introduced the petition of Revision No.11 of 2020 by amending a number of provisions of the Law No.17 of 1960 for promulgating the Criminal Procedures and Trials Law, which was unregulated by its Criminal Procedure Code. It has done good by doing so, as this reflects the keenness of the Kuwaiti Legislator to keep abreast of the comparative foreign legislations. It also aims at establishing and guaranteeing a fair trial for the accused.

International treaties and conventions were keen to determine the right of appeal to the accused in order to reach his right to a fair trial. Article 2/8 Clause (H) of the American Human Rights Treaty of 1969 stipulated that the accused "*is entitled to appeal the judgment before a higher degree court."*

The International Convention on Civil and Political Rights stated in article 5/14 that "*every person accused with a crime is entitled to a revision of the judgment and punishment by a higher court according to the law*."

The European Court of Human Rights confirmed in the case of Bayar Et Gürbüz C. Turquie 2015 that the right to appeal is a necessary component of a fair trial. The matter in this case related to the publication of an advertisement by an official in the newspaper

[xxvi] Leonardel Cavis, op. cit., page 472.

[xxvii] Wainwright V. Jsaec. U.S. 107. 1982. p.456

[xxviii] The majority of Arab legislations regulated the methods of appealing judgments, such as the Iraqi law in articles 243-279, articles 495-530 of the Algerian law and articles 187-189 of the Syrian law.

in Turkey for the Kurdistan Workers' Party, which is banned from dealing with it in Turkey as a terrorist party. This person was brought to trial, and the Turkish court sentenced him to a fine after the case had lasted for 3 years. The accused appealed this ruling to the Supreme Court in Turkey, and his appeal was rejected based on the inadmissibility of the appeal against the fine ruling. He appealed this ruling to the European Court of Human Rights on the basis of the trial court's violation of article 6, paragraph 1 of the European Convention on Human Rights. The European Court has ruled that the trial court has violated article 6 of the European Convention on Human Rights, which guarantees the right to appeal as one of the elements of a fair trial and that the accused has the right to appeal the judgment even if it was issued with a fine. Hence, the trial court may not base its judgment on a text that does not allow to appeal a fine that does not exceed a certain amount, as this text violates the right to a fair case.

We support the conclusion of the court, as the criminal judgment, even if the punishment is a fine, produces other effects such as the civil compensation. Therefore, depriving him from his right to appeal is considered as a deprivation of his right to a fair trial.[xxix]

The European Court of Human Rights has ruled that the right to appeal the deportation decision for a foreigner is one of the elements of a fair case. In the H.R. c. France case in 2011, its facts concluded with the issuance of an administrative decision to expel an Algerian person residing in France to his country. He appealed before the Administrative Court which upheld the decision. Then, he appealed this first instance judgment before the Court of Appeal. However, the first instance judgment was implemented, bearing in mind that French Law provides legal guarantees for those against whom a decision was issued for expulsion even if he was accused in his country of a terrorist crime. One of these guarantees is the right to appeal. A foreigner can appeal the decision to expel him within 48 hours before the Administrative Court, which must decide it within 72 hours. The expulsion decision may not be executed before the time limit has passed. In any event, if the case continues before the Administrative Court for a period longer than that, it is not permissible to implement the expulsion decision before that. If a judgment is issued by the Administrative Court regarding the validity of the expulsion decision, then the accused person may challenge it by appeal. However, the appeal decision was implemented after the issuance of the Administrative Court's ruling and before the appeal was decided, in accordance with the general rules for the Administrative Court rulings. Therefore, he appealed before the European Court of Human Rights for the trial court's violation of article 6 paragraph 1 of the European Convention on Human Rights on the basis of claiming that the trial court violated his right to litigation guaranteed to him in accordance with article 6 of the European Convention on Human Rights, which led to his failure to enjoy a fair trial. In addition to this violation of the right to litigation in two degrees, given that the decision of the Administrative Judiciary Court (first degree) is executed expeditiously without the appeal having a suspending effect, which exposes the appellant to whom an expulsion

[xxix] Cour Européenne des Droits de l'Homme, Affaire Bayar Et Gürbüz c. Turquie (nº 2), (*Requête nº 33037/07)*, 3 février 2015

decision was issued to an unavoidable risk. The European Court ruled that the appellant foreigner has the right to litigate as long as the administrative decision issued to expel him was susceptible to appeal and as long as this appeal had a suspensive effect. As for the appeal of the ruling of the Administrative Judiciary Court, it has no suspensive effect and does not deprive the appellant of his right to appeal. It is considered as a compliance with the established general rule when challenging the rulings of the Administrative Judiciary Court.[xxx]

After we addressed in the previous section the description of the accused's right to appeal judgments, by searching in the appeal methods, their reasons, and the legislative regulation, whether domestic or international, we must indicate the relationship of the appeal methods with the accused's right to a fair trial? We will illustrate this in the Second section, God willing.

5. Appeal's Relationship with the Accused's Right to a Fair Trial

Undoubtedly, appealing criminal judgments was legislated to rectify the errors and defects blemishing them, in order to reach the justice pending on their soundness. The criminal judgment may involve a wrong indictment, which indicates that the criminalized act for which the defendant was tried did not occur in the manner set forth in the criminalization form, or that it has occurred completely by a person other than that who was tried, or that the court has tried its perpetrator but with a description other than that for which he should have been tried. Therefore, indictment has replaced innocence, a person other than the real perpetrator was indicted or it has indicted him with a crime which is more severe that for which he should have been tried, or tried him without considering the guarantees required by the law, and therefore did not hear his claims, did not investigate his pleading or provide him with the opportunity to defend himself.

Therefore, the need of the accused emerged to have a means aimed at rectifying such defects and error sin the judgments issued against him. This method is appealing the judgments, through which the judgment is revised and the errors amended to reach the truth and the desired justice from the same. Therefore, the connection of the accused's right to a fair trial by reaching this objective is closely connected. This connection is evident through the effects established from each method of appeal.

Therefore, we divide this section, God willing, into subsections. The First Subsection is the ordinary appeal method and the Second Subsection is the extraordinary appeal methods in order to indicate their relationship with the right of the accused to a fair trial, the effects established from the right of the accused to appeal and their reflections on his trial, in order to reach a fair trial for him.

[xxx] Cour Europeenne Des Droits De L'homme, Affaire H. R. / France (5ème section), arrêt du *22 septembre 2011.*

5.1 Ordinary Methods of the Appeal

5.1.1 Opposition

Opposition (L'apposition) is defined as being an ordinary means of appeal of judgments passed in misdemeanors and irregularities, whereby the case is raised again before the same court which passed the judgment in absentia. Opposition is permissible in all judgments in absentia, irrespective of the court passing them, which means whether they are first instance, appeal or criminal court having jurisdiction over the misdemeanor by way of exemption. As for the judgments in absentia passed by the Criminal Court in a crime, they may not be appealed because they lapse by the force of the law upon the accused's presence or his arrest.[xxxi]

The basis of the right to appeal by opposition is observing the principle of being present and the oral principle, from which the right to fair hearing is derived. This is because the rule governing criminal trials is that they take place in confrontation of the accused in order to enable him to defend himself by submitting his claims, substantive and legal pleadings, as well as provide him with the opportunity to discuss the witnesses and refute the evidences existing against him. Therefore, the criminal judgment passed in the absence of the accused is one of the weakest judgments in expressing the argument of its decision. Therefore, it should not acquire the effectiveness of the matter ruled because it was passed without judiciary's hearing of the accused's decision.[xxxii]

The principle of confrontation is an essential element of a fair case, because it allows the accused to know what was presented against him in evidence, which allows him to discuss that evidence and respond to the arguments and grounds of the public prosecution. Although the European Convention on Human Rights did not explicitly mention the necessity for the accused to attend court hearings, it ruled that the presence of the accused is among the requirements of a fair case. Accordingly, it ruled, in the case of Cf X v Germany- that the defendant’s failure to attend the trial hearings renders the trial unfair and in violation of article (6) of the Convention.[xxxiii] Among the indications of this violation- in the case of Barberà, Messengué and Jabardo v Spain, that the accused was unable to discuss the prosecution witness because he did not attend the pleading hearing.[xxxiv]

Therefore, the judgment in absentia appears inconsistent with these considerations, in criminal cases more clearly than in civil cases where power of attorney is possible.[xxxv] As for criminal cases, some of them are permissible for the accused to attend by a proxy, and for others, which expose the accused to being sentenced to imprisonment, it is not permissible to attend by a proxy. Rather the accused must be present in person, otherwise the judgment is in absentia**.**

[xxxi] Merle Roger et Vitu (André) : Traite de droit criminel, procédure pénal , T.II.4èd, Cujas 1989, p.830.
[xxxii] Poncet D., Le jugement par défaut devant les juridictions pénales, quelques considérations de droit comparé , rèv. Sc.crim.1979.p.1
[xxxiii] Cf X v Germany, App no 1169/61, (1964) 13 CD 1.71 Colozza v Italy, judgment of 12 Feb 1985, Series A no 89, (1985) 7 EHRR 516, para 27.
[xxxiv] Barbara, Messengué and Jabardo v Spain, judgment of 6 Dec 1988, Series A no 146, (1989) 11 EHRR 360, para 78.
[xxxv] Dombo Beheer BV v Netherlands, judgment of 27 Oct 1993, Series A no 274, (1994) 18 EHRR, 213, para 32

However, the judgment in absentia does not always conflict with a fair case. As long as the accused was properly notified and re-notified with the case and did not attend, then he has no right to obstruct the course of justice, and therefore the court has the right to rule against him in absentia.[xxxvi] Accordingly, the European Court ruled- in Goddi v Italy -that there was a violation of the right to a fair trial if the accused was not properly notified of the hearing and the judgment was passed against him in absentia.[xxxvii]

The European Court relied in this respect on the idea of waiver. The accused has the right to waive his presence before the court, especially the court of first instance.[xxxviii] However, this is conditional upon him being given the opportunity to request hearing by opposing the judgment in absentia. As long as he was present when the judgment in absentia was appealed, the trial does not violate the right to a fair case. This is, of course, conditional on the opposition court's examination or the objection by appeal if he did not attend the opposition under the subject of the case and the right of defense is given to him after confronting him with the charge and the proof evidences submitted against him. Each time, the Appeal Court hears the subject of the case, the accused is entitled to appear before this court and not suffice with appearing before the Court of First Instance.[xxxix]

The European Court takes into consideration when it requires the necessity of the accused's presence during the hearing of the objection to the judgment in absentia, two considerations: the first is related to the extent of his right to discuss the evidence before the Appeal Court.[xl] The second is related to the extent of the seriousness of the charge addressed to him. If the charge is serious, these two considerations make it necessary the presence of the accused, otherwise the trial would be unfair.[xli]

Undoubtedly, the basis of opposing the judgment in absentia is respecting the principle of being present and the oral principle, which guarantee to the accused the right of defending himself against the charge attributed to him. Some said "it is assumed that the judge reads the case papers and rules for exoneration, if the elements of the crime are unavailable, irrespective of the presence of absence of the accused. The rule is the innocence of the accused, and that the absence of the accused despite his notification does

[xxxvi] Colozza v Italy, above n59, paras 27–29; Poitrimol v France, judgment of 23 Nov 1993, Series A ,no 277-A, (1994) 18 EHRR 130, para 31.

[xxxvii] Goddi v Italy, judgment of 9 Apr 1984, Series A no 76, (1984) 6 EHRR 457, paras 27–32.

[xxxviii] FCB v Italy, judgment of 28 Aug 1991, Series A no 208-B, (1992) 14 EHRR 909, para 35.

[xxxix] Tierce and others v San Marino, nos 24954/94, 24971/94 and 24972/94, ECHR 2001-IX, (2002) 34 EHRR 25, para 95. Although there are some exceptions including Fejde v Sweden, judgment of 29 Oct 1991, Series A no 212-C, (1994) 17 EHRR 14

[xl] Ekbatani v Sweden, judgment of 26 May 1988, Series A no 134, (1991) 13 EHRR 504, para 32; Helmers v Sweden, judgment of 29 Oct 1991, Series A no 212-A, (1993) 15 EHRR 285, paras 38 and 39.

[xli] Kremzow v Austria, Judgment of 21 Sept 1993, Series A no 268-B, (1994) 17 EHRR 322, para 68. When the matter is related to hearing the pleading for annulment, therefore the European Court determined that the presence of the accused was not necessary. Further, it also ruled in the case of: Botten v Norway, judgment of 19 Feb 1996, ECHR 1996-I, 126, (2001) 32 EHRR 3, para 53.

not mean his belittling of the court in order to rule against him in absentia for indictment. Rather, there is nothing which prevents ruling against him in absentia for exoneration."[xlii]

The Egyptian Legislator has regulated the opposition method in the Egyptian Criminal Procedures Law, Articles 398-401. Further, it was also regulated by the Kuwaiti Legislator in the Criminal Procedures and Trials Law, Articles 187-198.[xliii]

The Supreme Court in Libya ruled in the opposition that "*the wisdom for establishing the principle of appeal by opposition against judgments in absentia, is that the legislator has refrained from indicting the litigant without a defense on his part, and therefore has given him the right, if he was unable to exercise his right to defend himself, to request within a prescribed date a revision of his case before his judge who indicted him, in order to hear from him his defense for himself and withdraw from his ruling if he is convinced from the same, and confirm his ruling if he finds nothing to change his belief*."[xliv]

Up to the year 1935, the French Legislation has known the absentia system for not declaring the defense, where the absentia for not declaring the defense means that the accused is absent from being present or is actually present before the court but refrains for certain reasons from declaring his defense or discussing the charge attributed to him or discussion with the witnesses, which means he refuses to participate in the discussions during the hearing. The accused is considered as absent despite his physical presence in the hearing. Therefore, some called this absence as the absence of the present person.[xlv]

According to the absence system for not declaring the defense, the accused was attending the hearing and could reject participating in the discussions and declaring his defense in the subject of the case. In this event, the judgment is passed against him in absentia, without discrimination between the accused absent from being present and the accused being absent from defense.[xlvi]

An opinion in the French jurisprudence observed that absence for not declaring the defense is using a right and its factual form is to declare that he is not ready to defend himself against the charge attributed to him and to request adjournment. However, the court refuses adjournment and therefore, the accused notifies his rejection to participate in the discussions and absence is not materialized due to the absence of declaring the defense with the mere notification in form. Rather, it is materialized as a result of the real absence from the discussions in confrontation of the indictment.[xlvii]

The absence for not declaring the defense implies that the judgment is considered in absentia, and therefore the accused may challenge this judgment. This rule considers

[xlii] Dr. Abdulhakeem Fouda, Opposition in Civil, Criminal and Shariah Matters, Dar Al Fiker Al Jamai'I, Alexandria, 1992, page 14.

[xliii] The majority of legislations organized opposition in their procedural laws, such as article 361 of the Libyan Law, article 175 of the French Law, article 404 of the Moroccan Law, article 571 of the Italian Law, and article 410 of the French Law.

[xliv] Libyan cassation on 10/2/1970, year 6, page 142.

[xlv] Dr. Ahmad Shawki Abu Khatwa, Criminal Judgments in Absentia, Dar Al Nahda Al Arabiya, year 1987, page 105.

[xlvi] Mohamed Jaber Abdulazim Abdulqader, Absence of the Accused in the Trial Stage in the Egyptian and Comparative Procedures Law and Islamic Laws, a PhD thesis, Faculty of Law, Cairo University, Bani Suef Branch, 1997, page 156.

[xlvii] Helie Faustin : Traité de l'instruction criminelle, 2è, Paris,1866-1867, 8 Tames, p. 710.

the legal consecration of the defendant's physical presence. As the French Legislator did not consider the physical presence unless it was accompanied by the intellectual presence of the person by participating in discussions and refuting the accusation attributed to him**.**

The French Legislator amended by virtue of the decree-law issued on August 8, 1935, article 149 of the Criminal Investigation Law, whereby the system of absence was abolished for not declaring a defense as a result of the criticisms leveled against it that the absence system for not declaring a defense gives the accused an easy way to escape and underestimate justice as well as gives the accused with bad intention the opportunity to disrupt the course of justice and prolong the proceedings without justification. It is sufficient for the accused to exercise his right to challenge in the opposition to withdraw from the hearing before hearing the case, therefore the judgment is passed against him in absentia. The current French Criminal Procedure Law followed this approach and considered that the presence of the accused is an obligation on him. Article 143 of this law stipulates that "*it is not acceptable for any person to claim that he is absent as long as he is present from the beginning of the hearing*." [xlviii]

Although this system has been abolished in France, its importance is underlined by the connection between the lack of defense and opposition in the judgment in absentia, and therefore it is an evident that the right to challenge by opposition achieves the effectiveness of the defense.[xlix]

The European Court of Human Rights has decided that the defendant's absence from the trial hearing and the passing of a judgment in absentia against him does not contravene the requirements of a fair case, but with conditions. It is necessary for him to be informed of the accusation by the investigation authorities and to notify him officially about the date of the hearing, and being informed of the same, and that his failure to attend the trial hearing is without an acceptable excuse and that the accused has the right to appeal the judgment in absentia, whether by opposition or by appeal. If the appeal judgment is passed to uphold the judgment in absentia, then the accused may not afterwards challenge the judgment under the pretext that he did not defend himself during his trial in absentia as long as he attended the appeal hearing and expressed his defense and discussion with witnesses. In fact, it is summarized in filing a criminal case against one of the litigants, he was informed of the accusation by the investigation authorities, and he was formally informed and received this notification of the date of the trial hearing, but he did not attend the hearing without an acceptable excuse. Therefore, a judgment was passed against him in absentia for indicting him. Then, the accused appealed this judgment and the Court of Appeal upheld it. Then, he appealed this ruling before the European Court of Human Rights, in which he relied on its violation of article 6 paragraph 1, 3/clause A/B/C which promotes the right to a fair trial. The European Court for Human Rights ruled for the validity of the trial court judgment and that it has not

[xlviii] In implementation of the same, see: Crime 17 fév. 1993. Bull .N°81 et crime 28 fév 1995, Bull, N° 86

[xlix] It is worth noting that the Egyptian and Kuwaiti legislator and the majority of Arab legislations do not recognize the rule of absence for not showing a defense, which was applicable in France in the past.

violated the requirements of fair trial as established by article 6 of the Convention. The Court based based its judgment on that the accused was informed of the trial hearing and was already informed of the charge by the investigation authorities and had not provided an acceptable excuse for not attending the hearing, which would make him waive his right to defend in addition to that he may appeal the judgment.[1]

The judgments of the European Court of Human Rights in many cases have rejected this direction and previous interpretation.[li]

Appealing the judgment by objection implies several guarantees enjoyed by the appealing accused, which we will address respectively, God willing, as follows:

A. Discontinuing the implementation of the challenged judgment

The accused's exercise of his right to appeal the judgment passed against him in absentia by objection results in the inadmissibility of implementing this judgment. The objective of this is that the judgment in absentia was passed without the accused's showing his defense. Therefore, this judgment is considered as among the weakest judgments for evidencing the validity of its ruling. Therefore, justice requires suspending the implementation of this judgment during the objection period and during its hearing, until the judgment is final.

In its Criminal Procedures Law, the Egyptian Legislator has stipulated in article 467 thereof that "*the judgment in absentia for a punishment may be implemented if the accused therein does not challenge within the date prescribed under the first paragraph of article 398*." Then, it stipulated under article 468 thereof that the "*upon ruling in absentia for imprisonment for one month or more if the accused has no specific residence place in Egypt or if a pre-trial detention order is passed against him, the court may order, at the request of the Public Prosecution, his arrest and imprisonment. Upon arresting him, the accused is imprisoned in implementation of this order, until it is ruled in the objection filed by him or the date prescribed for the same lapses. Under no condition may the imprisonment continue for a period exceeding the sentenced period, and all unless the court to which the objection is filed deems releasing him before deciding the objection*."

We, in turn, say that the Egyptian Legislator was wrong for the possibility of imprisoning the accused in absentia, if he has no known domicile place in Egypt. This is because this judgment is in absentia and the defendant did not exercise his right to defense. Furthermore, this previous text 468 involves a discrimination between the defendant who has a residence place and the defendant who has no residence place. This in turn, obstructs the right of the defendant to a fair trial.

We commend the Kuwaiti Legislator which stipulated that judgments in absentia may not be implemented unless they became final. Article 214 of the Kuwaiti Criminal

[1] European Court Human Rights, Case of Mihelj v. Slovenia *(Application no. 14204/07)* 15 January 2015.

[li] *European Court Human Rights, a contrario, Miraux v. France*, no. 73529/01, § 36, 26 September 2006). *Van Mechelen and Others v. the Netherlands*, 23 April 1997. , *Sejdovic v. Italy* [GC], no. 56581/00, § 82, ECHR 2006-II.,*a contrario, Henri Rivière and Others v. France*, no. 46460/10, §§ 31-34, 25 July 2013).

Procedures and Trials Law stipulates that "*the judgments passed by the criminal courts may not be implemented unless they become final*."

Further, we recommend the Egyptian Legislator to rectify this error and cancel the paragraph of article 468 thereof, which rules for imprisoning the accused in absentia, if he has no known residence place in Egypt. In turn, we say that in order to avoid a legal gap for the accused in absentia who has no residence place in Egypt, to claim the Public Prosecution to travel ban him in order to complete his trial procedures without imprisoning him according to the judgment in absentia passed against him.

B. Re-filing the case again to the same court

Appealing the judgment by objection results in raising the case again to the same court which passed the judgment in absentia, and therefore the opportunity is provided to the accused in order to show his defense which he was unable to show as a result of being absent upon hearing the case.

Article 401 of the Egyptian Criminal Procedures Law stipulates that "*the objection results in the revision of the case for the appellant before the court which passed the judgment in absentia*."

Article 187 of the Kuwaiti Criminal Procedures and Trials Law stipulates that "*the accused in a judgment in absentia may be challenged by the accused person in misdemeanors and felonies. The objection takes place before the court which passed the judgment in absentia*."

When the case is raised to the same court again, it shall have the absolute authority to complete its elements, within the limits for which it was filed in the first time. Therefore, the statements of the accused may be heard and he may be confronted with other defendants or witnesses. Further, the witnesses who did not attend previously may be heard, as well as other procedures which the legislator permitted to the court in order to investigate the case.[lii]

If the procedures undertaken before the judgment in absentia are valid, they shall remain unchanged and the court is not obliged to repeat them upon hearing the objection. Despite this, the accused is entitled to show his defense and submit legal and substantive claims and pleadings. In this event, the court should investigate or reply to them, as if the case is being heard before it for the first time. Upon hearing the objection, the court shall adhere to its substantive and subjective limits. Therefore, if the accused appeals the civil and criminal cases, the court may hear them together. But if the appeal is confined to the criminal case, the court's authority shall be confined to this case only.

If the judgment in absentia rules for the exoneration of the accused from either of the two charges and indicted him in the other charge, the scope of the objection shall be outlined by the latter charge. Further, the court may not hear fact subsequent to the passing of the judgment in absentia if they were not raised to the court previously, and

[lii] Dr. Ahmad Sobhy Al Attar, Legal Methods of Appealing Criminal Judgments, first edition, without a publisher, year 1990, page 38.

constitute an accusation for other facts uncovered by the case in which the judgment in absentia was passed.[liii]

Further, the court shall adhere to the person of the appellant. If the accused alone is the one who challenged the judgment, then the court may not address the ruling of the judgment in absentia in connection with the compensation for the party liable for the public rights. In the event of multiple defendants and parties responsible for the public rights, and some of them challenged the judgment while the others did not do so, then the court's authority shall be confined to hearing the objection for those of them who challenged the judgment, in implementation of the rule for the relativity of the effect of the appeal.[liv]

C. Inadmissibility of Damaging the Appellant as a Result of his Objection

Appealing the judgment by objection results in the accused gaining a significant guarantee, which is the inadmissibility of being damaged by his objection of the judgment in absentia passed against him. This guarantee is considered the result of a general principle governing appeals in judgments, and rules that that the appeal may not be turned against the appellant.[lv]

The Egyptian Legislator confirmed this rule by stipulating in Article 401 of the Egyptian Criminal Procedures Law that "*the objection results in the revision of the case for the appellant before the court which passed the judgment in absentia. The appellant may not be damaged, under any condition, based on the objection filed by him*."

This is also confirmed by Article 197 of the Kuwaiti Criminal Procedures and Trials Law which stipulates that "*the objection may not be harmful to the appellant, as the judgment in absentia may be repealed and ruling for exoneration. Further, the judgment in absentia may be amended and the punishment stipulated therein reduced. However, such punishment may not be reinforced*."

In this respect, the Egyptian Court of Cassation ruled that "*the objection shall be heard before the same court which passed the judgment in absentia, after hearing the appellant's defense, if it observes the necessity of withdrawing from ruling, then it may repeal it or amend it. However, if it observes its amendment, it may only do so for the interest of the appealing accused, and may not rule for a punishment which is more severe than that ruled in absentia, otherwise it would have violated the law*."[lvi]

The French Legislator's approach is opposite to the Egyptian Legislator, as it determined that the appeal by objection leads to the lapse of the judgment in absentia, which means that this appeal is not a means for repetition but on the contrary, it has a lapse effect. This is stipulated by article 489 of the French Criminal Procedures Law, by

[liii] Dr. Ala'a Mohamed Al Sawi, op. cit., page 759.
[liv] Dr. Ahmad Sobhy Al Attar, op.cit., page 39.
[lv] Dr. Raouf Obaid, Criminal Procedures Principles in the Egyptian Legislation, Dar Al Fiker Al Araby, year 2006, page 763.
[lvi] Cassation 28 December 1982, Cassation Judgments Volume, year 23, page 219, page 696.

stipulating that "*the judgment in absentia is considered as null and void if the accused challenge sits implementation*."[lvii]

According to this text, the court may rule for a punishment more severe than it ruled in the challenged judgment in absentia.[lviii]

Jurisprudence justified this guarantee, which is the inadmissibility of damaging the appellant by his objection, that the objection is a complaint filed by the accused to the judge who passed the judgment in absentia for the purpose of repealing or mitigating the judgment, while it was possible for him to accept the judgment in absentia and not complain against the same. Therefore, it is unjust to damage him and make his complaint a damage against him and a reason for reinforcing the judgment against him.[lix]

Further, jurisprudence justifies this rule also that the appellant who fails to attend the hearing scheduled for the objection without a compelling excused he shall be punished for the same by considering the objection as null and void. Therefore, if it is possible to reinforce the punishment against that appellant who attending the objection hearing, his status would have been worse than the status of the person who deliberately failed to attend which is considered as very contradictory and against justice.[lx]

It is worth noting that the court hearing the objection is not required by law to consider the interest of the appellant unless within the limits stated in the text of the judgment in connection with the ruled punishment only. All the rectification carried out by the court within these limits of the judgment tin absentia whether in terms of the reasons, facts or law, may not be considered a contrary to the requirement of the objection for guaranteeing the inadmissibility of damaging the appellant by his appeal, as long as it did not change the punishment and as long as the court has considered the rights of defense as known in the law.[lxi]

5.1.2 Appeal

Appeal is defined as being an ordinary means of the methods of challenging criminal judgments, whereby the case is raised to a court of a higher degree than that which passed the appealed judgment in order to repeal or amend this judgment. Therefore, the appeal is considered as a means of change and reform. It is focused on the judgments passed by the district courts in misdemeanors, violations and felonies.[lxii]

The appeal is a reform or rectification of the error in the judgment before the Court of First Instance in particular and establishing a type of unity of legal interpretation among the courts to a certain extent. It makes the first instance judge being careful in implementing the law insightfully and wisely, and to properly guarantee the right of

[lvii] Stefani (G) , Levasseur (G) : procédure pénale, 16èd, 1996, p.576.
[lviii] See: crim 28 janv. 1985, Bull, n°43, et crim 5 oct .1994, Bull, n°319.
[lix] Dr. Ahmad Shawki Abu Khattwa, op.cit., page 151.
[lx] Dr. Raouf Obaid, op.cit., page 764.
[lxi] Cassation , 18 December 1944, Legal Rules Volume, part 6, No.427, page 564.
[lxii] The Egyptian legislation does not recognize the appeal judgments passed by the Criminal Court, unless after the issuing of the new Egyptian constitution which permitted the appeal of judgments passed by the Criminal Court. However, it did not adopt a law to this effect yet. This is contrary to the Kuwaiti legislator which makes the appeal of all judgments admissible, whether for misdemeanors or felonies.

defense. Further, the appeal makes the case presented to a court, the composition of which and the experience of its judges, provides assurance to the word of the judiciary and makes the judgment passed in the appeal acquire a significant authority, because it is less likely to involve an error. Rather, the multiple degrees of litigation make the 2nd degree court a controller over the 1st degree courts, whereby it confirms the right and rectifies the wrong. Therefore, the accused is assured of the judgment passed against him.[lxiii]

An argument was raised on the idea of appeal among jurists who supported and challenged the idea. Some criticized the idea of appeal, on the pretext that it prolongs the dispute and delays its decision. further, the 2nd degree court's judgment is unconfirmed, which exposes it in turn to error. If the 2nd degree court judges are closer to the right, why has not been the case presented to them directly. Further, it is said that the 2nd degree court provides an advantage for the necessity of having a third degree. In addition, the litigation system in two degrees breaches the equality of opportunities, in the sense that the party who won his case before the Court of First Instance, then lost it before the Appeal Court is not provided with another opportunity to present his case, such as the opportunity provided to the party losing his case in the first instance judgment. The multiplicity of the litigation degrees leads to the increase of costs for the litigants. It is also said that if the multiplicity theory is sound, then the right to appeal should have been given to all the litigants in all the cases. There are cases presented to the Court of First Instance in which it rules finally.[lxiv]

In this respect, it is said that the "*principle of litigation in two degrees is a transfer of the case from a judge who knew the case with a good knowledge to a judge who knew the case with bad knowledge*."[lxv]

The previous opinion was disputed by a group of jurists on the pretext that saying that the system of multiple degrees of litigation leads to prolonging the litigation period is rebutted theoretically, by the fact that it is undisputed that the ordinary slow court is better than the quick judiciary which is exposed to error. The slow procedures themselves are not really due to the multiple degrees of litigation insofar as it stems from the same procedures and from the failure of the judicial assistants and tools at times and from the litigants' persistence at other times. They responded to the proponents of the appeal idea that the benefit of the 2nd degree court is uncertain which does not justify repealing this degree but rather confirms keeping it. Further, its error is less likely as it is composed of judges who are more in number and deeper in experience.[lxvi]

Further, they said that raising the dispute before the 2nd degree court is rebutted because studying the dispute before the Court of First Instance makes the 2nd degree

[lxiii] Dr. Mohamed Al Fadel, Al Wajeez in the Foundations of the Criminal Trials, 1961, without publisher, page 323.
[lxiv] Dr. Mohamed Mohi Eddin Awad, Criminal Law- Its Procedures in the Egyptian and Sudanese Legislations, pat 2, Cairo, 1964, page 306.
[lxv] Dr. Mohamed Mahmoud Al Sharkasy, The Accused's Guarantees During the Initial Investigation Stage and Trial in the Libyan and Comparative Procedures Law, Dar Al Nahda Al Arabiya, 2001, page 639.
[lxvi] Dr. Mohamed Zaky Abu Amer, Defect of Error in the Criminal Judgment and Theory of Appealing It, op. cit., page 140.

court's task easier. Further, hearing the dispute before two courts of various degrees reduces the opportunity of making errors and provides a guarantee to the litigants to achieve justice. They replied that the saying for establishing a third degree as long as the multiplicity is an advantage is an over-argument, as it is unjustifiable for avoiding error to be over-precautious endlessly.

They also said that multiplicity leads to increasing the costs for the litigants, which they replied to by saying that it is easy for the owner of the right to spend for reaching his right while being assured rather than closing the door to it, and making its fate pending on a court which may right and may be wrong.[lxvii]

The European Court on Human Rights has confirmed in many of its judgments the right to appeal and considered it as among the requirements of fair trial and one of its fundamental elements. As a general rule, the accused may not be prevented from his right to appeal. However, it considered that restriction by the legislator by not permitting the appeal in a low significant crimes does not contravene the requirements of a fair case.[lxviii]

We, in turn, support the opinion for the multiplicity of litigation degrees, in view of the arguments they presented. Further, the multiplicity of the litigation degrees involve control, re-examination and investigation of the truth by a second body other than that which ruled at the beginning. This in turn leads to reaching the desired objective, being justice and achieving assurance for the accused for ruling in order to reach at the end a fair trial for him.

The Egyptian Legislator regulated the method of objection by appeal in the Criminal Procedures Law, for which it dedicated Articles 402-419. The Kuwaiti Legislator has also regulated the objection method by appeal in the Criminal Procedures and Trials Law, for which it dedicated Articles 199-213.

According to Law No.563 of 2000 promulgated on 15/6/2000, and effective starting 1/1/2001, the French Legislator has adopted the litigation in two degrees and established the accused's right to the same.[lxix]

It should be stated here that the appeal achieves significant guarantees for the accused during his trial, which firmly establishes the relationship of this method of objection, i.e. the appeal, with the existence of a fair trial for the accused, as follows:

The objection by appeal before a second degree court establishes a number of guarantees which we will state respectively, God willing.

A. Discontinuing the Implementation of the Appealed Judgment

The objection by appeal in the judgment passed by the Court of First Instance discontinues its implementation, as the principle governing criminal judgments rules that it is inadmissible to implement judgments unless they are final. The reason for this is that

[lxvii] Dr. Mohamed Mahmoud Al Sharkasy, op. cit., page 643.

[lxviii] European Court Human Rights, *Zaicevs v. Latvia*, no. 65022/01, §§ 55 and 56, ECHR 2007-IX , *Gurepka v. Ukraine (no. 2)*, no. 38789/04, § 33, 8 April 2010).

[lxix] Pradel J : Procédure pénale , Léo éd, CUJAS , p.761

the first instance judgment may be repealed or amended in the appeal. Therefore, it is just to postpone the implementation of the judgment pending decision in the appeal so that the party against whom it is implemented is unaffected.[lxx]

The Egyptian Legislator confirmed in article 460 of the Criminal Procedures Law that the criminal judgments are not implemented unless they become final, by stipulating that "*the judgments passed by criminal courts shall not be implemented until they became final, unless there is a provision in the law stipulating otherwise*."

Further, the Kuwaiti Legislator has also confirmed this matter by stipulating in article 214 of the Criminal Procedures and Trials Law that "*the judgments passed by the criminal courts may not be implemented unless they became final. However, the court may order making the first instance judgment for the punishment covered by instant implementation, according to the rules determined in this law*."[lxxi]

We, in turn, criticize the Egyptian Legislator, as well as the Kuwaiti Legislator, for this approach, as it permitted in a number of provisions and has given the discretionary authority to the court to implement the first instance judgment, despite the appeal of the first instance judgment. This matter wastes every value of the right to appeal, as well as involving an unjustified discrimination between the accused parties, which constitute at the end a breach of the accused's right to a fair trial. Further, this may lead to risks which may not be rectified afterwards in the event of implementing the judgment then repealing it by the court, such as imprisoning the accused. Therefore, we recommend amending these paragraphs of the foregoing Articles which permit a number of provisions as well as give the discretionary authority to the court to implement the first instance judgment despite its appeal, in order to reach a fair trial for the accused and rectify the effects of implementing the judgment in the event the judgment is repealed.

B. Presenting the Case again to the Appeal Court

The appeal results in that the case is raised to the Appeal Court in order to examine again all the legal and substantive matters which the Court of First Instance has already decided. The Appeal Court does not adhere to hearing the entire case as done by the objection court upon the presence of the appellant. Rather, it hears the case within the framework of certain restrictions as follows:

a. Adhering to the Case Facts and Persons

The Appeal Court adheres to the facts raised to the Court of First Instance in which it decided by the appealed judgment. Further, it adheres to the persons against whom the case was filed before the Court of First Instance. Therefore, it is inadmissible for the Appeal Court to address a fact which has not been presented to the Court of First Instance. Further, it may not enter new accused parties who have not been trialed before the Court of First Instance.

[lxx] Dr. Edward Ghali Al Dahabi, Criminal Procedures, op. cit., page 851.

[lxxi] The Libyan legislator adopted the same direction in article 321 of the Criminal Procedures Law, as well as the Tunisian legislator in chapter 214 of its law.

In implementation of the above, the Egyptian Court of Cassation ruled that "if the case was filed against the accused for stealing specific papers and the Court of First Instance ruled for exonerating him from the theft of these papers, then it is inadmissible for the Appeal Court to indict him in stealing other papers for which the case was not filed."[lxxii]

Further, it also ruled that "*if the charge attributed to the defendants before the Court of First Instance is their robbery attempt, then the charge of criminal agreement may not be attributed to them before the Appeal Court*."[lxxiii]

This rule derives its basis from the right of the accused to litigation in two degrees. This is because the Appeal Court's decision in a fact which has not been raised to the Court of First Instance or trial of an accused who has not been trialed previously before this court deprives the accused form one of the litigation degrees, in addition to breaching his right to defense.[lxxiv]

The Appeal Court does not hear a new fact which has not been raised previously to the Court of First Instance, which is an applicable rule that may not be departed from, even if the accused accepts the same, as it is connected with the public order. Breaching this rule results in the annulment of the judgment. In implementation of the same, it is ruled that "*the trial of the accused before a 2nd degree court directly for a fact which has not been raised previously to the Court of First Instance is considered as a violation of the provisions related to the public order and is not admissible by the acceptance of the accused*."[lxxv]

It is the same also in this prohibition if the fact intended to be added to the accused has emerged during the case or if it emerged after the passing of the first instance judgment or during the hearing of the appeal.[lxxvi]

The Appeal Court does not adhere only to the facts for which the case was filed before the Court of First Instance, but these facts should have been decided by the Court of First Instance in its appealed judgment. Therefore, if the Court of First Instance disregarded deciding a number of the claims or facts, the Appeal Court may not address them for the first time, as this deprives the accused from his right to litigation in two degrees.[lxxvii]

In view of the above, if the case is filed against an accused with more than one charge and the Court of First Instance omitted deciding some of them, then the Appeal Court may not decide the charges which the first instance judgment omitted even if the litigant accepts the same. This is because in this event it would have breached the rules of litigation in two degrees. Furthermore, the court would have decided a matter that the Court of First Instance has not applied its jurisdiction over it. Therefore, there is no judgment and accordingly, the appeal subject matter is lacking.[lxxviii]

[lxxii] Cassation 15 December 1941, Legal Rules Volume, part 5, No.327, page 600.
[lxxiii] Cassation 25 November 1968, Cassation Judgments Volume, year 19, No.209, page 1031.
[lxxiv] Dr. Ala'a Mohamed Al Sawy, op. cit, page 771.
[lxxv] Egyptian cassation, 3 March 1942, Legal Rules Volume, part 5, No.374, page 234.
[lxxvi] Dr. Ahmad Sobhy Al Attar, op. cit., 91.
[lxxvii] Dr. Mamoun Salama, op.cit., page 483.
[lxxviii] Dr. Mamoun Salama, Criminal Procedures in Egyptian Legislation, Dar Al-Nahda Al-Arabiya in 2002, 489.

The Appeal Court may change the legal description of the fact, and may amend the charge by adding the aggravating circumstances, such as adding to the deliberate beating a premeditated circumstance, or modifying the charge from wrong injury to manslaughter if the victim died after the initial ruling. However, in these events, it must notify the accused of the amendment that it carried out and allow him the opportunity to defend himself on this basis. It is also committed not to aggravate the penalty if he is the appellant without the Public Prosecution. It does not include changing the description of the charge or amending the accusation in favor of one of the two levels of litigation as long as the incident submitted to the Appeal Court is the exact one in which the Lawsuit was filed before the Court of First Instance.

In implementation of the same, it is ruled that "*the Appeal Court may change the description of the charge from forgery to collaboration in forgery with unknown parties, as long this is unfounded on facts other than those for which the case was presented*."[lxxix]

Further, it added that "*if the Public Prosecution files the case against the accused that he is considered as a non-suspect, and the Court of First Instance ruled in the case on this basis, then the Public Prosecution appealed the ruling and claimed in the appeal to consider the accused as being a suspect again, this does not involve directing any new incident to the accused which was not raised against him before the Court of First Instance. This is because he is referred to trial for an incident attached ot him, evidenced by his criminal record submitted to the first instance and Appeal Courts, which the Public Prosecution described wrongly by being an event of suspicion, although in the proper law it is an event of re-suspicion. If the prosecution appealed the first instance judgment for correcting this description for this incident specifically, which was raised before the Court of First Instance, it is the duty of the Appeal Court to correct its legal description even if the Public Prosecution did not regard it in the reasons of its appeal. This is, of course, conditional on drawing the accused's attention to the new description*."[lxxx]

The Kuwaiti Court of Cassation ruled that "*in view of the above and whereas it is determined that the appeal re-submits the entire incident to the 2nd degree court. Hence, it may give the facts already raised to the Court of First Instance their proper legal description without being restricted by the Public Prosecution's description fo the same or the description given by the Court of First Instance to the incident, as long as it did not attribute to the accused new acts and the material incident which it adopted as a basis for the new description is the same incident attributed to the accused, which was raised in the hearing for which the pleading took place. In this respect, it may while investigating the incident for which the case is filed, change the description of the charge after excluding the elements composing the incident which have not been confirmed for which the case was filed*."[lxxxi]

If the Court of First Instance erred and changed the charge attributed to the accused, then the Appeal Court should rectify this error and establish its judgment on the incidents for which the case was filed before the Court of First Instance. In

[lxxix] Egyptian Cassation, 7 April 1947, Legal Rules Volume, part 7, No.347, page 230.

[lxxx] Egyptian Cassation, 5 June 1961, Cassation Judgments Volume, year 12, No.124, page 645.

[lxxxi] Objection for cassation No.522 of 2013- Penal/1- hearing 17/1/2016, Dr. Badawi Abdulaleem Sayed Mohamed, Most Significant Legal Principles Adopted by the Kuwaiti Court of Cassation in Penal Matters up to 2017, Dar Al Nada Al Arabiya, 1st edition, year 2017, page 195.

implementation of the same, it is ruled that "*if the case was filed against the appellant as being the owner of a factory who transacted with the oil allocated for the factory to produce ghee in an objective other than that for which it is allocated, and hence the Court of First Instance indicted him with the crime of irregularity of the record in the factory register, which he appealed and the prosecution appealed, then the Appeal Court ruled for repealing the appealed judgment and indicting the appellant on the basis of the crime for which the case was filed in the first place, therefore it has not committed an error*."[lxxxii]

Here, we should point out that if the Appeal Court is restricted by the incidents already heard before the Court of First Instance, it is unrestricted by the defense and the methods of such defense. It may decide new pleadings declared by the litigants for the first time. Further, it is not restricted by the aspects of defense declared before the Court of First Instance, as for all the different aspects of defense declared by the litigants, even if they are new, the Appeal Court may address them and rely on them in its judgment.[lxxxiii]

However, the defenses which lapse for not declaring them before the Court of First Instance are inadmissible before the Appeal Court such as the pleading for the annulment of the subpoena paper.[lxxxiv]

b. Not to Harm the Accused by his Appeal

The appeal should not damage the appellant by his appeal. If the appeal is only filed by the accused, among the guarantees determined for him in this respect is that the Appeal Court may not aggravate the punishment against him or increase the compensation or cancel the suspension of the implementation. Further, it may not rule for incompetence of jurisdiction because the incident is its real description is a crime after the Court of First Instance ruled in it as being a misdemeanor, as long as the Public Prosecution did not appeal such judgment for correction of the error of the Court of First Instance, because the rule is that it is inadmissible to harm the appellant pursuant to the appeal filed by him alone.

In implementation of the same, it is ruled that "it is inadmissible in the law to aggravate the punishment ruled by the Court of First Instance if the appeal is filed by the accused alone, so that he is not harmed by his appeal."[lxxxv]

The rule that the accused is not harmed by his appeal is conditional on the Public Prosecution's non appeal with him, in the sense that if the appellant of the first instance judgment is the accused, by implementing the previous rule, the accused shall not be harmed by his appeal by aggravating the punishment against him or increasing the compensation. The Appeal Court may only uphold the previous judgment or amend it for his benefit or repeal the same. But if the Public Prosecution appealed with the accused the first instance judgment, Appeal Court shall not be restricted by the previous rule

[lxxxii] Egyptian Cassation, 14 April 1952, Cassation Judgments Volume, year 3, No.306, page 817.
[lxxxiii] Dr. Mohamed Eid Al Ghareeb, Explanation of the Criminal Procedures Law, part 2, 2nd edition, Gold Falcon Press, 1996-1997, page 1846.
[lxxxiv] 1st May 1950 cassation, law profession, year 31, No.84, page 275 (this judgment is reference dby Dr. Mohamed Eid Al Ghareeb in the previous reference page 1846.)
[lxxxv] Egyptian Cassation, 7 April 1947, Legal Rules Volume, part 7, No.71, page 68.

which is not to harm the accused by his appeal, as it may amend the first instance judgment for or against the accused. Further, it may aggravate the punishment against him. The Egyptian Legislator has restricted the right of the Appeal Court upon filing the appeal by the Public Prosecution if the first instance judgment ruled for the exoneration of the accused. It stated that when the Appeal Court intends to aggravate the punishment against the accused sentenced for his exoneration in the first instance judgment, such judgment should be passed with the consensus of the opinions of the judges of the Appeal Court.

The Egyptian Legislator stipulated in the Criminal Procedures Law article 417 that "*if the appeal is filed by the Public Prosecution, the court may uphold, repeal or amend this judgment, whether against or in favor of the accused. The sentenced punishment may not be aggravated neither the judgment passed for exoneration may be repealed unless with the consensus of the opinions of the court judges*."

We, in turn, commend the Egyptian Legislator of this restriction. We recommend the Kuwaiti Legislator to follow the Egyptian Legislator in this direction and to codify the previous text in the Kuwaiti Criminal Procedures and Trials Law.

After addressing the ordinary methods of appeal, namely (objection- appeal) in the first subsection, it is necessary to address the extraordinary methods of appeal (cassation – revision) to enable us to explain the relationship between the methods of appeal with the accused's right to a fair trial.

5.2 Second Section – Relationship of the appeal of judgments with the Defendant's right to a fair trial.

5.2.1 Second Subsection: Extraordinary Methods of Appeal

The extraordinary methods of appeal are based on the final judgment, which is the decisive judgment in the subject of the case, which is non-appealable by one of the ordinary methods of appeal. If the appeal according to the ordinary methods aims at reforming the challenged judgment in its legal and substantive aspects, then the appeal according to the extraordinary methods may aim at reforming the law errors in the judgment (cassation). The appeal may aim at reforming the errors in the subject matter which would have been discovered pursuant to new incidents after its passing (revision). Therefore, we will address the extraordinary methods of appeal respective, God willing.

5.2.1.1 Cassation

Cassation is an extraordinary method of appeal which permits submitting the final judgment to a higher court for its trial and determining the extent of its conformity with the law. The Court of Cassation does not hear again the subject of the case. Rather, its task is confined to investigating whether the law has been applied properly on the facts of the case, as confirmed by the trial court or not. Therefore, it is said that the objection

by cassation resembles a complaint against the court which passed the law for its contravention of the law in hearing the case or passing the judgment.[lxxxvi]

The subject of the case in the final judgment is not raised to the Court of Cassation. Rather, only the judgment is raised for its trial. In this respect, the Egyptian Court of Cassation said "*the objection for cassation may not be considered as an extension of the litigation. Rather, it is a special litigation, the task of the court therein is confined to ruling in the validity of the judgments in terms of adopting or not adopting the rule of the law in the claims and aspects of defense submitted to it. The Court of Cassation does not hear the case unless in the condition it was before the trial court.*"[lxxxvii]

The objection for cassation in the Egyptian and French Laws is considered as outside the degrees of litigation, in the sense that it is not a second degree in crimes or a third degree in misdemeanors, making it have a special status in view of the distinction of the role performed by the Court of Cassation in the judicial scale. It does not hear the case again, in the sense that it does not decide the facts or rule for punishments. Rather, it accepts the facts of the case as confirmed by the judge of the final judgment.

This is contrary to a number of other legislations which consider the Supreme Court as a degree of litigation to hear the case as a last degree and pass a judgment in the subject matter, in the sense that it hears the case from the substantive and legal aspects, such as the American, English and Canadian law.[lxxxviii]

Considering the Court of Cassation as outside the degrees of litigation implies that no new reasons may be submitted before the Court of Cassation, as the objection for cassation's effects do not include transferring the case in its entirety before the Court of Cassation. Rather, the court hears the case in the condition it was before the trial court. Therefore, no new reasons may be submitted before the Court of Cassation which are unrelated to the claims and pleadings declare before the trial court.[lxxxix]

Therefore, the authority of the Court of Cassation is determined in controlling the final judgments to ensure the proper implementation of the law on the facts of the case, and that they have been based on proper legal procedures, and does not decide the facts of the case. Therefore, if it accepts the appeal, it rules for repealing the challenged judgment and refers the case to the trial court to hear it again.[xc]

However, the Court of Cassation may, in specific cases, address the correction of the defect in a manner that entails ruling in the case, but this does not mean that the Court of Cassation has the authority to discuss the matter with the exception of one case, which is when the appeal is accepted for the second time.[xci]

[lxxxvi] Hassan Alaam, Criminal Case and the Cassation Litigation, Journal of the Law Profession, year 68, issue 9 and 10, November and December 1988, page 38.
[lxxxvii] Cassation, 21 June, year 1965, Cassation Judgments Volume, year 16, No.120, page 611.
[lxxxviii] Dr. Ahmad Fathy Soror, Cassation in Criminal Matters, Dar Al Nahda Al Arabiya, year 1988, page 12.
[lxxxix] Dr. Ahmad Fathy Soror, op.cit. page 17.
[xc] Dr. Hamed Abdulhaleem Ismail Al Sheref, Authority of the Court of Cassation upon Ruling in the Appeal in Criminal Matters, a PHD thesis, Faculty of Law, Cairo University, Bani Suef Branch, undated, page 31.
[xci] Dr. Ahmad Fathy Soror, op.cit. page 17.

If the court dismisses the objection for cassation, then the challenged judgment shall remain existing for the facts it ruled, because the Court of Cassation does not conduct the trial for the facts but conduct the trial of the challenged judgment in terms of the validity of its implementation of the law, as well as in terms of the procedures followed by the trial, without addressing the facts of the case to observe whether they are confirmed or not, or even in the assessment of the evidences.[xcii]

The objection for cassation is very significant, as it permits verification that the trial court has applied the law on the factual matters properly, which makes the accused assured of the justice of the trial.

Further, it also permits verifying that the court has investigated the pleadings and substantial claims or replied to them by a reasonable response that guarantees the accused his right to defense, and also allows making sure that the trial procedures were carried out in accordance with the law, that the court was properly composed, and that the accused was guaranteed all the guarantees set for him. Therefore, the appeal by cassation is a major guarantee that ensures the fairness of the trial for every accused before the court. Further, through appealing for cassation, oversight is achieved over the court's commitment to the reasoning of its rulings. This is based on that if the criminal judge is free to form his belief, this freedom is restricted by drawing his belief from the evidence presented to him in the hearing and that these evidences are legitimate and that he evidences his conviction by a reasonable proof. It is known that the perception of this certainty is through reasoning. The reasoning of the judgment makes the judge carefully examine the case papers to ensure the integrity of the judgment, which leads to saying that through reasoning, the extent of the conviction of the accused with the judgment or his dissatisfaction and complaining against the same is revealed. Also, through reasoning, the court extends its oversight on the extent of the validity of the judge's belief and to uphold or repeal his ruling.[xciii]

The Egyptian Legislator regulated the procedures and rules for the appeal by cassation for which a special law is dedicated to regulate, which is Law No.57 of 1959. Further, the Kuwaiti Legislator laid down rules and procedures for the appeal by cassation for which it dedicated Law No.40 of 1972.

It should be pointed out here that the appeal by cassation achieves significant guarantees for the accused during his trial, which establishes the relationship between this method of appeal by cassation, with the existence of a fair trial for the accused, as follows:

The appeal by cassation results in a set of guarantees aimed at considering the interest of the appellant/accused, which we will stated respectively, God willing.

[xcii] .Mr. Ali Zaki Al Oraby, op.cit, page 223, Dr. Mohamed Eid Al Ghareeb, op.cit, page 1091.
[xciii] Dr. Ali Mahmoud Hamouda, General Theory in the Reasoning of the Criminal Judgment in its Various Stages, a PHD thesis, Faculty of Law, Cairo University, 1993, page 98.

A. The Right to Claim the Discontinuation of Implementation of the Appealed Judgment

The appeal by cassation does not result in discontinuing the implementation of the judgment. The convicted has no means of arriving at discontinuing the implementation of the judgment except by filing an objection to the implementation pending the decision in the appeal.[xciv]

However, in order to guarantee the interest of the accused and due to the probability of confirming the error in the appealed judgment, and hence the repealing such judgment, the accused may claim the Court of Cassation to discontinue the implementation of the judgment pending decision in the appeal and passing the judgment in the cassation.

Therefore, the Egyptian Legislator has permitted under article 9 of the Law No.23 of 1992, amending article 36 of the Law Regulating the Appeal by Cassation Cases, for the accused or upon the initiative of the same court to discontinue the implementation of the appealed judgment before examining the appeal submitted to it and passing its judgment in the cassation.

The aforesaid article stipulates that "*the appellant in a judgment passed by the Criminal Court for a punishment restricting or depriving freedom, may claim in the appeal reasons memorandum the discontinuation of the implementation of the punishment, and to schedule a hearing for the appeal within a date not exceeding six months. One or more chamber held at the Chambers may be allocated to examine the appeals in the judgments of the Appealed Misdemeanors Court, to decide with a reasoned decision the appeals. It may order the discontinuation of the implementation of the freedom deprivation punishment pending decision in the appeal. In all events, the court may, if it ordered the discontinuation of the implementation of the punishment, rule for submitting a bail or the procedures it deems to guarantee that the appellant does not escape*."

We should point out here that if the accused is sentenced to the death penalty, it may not be implemented unless it is ruled in the cassation. This discontinuation is considered as a legal discontinuation binding on the court which has not discretionary authority in this respect. The Egyptian Legislator has stipulated the same in article 469 of the Criminal Procedures Law by stipulating that "*appeal by cassation does not result in discontinuing the implementation unless the judgment was passed for the death penalty.*"

In the Criminal Procedures and Trials Law, the Kuwaiti Legislator stated in article 217 thereof that "every death penalty judgment may not be implemented unless after the Amir's ratification of the same."[xcv]

[xciv] Giudicelli Delage G., La motivation des décisions de justice, thèse, Poitiers, 1979, p.29

[xcv] The Libyan legislator has stipulated in article 385 of the Criminal Procedures Law, the Iraqi legislator in article 386, the Syrian legislator in article 345, and the Egyptian legislator and Kuwaiti legislator, have adopted the discontinuation of the implementation of the death penalty judgment pending ratification or casation of the judgment.

B. Not Harming the Appellant by his Appeal

The rule of not harming the appellant by his appeal is considered among the fundamental guarantees which govern the theory of appeal in criminal judgments, whether the appeal is ordinary or extraordinary.[xcvi]

In this respect, the Egyptian Legislator has stipulated in article 43 of the Cassation Law that "*if the cassation of the judgment took place pursuant to the claim of one of the litigants other than the Public Prosecution, then he shall not be harmed by his appeal*."

The Kuwaiti Court of Cassation ruled in this respect that "*the crime of bribery under the subject of the second charge with which the appellant is indicted and the crime of breach of trust, both have independent elements and resulted from two acts which are combined by one objective only. Therefore, the connection stipulated under article 84 of the Penal Law is eliminated. Therefore, the appellant should be punished for the breach of trust crime by an independent punishment. However, as the appellant is the one who filed the appeal without the Public Prosecution, therefore it is inadmissible that he is harmed by his appeal. Hence, this court may only suffice with the punishment ruled against him for the bribery crime under the second charge while keeping the removal punishment according to the provision of Articles 68 and 69 of the Penal Law. Further, the refund and fine punishments should be excluded for the embezzlement crime*."[xcvii]

In view of the above, the field of implementing this guarantee, which is not harming the appellant by his appeal in the cassation, is confined to the punishment or compensation ruled, as it is considered in this event as the limit which the court to which the case is referred may not exceed after cassation of the judgment. This guarantee is not transferred without the assessment of the facts and giving them the proper description. The Court of Cassation shall adhere with achieving this guarantee upon hearing the subject of the case in the event of accepting the appeal by cassation for the second time.[xcviii]

C. Obligation of the Court to which the Case is Referred to Establish the Fairness of the Trial

Accepting the appeal by cassation and referring the case to the court having the jurisdiction over the case, implies that the case is returned to its first condition before passing the repealed judgment. The Egyptian Legislator has stipulated in the text of Articles 2/39 and 3/39 of the Egyptian Cassation Law that if the judgment is repealed, the case shall be returned to the same court which passed the judgment, but it shall be composed of other judges than those who passed the repealed judgment. If the court has no other judges, then it may be referred to another court. Undoubtedly, the legislator aims in this provision to achieve for the accused the assumptions upon which his right to a fair trial is based, particularly his right to neutral and independent litigation. This provision guarantees that the case is being heard by neutral judges who have no prior idea about the case, and therefore have intellectual independence.

[xcvi] Dr. Mamoun Mohamed Salama, op.cit., page 277.
[xcvii] Cassation 5/1/1981, objection No.310/80 penal, Legal Rules volume up to 1985, page 188.
[xcviii] Dr. Ala'a Mohamed Al Sawi, op.cit., page 782.

The referral court shall achieve the guarantees of the independent trial, whereby the trial starts again and hears the case publicly in the presence of the accused, with oral hearing of the witnesses, as well as achieve for the accused all the required guarantees for the defense against the charge attributed to him. [xcix]

5.2.1.2 Revision

Revision is an ordinary method of appeal as a means for proving the exoneration of the convicted with a conclusive judgment blemished with error in the assessment of the facts for guaranteeing the proper achievement of justice.[c]

It is known that the conclusive judgment is the title of the truth, and that it is inadmissible to search in another truth than that expressed by the judgment. However, after the judgment became conclusive, which means possessing the power of the matter ruled, a number of facts may emerge, which if sighted by the court upon passing the judgment indicting the accused, it would have changed its judgment.

The Egyptian Legislator regulated the appeal by revision in the Criminal Procedures Law under Articles (441-453). Further, it is regulated by the Kuwaiti Legislator under Law No.11 of 2020 for amending a number of provisions of the Law No.17 of 1960 promulgating the Criminal Procedures and Trials Law. Further, it is regulated by the majority of the Arab legislations such as the Libyan Criminal Procedures Law in article 402, article 14 of the Iraqi law and article 531 of the Algerian law.

It has been said in the justification of the above that keeping the power of the matter ruled for the conclusive judgment despite confirming the judicial error blemishing the judgment constitutes an infringement upon the prestige of the judiciary and affects the confidence which judgments should enjoy, as well as distorting the truth they express. Therefore, it was possible to discard the conclusive judgment by revision for the purpose of reforming the judicial error related to the facts, for having the considerations of justice and social interest prevail in avoiding the errors of the judiciary to reach a new judgment which reflects the absolute truth.[ci]

The revision of criminal judgments results in several guarantees to the accused during his trial in order to reach his right to a fair trial. The Egyptian Legislator did not specify a specific period for claiming the revision as applicable in all the methods of objection, which reserves the right of the person who was indicted unjustly to defend himself, as the majority of the revision cases are subject to the emergency of an unknown fact or judgment, which no one was capable of predicting. Therefore, the considerations of justice prevailed and the exercise of this method of the extraordinary methods of appeal is not restricted by a specific time period. Further, the Egyptian and Kuwaiti Legislator have decided to discontinue the implementation of the death punishment pending deciding in the submitted claim or ratification. In addition, the convicted

[xcix] Dr. Ahmad Fathy Soror, Cassation in Criminal Matters, op.cit., page 307.

[c] Dr. Mahmoud Najeeb Hosny, Explanation of the Criminal Procedures Law, Dar Al Nahda Al Arabiya, year 1988, page 1285.

[ci] Dr. Edward Ghali Al Dahabi, Revision of Criminal Judgments, Alam Al Kutub, Cairo 1986, 2nd edition, page 32.

benefits from the rule of not harming the appellant by his appeal upon accepting the claim and referring the case to the court in order to hear it again, as it is inadmissible for it to rule for a punishment stricter than the previously ruled punishment against him. Further, the judgments passed by it may be appealed by all the determined methods of appeal.[cii]

As revision does not result in discontinuing the implementation of the judgment by its nature, contrary to the rule adopted by the Egyptian and Kuwaiti Legislator for the death punishment judgment due to the specificity of this judgment, we propose the enactment of a provision through which the court may discontinue the implementation of the judgment upon appealing the judgment by revision, if it is evident to the court that there are substantial indications according to which it is probable to rule in favor of the appellant.

In view of the above, it is evident to us that the ordinary legal methods of appeal (objection- appeal) and extraordinary methods of appeal (cassation- revision) guarantee the efficiency of the right of defense, and therefore achieve the guarantees of the right of the accused to a fair trial.

6. Conclusion

After addressing in this research, the description of appealing judgments and its effects on the accused person through addressing in the First Section the concept of the right to appeal judgments and its description, the meaning of the accused's right to appealing judgments, and the legislative regulation of the accused's right to appeal judgments. Then, we moved in the Second Section to the appeal of judgments' relationship with the accused's right to a fair trial. In this section, we addressed the ordinary means of appeal methods and the extraordinary means of the appeal methods.

At the end, we appeal to God that we have succeeded in this research. We also hope that it will act as a reference for everyone interested in the subject of appealing judgments.

Praise be to God and prayer and peace on the most honorable creation, our Prophet Mohamed, his family and companions.

7. Results

We conclude several results from this research as follows:

1. Appeal is considered as one of the guarantees of the accused's right to defending himself.
2. Appeal is considered as one of the elements and inputs of a fair trial.
3. Fair trial is unimagined without stipulating the accused's right to appealing judgments.

[cii] Dr. Ahmad Fathy Soror, Cassation in Criminal Matters, op.cit., page 367.

4. The methods of appeal differ with the difference of the judgment passed in the case.
5. Appeal methods are divided into ordinary and extraordinary methods.
6. Ordinary appeal methods are represented in objection and appeal.
7. Extraordinary appeal methods are represented in cassation and revision.

8. Recommendations

After this research, we recommend the following:

1) Amending legislations in order to adopt the right of the accused to appealing the judgment passed against him for a fine.
2) Suspending the criminal judgment passed against the accused pending decision in the appeal submitted against the judgment.
3) Setting up a chamber for hearing the appeals submitted by the accuseds in order to speed up deciding them.

Conflict of interest statement
The author declares no conflict of interest.

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