

The Judge's Authority in Assessing Criminal Penalties and Forming His Inner Conviction

Dr. Ghanem Lahcene

Université d'Alger 1

Ghanem.lahcene@gmail.com

Dr. Douadi Abdellah

Université de Bordj Bouareridj

Douadi.abdellah@univ-bba.dz

Pr. Bendaoud Hocine

Université de Bordj Bouareridj

Bendaoud.hocine@univ-bba.dz

Received: 06/02/2026

Accepted: 14/06/2026

Published: 07/09/2026

Introduction:

A judicial judgment is a document of justice. Although the judge enjoys discretionary authority in carrying out procedural or judicial acts, this does not mean that his authority is absolute in issuing whatever judgments he wishes. Rather, the judge exercises this authority within a specific framework, because he always seeks to achieve justice, and his authority is constrained by the achievement of this objective. The discretionary authority granted by law to the judge constitutes an exception to the general rule that a judgment is bound by the provisions of the law, and that the law leaves the judge a certain degree of freedom to achieve justice by choosing the action that is consistent with the circumstances of the case or by determining the solution he deems appropriate for the dispute. The function of the judge is therefore to adjudicate in accordance with the law, and his authority is limited by the necessity of achieving the objectives of the law.¹ What are the different systems of judicial conviction? What are the elements of criminal judicial certainty? What are the limits of the judge's authority in assessing criminal penalties? And what are the rules governing the formation of his inner conviction? These are the questions that we shall seek to examine in detail in the following article, by dividing it into three sections. In the first section, we address the judge's authority in assessing criminal penalties; in the second, we examine inner conviction and the elements of judicial certainty in criminal matters; while in the third section, we present the restrictions imposed on the judge's freedom of proof in criminal matters and the limits of his authority in forming his inner conviction.

Section One: The Judge's Authority in Assessing Criminal Penalties

"Sally Raymond" states: "Punishment that does not concern itself with rehabilitating, reforming, and disciplining criminals is a futile and inhumane act. When assessing a criminal penalty, the judge must take into consideration the personality of the offender and his circumstances, for the purpose of punishment is to reform the offender and eliminate the

¹ Muhammad Fahim Darwish, op. cit., p. 465.

criminal phenomenon.”² This is what the judge seeks to achieve within the framework of the authority granted to him, in light of what is known as judicial individualization, whereby the judge assesses the appropriate punishment for each case brought before him according to a scientific approach. Accordingly, the discretion entrusted to the judge in applying the law and determining the punishment has become an established principle in contemporary penal legislation, although legal schools differ in the extent of the authority granted to the judge, depending on the criminal and penal policy adopted by the legislator.³

In this section, we shall address the concept and scope of the judge’s authority in assessing criminal penalties (First Subsection), and then present the safeguards for protecting the accused from the judge’s authority in assessing criminal penalties (Second Subsection).

First Subsection: Concept and Scope of the Judge’s Authority in Assessing Criminal Penalties

The legislator has granted the judge authority enabling him to assess the punishment; however, he must bear in mind the objective that he is required to understand and achieve before pronouncing the sentence, particularly in areas where his discretionary authority is broad. This authority is not the product of any particular era or society; rather, it is a cumulative idea, that is, it is the result of developments that have taken place in societies throughout successive historical periods.

We shall address below the definition of the judge’s authority in assessing criminal penalties (First), and then clarify the scope of this discretionary authority (Second)

First: Definition of the Judge’s Authority in Assessing Criminal Penalties

The legislator grants the judge the authority to assess the punishment by using the legal means upon which he relies. Justice requires a certain degree of proportionality between the severity of the punishment and the seriousness of the crime. Nevertheless, the legislator’s role remains confined to the framework of generality and abstraction, leaving the judge, within the discretionary authority granted to him, the opportunity to consider the circumstances of each offender.

Legal scholars have not agreed on a specific definition of the discretionary authority of the criminal judge. There have been several attempts to define it, including the definition provided by Dr. Abdullah Suleiman, who considered discretionary authority to be: “the jurisdiction of the judge to choose the appropriate punishment to be applied to the accused in accordance with the legal provisions.” Dr. Mahmoud Naguib Hosni defined it as: “the ability to reconcile the factual circumstances of the case brought before him and the circumstances of its perpetrator when choosing the criminal penalty, whether a punishment or a preventive measure, in terms of type or amount, within the limits prescribed by law, in a manner that achieves consistency between individual and social interests alike.” As for Dr. Ashraf Tawfik Shams al-Din, he defined it as: “the judge’s authority to choose the type and severity of the punishment and the

² Suleiman Abdullah, *Commentary on the Algerian Penal Code, General Part, Volume II*, 6th ed., University Publications Office, Algiers, 2008, p. 492.

³ *Ibid.*, p. 492.

extent to which it is enforceable from among the options granted to him by the legislator and stipulated by law.”⁴

It is clear from the foregoing definitions that the judge’s authority in assessing the criminal penalty is his freedom to assess the appropriate punishment from among the punishments prescribed by law, while observing the rules governing the assessment of punishment.

The discretionary authority of the judge is a power granted to him by the legislator so that he may reconcile legislative provisions with procedural provisions. Thus, what is the subject matter of discretionary authority (I), and what is its relationship with the function of punishment (II)?

I/ Subject Matter of Discretionary Authority:

A problem arose in criminal jurisprudence as to whether discretionary authority concerns the objectives that the law seeks to achieve or the means. In response to this issue, two approaches emerged. The first, namely the traditional approach, considers punishment an end in itself, as it establishes an objective relationship between the punishment and the seriousness of the crime, which makes the punishment determined in a manner that does not allow any discretionary authority for the criminal judge in applying it.⁵ According to this approach, the role of the judge must be limited, because the law is placed before the judge, and therefore he must adhere to its content, without seeking the other underlying rationales of the legal rule that the legislator did not expressly include in the criminal provisions.

The modern approach, however, considers criminalization to be based on the idea of the social dangerousness of the act, whereby the judge has an active role in achieving the effectiveness of the Penal Code. It is sufficient for the perpetrator to engage in conduct involving a danger that threatens the interests protected by law for him to be considered to have committed a crime, regardless of whether the material result of the act has occurred.⁶

The absence of a legal provision governing different forms of conduct does not prevent criminalization from opening the door to expansion and the imposition of punishment, because society is constantly evolving. It is therefore necessary to keep pace with this development in all its manifestations. Hence, the importance of discretionary authority for the criminal judge in assessing punishment becomes apparent, taking into consideration the crime as a material fact and the personal circumstances of its perpetrator.⁷

The subject matter of the discretionary authority of the criminal judge lies in:

1- The assumptions of the criminal provision, namely the material elements constituting the criminal act, while also taking into consideration the personal circumstances of the perpetrator of the crime.

⁴ See in this regard: Ibid., p. 492.

⁵ Bakkar Hatem, *The Criminal Judge’s Authority in Assessing Punishment and Preventive Measures*, Al-Jamahiriyah Publishing, Distribution and Advertising House, Benghazi, Libya, 2002, p. 147.

⁶ Behnam Ramses, *The General Theory of Criminal Law: The Theory of Criminalization in Criminal Law*, The Criterion of the Authority to Punish from a Legislative and Practical Perspective, 2nd ed., Mansha’at al-Maaref, Alexandria, Egypt, 1996, p. 121 et seq.

⁷ Sidqi Abdel Rahim, *The Philosophy of Criminal Law (A Foundational Study in French Thought)*, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, n.d., p. 186 et seq.

2- The judge's determination of the legal effect of the committed act within the limits prescribed by law, where the punishments are those for which the legislator has established a maximum and a minimum, or the choice of one of the punishments where the legislator has left the judge free to choose the appropriate punishment.

II/ Relationship between the Discretionary Authority of the Criminal Judge and the Function of Punishment:

Discussing the relationship between the discretionary authority of the criminal judge and the function of punishment leads us to clarify an idea, namely that the difference between the punitive policy adopted by contemporary legislation and that of the traditional schools, which deny the extent to which the discretionary authority of the criminal judge is affected by the function of punishment, is based on the consideration that the sole objective of imposing punishment is deterrence, which can only be achieved by determining the punishment in legal provisions, both quantitatively and qualitatively, a matter that falls exclusively within the competence of the legislator. The judge has no authority to characterize the crime or to choose the punishment according to the personal circumstances of the offender.⁸

In contrast, the Italian positivist school demonstrated the influence of the function of punishment on the discretionary authority of the criminal judge. It considered it necessary to grant the judge broad discretionary authority to choose the punishment he deems appropriate, following the correct and sound legal characterization of the criminal act brought before him. The objective of the law is to seek the most effective and efficient means, from a technical perspective, of achieving the purpose it pursues, through the authority conferred upon the judge by the legislator. Thus, he seeks to achieve two objectives: reforming the offender and curbing the wave of crime.

Second: Scope of the Judge's Authority in Assessing the Criminal Penalty:

The judge seeks to determine the appropriate punishment to be applied within the framework of the discretionary authority granted to him, based on the cases brought before him and within the framework of the logical distribution of jurisdiction between the legislator and the judge, in a manner that achieves harmony between the interests of the community on the one hand and the interests of individuals on the other, while observing the rules governing punishment so that this discretionary authority becomes a means of criminal protection of rights rather than a means of violating those rights.

The legislator has sought to narrow the scope of differences in punishment among accused persons and to ensure a greater degree of equality by focusing on the rules governing the assessment of punishment and the criteria for exercising this authority. In this subsection, we shall examine the concept of the guiding rules for assessing punishment (I), and then the types of discretionary rules governing the judge's authority in assessing the criminal penalty (II).

I/ Concept and Scope of the Guiding Rules Governing the Judge's Authority in Assessing Punishment:

We shall present below the definition of the guiding rules governing the judge's authority in assessing punishment (1), and then clarify the scope of these guiding rules (2).

⁸ Khouri Omar, Penal Policy in Algerian Law: A Comparative Study, PhD Dissertation in Criminal Law, Faculty of Law, University of Algiers, 2008, p. 18 et seq.

1- Definition of the Guiding Rules Governing the Judge's Authority in Assessing Punishment:

The rules governing the assessment of punishment constitute part of the safeguards against judicial arbitrariness. They refer to the criteria by which the judge assesses the punishment. These rules aim to achieve a sound and comprehensive assessment of the seriousness of the crime and the responsibility of its perpetrator, and the extent of the appropriate punishment he deserves.⁹

2- Scope of the Guiding Rules Governing the Judge's Authority in Assessing Punishment:

Scholars have differed in determining the degree of freedom available to the criminal judge in assessing punishment. The first approach, which adopts a broad view of the judge's discretionary authority, considers that this authority, in principle, presupposes that the judge enjoys a degree of freedom to assess the seriousness of the criminal act and the personality of its perpetrator, and then determine the type and amount of punishment to be applied. Accordingly, there is no room for rules restricting the judge's authority. According to this approach, such rules constitute a form of control over the judge's work that would hinder him, whereas through this freedom he seeks to make legal provisions keep pace with developments occurring in society.¹⁰

Accepting the absolute discretionary authority of the judge would subject citizens' freedom and their fate to the whims, dispositions, and personal considerations of judges. Although modern criminal policy recognizes the granting of broad discretionary authority to the judge in order to achieve the individualization of punishment, it insists that this authority be subject to rules that emphasize the need to prevent its expansion and the necessity of exercising it within a legal framework and in accordance with legal directives.

The second approach, however, narrows the scope of the judge's discretionary authority and considers it necessary to confine this authority to the narrowest possible limits. This can only be achieved by establishing a set of guiding rules by which the judge is guided. This approach bases its view on the premise that the judicial profession is a profession of a technical legal nature in which there is no room for personal conviction or discretion. This view is consistent with that of the proponents of strict legality, who consider the judge to be deprived of any discretionary authority, whether with regard to identifying criminal acts or determining punishments. They regard the system of rules as the judicial counterpart of the system of punishments that emerged in the laws of the French Revolution. In order to leave no room for the exercise of the judge's discretionary authority, the legislator must formulate legal provisions

⁹ Adel Aarez, *The General Theory of the Circumstances of Crime*, Al-Alamiya Printing Press, place of publication not stated, 1967, p. 474.

¹⁰ A number of modern legislations have granted broad authority to the judge in assessing punishment, including the new Swedish Penal Code, which is considered a model expressing this trend. It has introduced flexibility into legal provisions by granting broad authority to the judge. This is attributable to the fact that these legislations emerged concurrently with the development of criminology in its various branches, including psychological, sociological, and biological sciences, which fostered an awareness of the need to introduce greater flexibility into crimes and punishments and to grant judges broad authority in assessing punishments and measures. See: Akram Nash'at Ibrahim, *The Legal Limits of the Criminal Judge's Authority in Assessing Punishment*, Dar Al-Ilm wa Al-Thaqafa for Publishing and Distribution, Cairo, Egypt, 1996, p. 50.

in clear, explicit, and easily understandable terms, enabling the judge to apply them. Consequently, his authority and function are confined to the scope of the law with regard to the facts brought before him, and he is therefore required to determine the legal characterization of every crime on which he adjudicates.¹¹

It is clear from the foregoing that the objective of restricting the judge's authority in assessing punishment is to achieve equality among citizens before the law and the judiciary. Unifying the system of punishment for all citizens ensures a degree of justice. On the other hand, however, such restriction may lead to inequality before the judiciary. Applying the same punishment to two persons, one of whom is a habitual offender and the other has committed a crime for the first time under the influence of psychological circumstances and pressures, constitutes injustice and inequality. It also leads to a deviation from the objective of punishment, which is reform. This approach is also criticized on the grounds that it facilitates the task of habitual offenders in escaping punishment through acts that have not been criminalized, despite their departure from the rules of morality. The continuous development of life in various fields has allowed acts that were once condemned to emerge and become aggravating circumstances in crimes, depending on the circumstances accompanying these acts.

In contrast to these two approaches, there is another moderate approach adopted by most modern legislations. It is a middle and conciliatory approach between the two preceding approaches, as it recognizes the legality of the framework upon which the judge bases his assessment, relying on the evidence and circumstances of each case separately, which the legislator cannot fully comprehend or confine within fixed and permanent legal provisions from one case to another and from one period to another. At the same time, it requires reasoning to highlight the elements and justifications underlying the assessment of punishment. Therefore, we find that, alongside granting the judge broad discretionary authority in order to keep pace with developments, criminal policy emphasizes the necessity of preventing this authority from becoming arbitrary.

Based on the foregoing, it can be said that the judge possesses broad discretionary authority, but he is required to provide reasons for this assessment. The law does not grant the judge creative power to determine the punishment; rather, his role is considered complementary to the will of the legislator. He has no right to follow his own ideas when determining his judgment.¹²

¹¹ Qarimis Sarah, *The Criminal Judge's Authority in Assessing Punishment*, Master's Dissertation, Criminal Law and Criminal Sciences Branch, Faculty of Law, University of Algiers, 2011–2012, p. 165.

¹² The Ninth Congress on Criminal Law confirmed this view, as the legal scholars who participated in it drew attention to the issue of the extent to which the provision is compatible with the standards governing the judge's authority to assess the penalty. The Congress's recommendation stated: "In cases where exceeding the legally prescribed maximum penalty is permitted when aggravating circumstances exist, these circumstances shall be listed by way of example and not limitation. This list shall specify the objective elements for aggravating the punishment for the offense, as well as the characteristics inherent in the offender's personality and the motives behind his criminal conduct, with the aim of ensuring the protection of society and reintegrating the offender into it." Most legislations adopted this recommendation, including Libyan legislation in Article 28 of the Libyan Penal Code and Italian legislation in Article 133 of the Italian Penal Code. As for the Algerian legislator, it did not provide for these safeguards and left the judge free to assess the criminal penalty while observing the legally prescribed limits. See in detail: Bakkar Hatem, *The Criminal Judge's Authority in Assessing...*, op. cit., p. 56.

II/ Types of Rules Governing the Assessment of Punishment:

Criminal acts are linked to their material aspects, and the descriptions attributed to them by the legislator in criminal provisions, together with the rules governing assessment, reflect differences among criminal acts, since when the judge assesses punishment within the framework of the authority granted to him, he takes into consideration everything related to the crime so that his assessment does not fall outside the framework of the law, while taking into account the circumstances of the offender.

In order to identify the types of these rules, we shall present two types: the objective rules related to the crime (1), and the personal rules related to the offender (2).

1/ Rules Related to the Crime: With regard to the rules related to the crime, they differ according to the material and mental elements of the crime:

A- Rules Related to the Material Element: The material element of the crime essentially consists of a voluntary material activity, known as the criminal conduct, and the harmful result. Criminal conduct varies according to circumstances, and the harmful result varies accordingly. Therefore, it is necessary to identify the rules related to criminal conduct and the consequences resulting from it.

· **Proportionality of the Criminal Penalty to the Seriousness of the Criminal Conduct:**

Some legislation has expressly provided for the necessity of the judge taking into consideration the seriousness of criminal conduct. The seriousness of the crime can be identified through the following matters:

The nature and type of the act and the means used to commit it, its purpose, the place and time of its occurrence, and all other circumstances related to it.¹³ The concept of the rule concerning the seriousness of the act and the crime scene includes whether the place is deserted or frequented, as well as whether the crime occurred during the day or at night, the reason for its occurrence, and the circumstances surrounding it, which may lead to the mitigation or aggravation of the punishment, in addition to the conduct of the offender in committing the crime. A person who commits an indecent act in an uninhabited place has his punishment mitigated, unlike a person who commits the same act in an inhabited place. In the latter case, the punishment is aggravated because the seriousness of the violation of public decency is related to the place of the crime. Likewise, a person who violates the sanctity of dwellings for the purpose of theft is, in reality, committing two crimes; therefore, it is natural that the punishment should correspond to this double violation.

Time of the crime: As for the time of the crime, it is the period during which it is committed, and it is an element taken into consideration by the legislator when aggravating or mitigating the punishment. The punishment is aggravated during wartime as well as in nocturnal offenses, and it is mitigated in the case of a public indecent act when it occurs late at night, since, in practical terms, such conduct does not constitute a significant violation of public decency due to the small number of passers-by at that time. On this basis, punishment varies according to place and circumstances.

¹³ Abu Amer, Muhammad Zaki, Commentary on the Penal Code (General Part), University Publications Office, Alexandria, Egypt, 1986, p. 113.

The means used in the criminal act and the method adopted to carry it out also fall under the rule concerning the seriousness of the act. Sound reasoning dictates reducing the punishment of a person who merely takes a life, while aggravating the punishment of a person who takes a life and mutilates the corpse. The judge must also take into account the manner in which the criminal act was carried out and the degree of violence used in committing a theft, for example, as well as the extent of cruelty characterizing an act of assault or injury. The criminal act itself involves a criminal danger threatening the right protected by law, and this danger is measured according to the extent to which the act tends to cause an infringement upon that right. Furthermore, the nature and type of the crime and the extent to which it affects the customs and traditions of society have a significant impact on the assessment of punishment.

By examining the Algerian Penal Code, we find that there are circumstances expressly provided for by the legislator in the Special Part, whereby the punishment is aggravated or mitigated depending on the circumstances. Among these is the circumstance of nighttime in the crime of theft, which changes the characterization of the crime and aggravates the punishment to temporary imprisonment for five to ten years, pursuant to paragraph 02 of Article 354 thereof. As for the means used in the crime, carrying a weapon in the crime of theft constitutes an aggravating circumstance, with the punishment reaching life imprisonment pursuant to Article 351 of the same Code.

These and other circumstances aggravate the punishment and may change the characterization of the crime from a misdemeanor to a felony when they accompany the offender's criminal conduct. As for the type of criminal act, this is left to the judge's discretionary authority.¹⁴

· **Proportionality of the Criminal Penalty to the Seriousness of the Criminal Result:**

The legislator does not classify an act as a crime unless it entails a harmful criminal result affecting the interests of the individual and society. The criminal result is the harmful consequence of the act, that is, the consequence affecting the public interest protected by the legislator through the criminalization rule. As for actual harm or merely exposing the protected property or interest to danger, the criminal penalty is assessed according to the seriousness of the harm caused by the conduct to the interest protected by law.

The concept of harm encompasses interests or values that have been wholly or partially impaired or destroyed, as well as interests that are potentially subject to impairment. In this sense, crimes having harmful consequences are numerous. It is sufficient for the law to require, for the existence of the crime, the occurrence of a specific harm as an essential element of its material component. The judge must then ascertain whether this harm has actually occurred. Examples include crimes against bodily integrity and crimes against property.¹⁵ However, not all crimes require the existence of harm for their commission. There are crimes that, although they threaten the individual and society, do not contain actual harm, such as the crime of a witness refusing to give testimony. The conduct itself entails the possibility of harm. The

¹⁴ Such as assessing the violence involved in an indecent act, where the courts have consistently considered moral violence as a circumstance in the offense of an indecent act against a young victim. The judges justified their decision on the grounds that the victim stated that the accused had taken her to a forest and committed the act against her by force. The assessment of violence in this case falls within the discretionary authority of the trial judges. See: Bakkar Hatem, *The Criminal Judge's Authority in Assessing...*, op. cit., p. 58.

¹⁵ Behnam Ramses, op. cit., p. 567.

harmful result punishable by the legislator is that which is prohibited in the Penal Code. Examples of harmful results include death in the crime of murder and bodily injury resulting in permanent disability.¹⁶

Criminal harm has three forms:

- The first form: Potential danger of occurrence.
- The second form: Violation of the legislator's commands through the breach of legal rules.
- The third form: A potentially occurring harmful result.

From the foregoing, the effectiveness of the rule concerning the seriousness of the criminal result in determining the penalty becomes clear. In assessing punishment, the criminal judge relies on the consequence of the criminal conduct

B/ Rules Related to the Mental Element: The mental element of the crime is based on a psychological relationship linking the material aspects of the crime to the personality of the offender. The essence of this relationship is the will. Therefore, a person cannot be held accountable for a crime where no connection or relationship exists between its material aspects and his will. The essence of the mental element is thus the legally relevant will. The rules related to the mental element are divided into two types:

The rule of proportionality between the criminal penalty and the seriousness of intent:

Criminal intent is the most serious form of the mental element and indicates the bad faith of the accused. It should be noted that most legislations have not provided a definition of criminal intent, but have merely indicated the necessity of its existence for criminal liability to arise. An examination of the Algerian Penal Code shows that many provisions require its presence, including Article 254, which defines murder as: "intentionally taking the life of a human being," and Article 264, which provides that: "Whoever intentionally causes wounds to another person or strikes him, or commits any other act of violence or assault..." Article 365 also provides that: "... shall be punished by imprisonment from one year to five years and a fine from 1,000 DZD to 10,000 DZD whoever intentionally conceals the embezzled objects." Through these legal provisions, it is clear that intent or criminal intention is a necessary condition for criminal liability in this category of crimes.

In one of the decisions of the Supreme Court, it was held that: "Where it is legally established that intentional murder is the intentional taking of the life of a human being, the question on the basis of which the court convicted the appellant of the felony of intentional murder, without mentioning the element of intent, means that by ruling as it did, it violated the law."¹⁷ Intent is therefore an essential element for the establishment of the crime, and on its basis the liability and punishment of the offender are determined.

The judge must therefore make the degree of culpability a criterion guiding him in determining the amount of punishment. Direct intent is more serious than eventual intent; premeditation is more serious than intent without premeditation; specific intent is considered more serious than general intent; and unlimited intent is more serious than limited intent.

¹⁶ Al-Saeed Kamel, Commentary on the General Provisions of the Penal Code, Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2002, p. 212.

¹⁷ See: Supreme Court Decision, Criminal Chamber, issued on 22/05/1988, Judicial Journal, No. 03, 1992.

Proportionality of the criminal penalty to the seriousness of unintentional fault:

This represents the second type of rules related to the mental element. Unintentional fault does not give rise to a crime unless the conduct of the accused leads to a criminal result and the offender's will is characterized as culpable, even though it was not directed toward causing the harmful result, merely because it failed to observe due care and caution.

When the legislator punishes negligence, recklessness, and lack of precaution, the objective is to protect the human right to life and the right to bodily integrity.¹⁸

If the punishment prescribed for offenses committed through fault is intended solely to protect society or safeguard the public interest, it is necessary, in order to achieve this purpose, to distinguish between the perpetrators of such offenses in terms of their capacities and general psychological conditions when assessing the fault committed by them, so as to determine the punishment appropriate to them.

The judge may reduce the punishment to the minimum or increase it to the maximum in a manner that serves the interests of society and is appropriate to the personality of the offender.¹⁹

It is clear from the foregoing that the assessment of the seriousness of fault is left to the judge, on the basis of which the punishment is determined. The punishment may therefore be aggravated or mitigated depending on the assessment of the seriousness of the fault.

2/ Rules Related to the Offender:

The judge's task is no longer confined to establishing the facts and the circumstances surrounding them and applying the law thereto. Rather, it has extended to examining the personality of the accused and identifying the reasons that led him to commit the crime in order to determine the type of punishment he deserves. The rules related to the offender may be personal, represented by the motives for committing the crime and the character of the accused; they may also be objective, represented by the relationship of the offender with society. These rules may also relate to the offender's conduct during and after the commission of the crime, as will be explained below:

A- Rule of the Motives for Committing the Crime:

¹⁸ Upon examining the Penal Code, for example, Article 288 thereof provides: "Anyone who causes death by mistake or causes it through recklessness, lack of precaution, lack of attention, negligence, or failure to observe regulations shall be punished by imprisonment for a period of six months to three years and a fine of 1,000 to 20,000 DZD."

In this regard, the Supreme Court ruled that: "... Whereas it is established in the case at hand that the question submitted by the court was incomplete, because it did not address in detail the elements of the offense of involuntary manslaughter, which requires, in addition to the existence of the material act causing death, a fault attributable to the perpetrator of that act, since the element of fault constitutes the essential element of the offense of involuntary manslaughter." See: Decision issued on 10/05/1988, Case No. 49360, Judicial Journal, No. 01, 1992.

Article 289 of the Penal Code also provides that whoever causes an injury, wound, or illness resulting in total incapacity for a period not exceeding three months shall be punished by imprisonment for a period of two months to two years and a fine of 500 to 1,500 DZD, or by either of these two penalties. Article 290 aggravates the penalty provided for in Article 289 by doubling it if the offender was intoxicated or attempted to evade criminal or civil liability.

¹⁹ Rahmani Mansour, Concise Treatise on General Criminal Law, Dar Al-Huda for Printing, Publishing and Distribution, Algeria, 2003, p. 96.

At its inception, crime is merely an idea that occurs to a person's mind. This idea is the product of factors and causes that control the offender's personality, weaken his ability, and drive him toward crime. This is known as the motive or incentive. Some scholars have distinguished between the meanings of motive and incentive. The incentive is the feeling of a need for something in order to satisfy a particular desire, and it is a psychological factor that drives the accused spontaneously and without deliberation toward crime, whereas the motive represents the reason for the criminal conduct or the justification for the crime. However, this distinction has gradually disappeared, and the view that the two terms should be used as synonyms has prevailed.

It is generally accepted that the motive is not taken into consideration with regard to the crime as a general rule. However, its importance cannot be denied in the assessment of the criminal penalty, as it affects the punishment through mitigation or aggravation. Accordingly, the motives for committing the crime constitute personal factors that are taken into consideration within the framework of the rules governing the judge's discretionary authority. Depending on the nature and degree of the motive, the penalty is determined in a number of cases. The commission of the crime with its material and mental elements is no longer sufficient to consider the perpetrator liable; rather, another condition has been added, namely that the offender must present a criminal danger.

B- Rule of the Character of the Accused:

The rule concerning the character of the accused refers to his morals and the reputation for which he is known, the conduct for which he has become known, the previous accusations brought against him, and the criminal records registered against him. All these elements reveal the degree of danger he poses, and through them the judge determines the punishment in terms of type and amount. The accused's past is a mirror of his present, as a person with no criminal record is less dangerous than one with a criminal record. Hence, the importance of conducting a social inquiry into the personality of the accused before judgment becomes apparent.

C- Rule of the Accused's Conduct During and After the Commission of the Criminal Act:

This refers to the accused's display of indifference while engaging in such conduct, and to the intent and violence he demonstrates, which reveal his criminal tendency, or, on the other hand, the fear and hesitation he may display. The severity of his acts, the precautionary measures, and the means of concealment adopted in carrying out his crime and hiding its traces indicate the degree of danger posed by the accused. On the other hand, reporting a crime, admitting its commission, and seeking to remedy the damage resulting from it are matters that reveal the limited degree of danger posed by the accused. Taking these circumstances into consideration facilitates the judge's task in assessing the appropriate penalty and justifies aggravation in the first case and lenient treatment in the second.

D- Rule of the Personal, Family, and Social Circumstances of the Accused's Life:

There is no doubt that a person's life is shaped by the society in which he lives, whether within his family or among his colleagues at work, as well as by the obstacles he encounters in his daily and professional life. These factors may hinder his social development and affect his normal and abnormal behaviors, depending on the extent of his response to or resistance against the negative factors confronting him.

The close relationship between economic conditions and the criminal phenomenon has been established, which highlights the necessity of investigating these circumstances when the accused is tried for the crimes attributed to him once his guilt has been established.

Second Subsection: Protection of the Accused Against the Misuse of the Judge's Authority in Assessing the Criminal Penalty

The most important form of protecting the accused against the misuse of the judge's discretionary authority lies in the necessity of providing reasons for the judgments and decisions he issues. His function is to adjudicate in accordance with the law, and his will is not absent when exercising his judicial function. The assertion that the judge's will is absent would lead to the absence of judicial authority itself. When the judge rules on the basis of a legislative provision or another source, he is adjudicating, and such adjudication requires a degree of freedom. The judicial authority does, in fact, possess this freedom. The judge also possesses authority or a power enabling him to take a decision and also to regulate circumstances in a particular manner within society and impose them through the orders he issues in this regard.

The basic principle is that the judge's authority is not complete. If the judge has the power to assess and choose, he does not have the freedom to assess and choose in whatever manner he wishes. This authority granted to the judge is not given to him to exercise according to his personal inclination; rather, it is granted so that he may exercise the function entrusted to him appropriately and correctly. His authority has specific objectives that he must seek to achieve, and he must exercise his authority according to certain methods, technical means, and defined principles. The law does not intend for the judge's authority to be arbitrary, and reasoning is the only means of achieving this.²⁰

Legal scholarship unanimously agrees that the obligation to provide reasons is a principle of natural law linked to the belief in the existence of such law and what are known as natural rights.²¹

The reasoning of the judgment translates the intellectual activity through which the judge reached his decision and reveals the reasoning upon which he relied. This makes it possible to review the judge's work, because such work is legal in nature. Reasoning first ensures the correct application of the proper law, and secondly constitutes an analytical examination of the facts underlying the dispute to which the law is to be applied. The judge may make an error concerning the facts when understanding them, or concerning the law when determining it.

A judgment, through its reasons, reveals the manifestations of any such error that may affect it. Thus, reasoning is the only means by which the manner in which the judge applied the law can be known, and the tool through which the reasons that led him to reject the claimant's claim can be identified. It is also the tool that ensures the prevention of judicial arbitrariness and abuse of authority, thereby achieving balance. The judgment must be an expression of truth and, at the same time, evidence of justice, and the conclusion reached must not conflict with justice. Reasoning also ensures the integrity, impartiality, and seriousness of judges.²²

²⁰ Azmi Abdel Fattah, *Reasoning of Judgments and Judicial Acts*, 1st ed., publisher and place of publication not stated, 1983, pp. 193–194.

²¹ Muhammad Fahim Darwish, *op. cit.*, p. 466.

²² *Ibid.*, p. 467.

Although the criminal judge is free to be convinced by any evidence, and his conviction is not subject to review by the Court of Cassation, his freedom is nevertheless restricted by the necessity of giving reasons for his judgment; otherwise, it becomes subject to review by the Court of Cassation.²³ What, then, is meant by reasoning? (First), what are its functions? (Second), to what extent is it mandatory? (Third), what are the conditions for its validity? (Fourth), and what is the consequence of violating the obligation to provide reasons? (Fifth). These are the questions that we shall attempt to answer through the following elements:

First: Concept of Reasoning:

Reasoning means that the judgment or decision must contain the necessary and sufficient justifications supporting its issuance, in such a way as to express the mental process through which the judge reached the conclusion at which he arrived.

The reasoning of a judicial judgment also means “stating the factual and legal arguments upon which it is based and which produce it, and which convinced the judge to rule as he did and led him to adopt the approach in his judgment in which he found reassurance.”²⁴

If the authority of the judge is distinguished from other authorities by being an authority confined to him, such that he may neither relinquish it nor delegate it nor seek assistance in exercising it, and by being discretionary authority, then, as a general rule, it is not arbitrary authority, because the judge exercises it within the limits of the law. Accordingly, when exercising it, he must observe the limits of his authority, respect the procedural role of the parties, and ensure equality between the parties by respecting the rights of the defense, as a procedural principle deriving its foundations from natural law and governing all proceedings. Therefore, providing reasons for the judge’s work constitutes a prominent characteristic distinguishing it from the acts of other authorities. It may be of great importance in judicial work, since, in addition to being an essential means of ensuring the judge’s impartiality and respect for the rights of the defense, as well as protecting the judge himself from what his mind or emotions might prompt him to do or what pressure might induce him to do, it is the foundation for convincing public opinion of the fairness of the judiciary. It is also the fundamental and ultimate basis for protecting its independence. In addition to this, reasoning performs a technical role by enabling the Court of Cassation to exercise its review over lower courts, enabling the convicted person to identify the defects affecting the judgment, and enriching legal thought in general.²⁵

Accordingly, the review exercised by the Court of Cassation focuses on identifying the objective reasons and evidence upon which the lower court judges based their conviction as to the correctness of their ruling. This is done by determining the facts for which punishment was imposed, as well as the legal provisions pursuant to which the judgment was issued.²⁶

²³ Mamdouh Khalil Al-Bahr, *op. cit.*, p. 342.

²⁴ Taheri Hussein, *The Reasoning of Judicial Decisions*, Dar Houma, Algeria, 2014, p. 16.

²⁵ Mohamed Fahim Darwish, *op. cit.*, p. 724, footnote No. 01.

²⁶ The report of the Procedures Committee of the Egyptian Senate, in its commentary on Article 310 of the Code of Criminal Procedure—which stipulates that every judgment imposing a penalty must include a statement of the facts punishable by law and must refer to the legal provision pursuant to which the judgment was rendered, otherwise it shall be null and void—states the following: “The judge must justify his judgment in all respects,

Factual reasons refer to the facts, means of defense, and evidence upon which the judgment relies in establishing the existence or non-existence of the basic fact, which constitutes the factual element whose existence is presumed for the application of the legal rule. Legal reasons, on the other hand, refer to the identification of the legal basis and legal arguments pursuant to which the judge issues his judgment after legally characterizing the facts and identifying the facts necessary for applying the law to the judicial judgment in terms of its elements and particulars. The true purpose of providing reasons for the judgment is to enable review of the judge's work and to verify his understanding of the facts of the dispute, without excessive reasoning or unnecessary elaboration.²⁷

From the foregoing, we conclude that the reasons for a judgment mean the factual and legal grounds upon which the judgment is based. Reasoning is of great importance because it identifies the grounds upon which the judge based his judgment and constitutes a means that assists him in reaching the conclusions announced in the operative part of the judgment, thereby removing any suspicion of emotional influence. Reasoning is also a means of identifying the grounds upon which the judgment was based, enabling the Court of Cassation to verify the validity of the judgment and its basis. Therefore, the reasons must be recorded, separate, and consistent, so that the judgment is not rendered invalid.²⁸

Second: Functions of Reasoning:

Reasoning has several functions, which vary according to whether it is regarded as a means of reviewing judgments (I), a means of strengthening the judgment (II), or, finally, a means of determining the scope of the judgment and giving it moral authority (III). These will be presented as follows:

I/ Function of Reasoning as a Means of Reviewing Judgments: According to this function, reasoning may be regarded as a means of protecting private interests (1), or as a means of protecting public interests (2).

1/ Its Function as a Means of Protecting Private Interests:

Legal scholarship unanimously agrees that respect for the rights of the defense is the principal principle around which the other procedural principles revolve. The right of defense encompasses a set of rights deriving from it. In order to ensure respect for this right, the judge is subject to two fundamental obligations. The first is impartiality between the parties (A), and the second is the judge's obligation of fairness, which requires him to inform the parties of all factual or legal issues raised in the proceedings (B). Through reasoning, individuals can ascertain that the procedure adopted by the judge has not involved any violation of the right of defense.²⁹

A/ Reasoning as a Means of Reviewing the Judge's Impartiality:

Judicial impartiality means the absence of bias, that is, the judge does not take the side of one party against the other. In legal terminology, judicial impartiality means that the judge may base

whether with regard to the establishment of the charge or the application of the law." See: Abdel Hamid Al-Shawarbi, *Criminal Nullity*, Modern University Office, Egypt, 2007, pp. 573–574.

²⁷ Mohamed Fahim Darwish, *op. cit.*, p. 725.

²⁸ Mamdouh Khalil Al-Bahr, *op. cit.*, p. 343.

²⁹ *Ibid.*, pp. 205–206.

his judgment only on the evidence presented before him.³⁰ In other words, he does not intervene spontaneously to seek the truth, whether with regard to determining the subject matter of the action³¹ or collecting the elements of evidence.³²

B/ Reasoning as a Means of Reviewing the Judge's Compliance with the Principle of Adversarial Proceedings:

Respect for the right of defense does not merely require the judge to maintain impartiality in both its absolute negative and positive aspects. There is another aspect of this right, namely the judge's obligation of fairness between the parties, whereby he must inform them of everything relating to the proceedings in terms of facts and law and ensure confrontation between the parties. This means that he must not surprise them by adopting a solution to the dispute that is not based on the factual and legal elements known to the parties, particularly in administrative and criminal matters.

The principle of adversarial proceedings requires the party who takes a measure intended to be invoked against the opposing party to inform that party of such measure, so that the parties may debate it. The obligation to respect adversarial proceedings takes two forms: it requires the judge to supervise the actions of the parties in order to ensure compliance with this principle, and it also requires him, when forming his conviction, to base it only on matters that have been debated by the parties and not to seek the truth beyond the scope of the facts. Reasoning is the only means that makes it possible to determine whether the judge derived the grounds of his judgment from the final submissions debated by the parties.³³

C/ The Function of Reasoning as a Means of Protecting Public Interests:

Reasoning performs a general function related to the public interest, as it opens the way for reviewing the correctness of judicial decisions through higher-ranking judicial bodies. Reasoning also contributes to strengthening the judgment and fostering confidence in it, thereby making it possible to determine the extent to which the judiciary has understood the legal rules.³⁴

A/ The Role of Reasoning in the Court of Cassation's Review of the Correctness of the Judgment:

The Court of Cassation exercises such review in order to ensure that the judgment does not violate the law and to verify its correctness. In detecting such defect, the court is required not

³⁰ Taheri Hussein, op. cit., pp. 85–86.

³¹ Since the parties are the masters of the facts, the judge does not rule on matters that have not been requested of him, nor does he alter the basis of the claim. See: Azmi Abdel Fattah, op. cit., pp. 207–209.

³² The principle in this regard is that the submission of evidence and facts establishing the claims of the parties rests upon them alone, as the civil judge is required to maintain absolute neutrality during the evidentiary proceedings and the search for possible truth, rather than objective truth. The judge may form his conviction only on the basis of the elements prescribed by law and submitted in the form recognized by law, and he is prohibited from evaluating the elements of evidence on the basis of his personal knowledge. Information derived from experience in general matters does not constitute personal knowledge upon which the judge is prohibited from basing his judgment. As for the criminal or administrative judge, he resorts to interrogation, and his neutrality in this case merely means the absence of bias. For a detailed discussion of the reasoning of civil judgments, see: Taheri Hussein, op. cit., pp. 11–35; see also: Azmi Abdel Fattah, op. cit., pp. 210–212.

³³ See: Taheri Hussein, op. cit., pp. 84–85; Azmi Abdel Fattah, op. cit., pp. 212–216.

³⁴ Taheri Hussein, op. cit., p. 75.

to address the merits of the dispute, but to confine itself to reviewing the correctness of the application of substantive and procedural law. Judicial error relates to the reasoning applied by the judge, and may concern either the major premise of this reasoning, which refers to the applicable legal rule. An error in this premise occurs when the judge denies the existence of the legal rule, denies its binding force, interprets it incorrectly, or it may concern the minor premise, which refers to the facts. An error in this premise occurs either when determining these facts, applying the law to them, or stating the conclusions reached by the judge, such as where the error concerns the inference drawn in understanding these facts, if the inference is defective. An error may also occur in assessing the evidence relied upon by the judge, where such assessment is not reasonable.³⁵

Since the Court of Cassation is required to verify the correctness of the judgment, despite being prohibited from addressing the merits, it cannot exercise its review in this regard except by examining the mental activity undertaken by the judge and determining the reasoning he followed and the extent of its conformity with the law. This can only be achieved through reasoning. When the reasoning is serious and sufficient, the Supreme Court can determine whether the judge correctly characterized the facts or not; whether he attributed to them the legal effects prescribed by law or not; whether he correctly understood the facts or misunderstood them; and whether he properly assessed the evidence or not. All these matters are subject to the review of the Court of Cassation.³⁶

B/ The Role of Reasoning in Enabling the Court of Cassation to Review Cases of Miscarriage of Justice and Cases of Cassation in the Interest of the Law:

The Court of Cassation exercises this review where no avenue of appeal against the judgment remains available to the parties. This review does not seek to verify whether the judgment violates an explicit legislative provision, nor does it seek to assess the reasoning undertaken by the judge, nor does it seek to have the case reheard before the courts. Rather, it seeks to annul judgments characterized by defective adjudication. Some consider this to be a form of disciplinary authority exercised by the Court of Cassation over judgments, and it does not fall within the meaning of the judicial authority exercised by the court when the law is violated in its narrow sense.

Reasoning performs two important functions in this regard. First, reasoning is the only means by which it is possible to determine the manner in which the judge applied the law, and the only means by which the reasons that led him to depart from the apparent meaning of the legal provision or the apparent intention of the contracting parties can be identified. Second, reasoning is the means of demonstrating instances in which the judiciary departs from the provisions of the law, which may prompt the legislator to amend the law if it finds that there is judicial resistance to some of its provisions.³⁷

³⁵ Azmi Abdel Fattah, *op. cit.*, pp. 217–218.

³⁶ To clarify the scope of the role of reasoning in enabling the Court of Cassation to exercise oversight for the purpose of detecting the defect of violation of the law, it is necessary to determine the scope of oversight over the trial court in this regard, and then the substance of such oversight. *Ibid.*, pp. 212–226.

For a detailed discussion of the function of reasoning as a means of protecting the public interest, specifically its role in the Court of Cassation's review of the validity of the judgment, see: Taheri Hussein, *op. cit.*, pp. 75–80.

³⁷ Azmi Abdel Fattah, *op. cit.*, pp. 226–227.

II/ The Function of Reasoning as a Means of Strengthening the Judgment:

In this section, we address the view that all reasons enjoy the authority of *res judicata* (1), as well as the view that some reasons enjoy such authority (2), and finally the view that reasons do not enjoy such authority (3).

1/ The Authority of Res Judicata Extending to All Reasons:

The basis of this view is that the authority of *res judicata* constitutes a presumption that the judgment represents the truth, and that considering only the operative part as containing the adjudication of the matter in dispute is incorrect, because the operative part has no value without the reasons, which constitute the logical and necessary basis for its existence and without which the operative part would have no legal foundation.

If reasoning contributes to granting the judgment the authority of *res judicata*, and although such authority primarily attaches to the operative part, the reasons nevertheless play a prominent and important role. They support the operative part, establish its existence, and give it force. Through them, the operative part becomes effective, in addition to the fact that the reasons may, in some cases, clarify ambiguities surrounding the operative part.³⁸

For all the reasons of a judgment to enjoy authority, there must be a logical and necessary connection between the reasons and the operative part.³⁹

2/ The Authority of Some Reasons:

This approach is based on the idea that the operative part and the reasons should not be separated, on the grounds that the judgment is an indivisible mental act. However, according to this approach, the general rule is that authority attaches only to the operative part, while, exceptionally, it extends to only two types of reasons. This approach is predominant in French legal scholarship. Its proponents argue that practical considerations require recognizing that some reasons enjoy authority, because an absolute assertion that reasons do not enjoy authority, as maintained by the approach denying such authority, leads to unacceptable consequences.⁴⁰

3/ Reasons Do Not Enjoy Authority:

A body of legal scholarship holds that reasons do not, in themselves, enjoy authority. What is referred to as the decisive reason does not exist theoretically, but only practically, as a result of a defect occurring when the judgment is drafted. The view that reasons do not enjoy authority rests on two considerations. The first is technical and considers that granting some reasons the authority of *res judicata* is due to the insufficiency inherent in the operative part. The second is philosophical and consists in the fact that, although the operative part and the reasons are actually connected, the basis for the existence of each is not the same. Pronouncing the judgment constitutes adjudication and decision-making, that is, taking a decision in a specific case, whereas reasoning constitutes justification, clarification, and presentation of the method followed by the judge. Thus, reasoning is not the decision itself, but rather the justifications for the decision.

³⁸ See: Hadi Hussein Al-Kaabi and Faisal Nouri, "Reasoning of Civil Judgments – A Comparative Study," *Al-Muhaqqiq Al-Hilli Journal of Legal and Political Sciences*, University of Babylon, Iraq, Issue No. 2, Sixth Year, 2014, p. 154.

³⁹ See for details: Azmi Abdel Fattah, *op. cit.*, pp. 230–232.

⁴⁰ See for details: *Ibid.*, pp. 232–242.

If the idea of authority is based, according to the majority of legal scholars, on the notion that the judgment represents the truth or constitutes an instrument of stability, it is not logical to grant authority to the justifications that led to the issuance of the judgment, regardless of the value of those justifications. On the other hand, pronouncing the judgment is an expression of authority, while reasoning is a means of explaining how that authority was exercised. The authority of *res judicata* is connected with authority, and since reasoning is not itself an exercise of authority, asserting that the reasons enjoy the authority of *res judicata* in the same manner as the judicial decision amounts to denying reasoning itself and undermining its role as an element of the judgment.⁴¹

III/ The Function of Reasoning as a Means of Determining the Scope of the Judgment and Giving It Moral Force:

Reasoning plays an important role in giving the judgment a force of precision, that is, in clearly and specifically determining the scope of the judgment, both in terms of facts and law (1), which in turn gives it the moral force it enjoys (2).

1/ Reasoning as a Means of Determining the Scope of the Judgment in Terms of Facts and Law:

In order for a judgment to acquire the force of its operative part, it must be clear and free from ambiguity regarding what it has decided in terms of facts and law. This is necessary so that the Supreme Court can exercise its review over the proper application of the law through the judge's determination of the facts according to sound judicial reasoning. Such judicial reasoning consists in demonstrating the correctness of the trial judge's understanding of the facts and the evidence establishing or refuting them, and in responding to the parties' claims and substantive defenses. This is referred to as factual reasons.⁴²

Reasoning is a means of determining what the judge adjudicates in terms of the subject matter and what has been discussed between the parties. It is also a means of determining the scope of the devolutive effect of an appeal. If it is accepted that the scope of the dispute on appeal is determined by the same limits that existed before the court of first instance, except in exceptional cases, then the scope of the devolutive effect can only be determined through reasoning. Reasoning also plays a role in determining the scope of the judgment in terms of law, that is, by stating the legal rule applied by the judge and explaining his interpretation of it. It also plays an important role in supplementing the law.

It is clear from the foregoing that reasoning is the only means of defining certain indefinite legal concepts, such as interest, benefit, bad faith, exceptional circumstances, serious harm, and others. In determining the meaning of these terms, the judge exercises broad but non-discretionary authority. If he does not define the meaning of these indefinite terms in the reasons for his judgment, their meaning will not be understood, and the judgment will be tainted by arbitrariness.⁴³

2/ Reasoning as a Means of Giving the Judgment Moral Force:

⁴¹ See for details: *Ibid.*, pp. 242–247.

⁴² See: Mestari Adel, *Judicial Logic and Its Role in the Soundness of the Criminal Judgment...*, op. cit., p. 204.

⁴³ *Ibid.*, p. 247.

There is no doubt that the real force of any act or decision lies in its clarity and in the general acceptance of it. At that point, it acquires a force that prompts people to respect it and refrain from obstructing its implementation. This force is established vis-à-vis public opinion. A judgment does not acquire such force unless it is reasoned. The moral force of a judgment is not limited to public opinion; rather, it extends to the judiciary itself, giving it moral force vis-à-vis other courts, particularly in countries that adopt judicial precedents.⁴⁴

Third: The Extent to Which Reasoning Is Mandatory:

The obligation to give reasons for judicial judgments was provided for in Article 162 of the 2016 Constitutional Amendment,⁴⁵ which states: “Judicial judgments shall be reasoned and pronounced in public hearings.

Judicial orders shall be reasoned.”⁴⁶

Accordingly, the judge’s task is not limited to providing a just solution to the case; rather, he must support it with argument and evidence. For this reason, the law requires judgments to be reasoned,⁴⁷ as this constitutes an indispensable guarantee for the proper administration of justice. It enables the concerned party to directly verify that the court has considered his position and, consequently, ensures respect for the rights of defense. Reasoning also contributes to convincing public opinion of the fairness of the judiciary, dispels any suspicion surrounding it, and enables the Court of Cassation to exercise supervision over the courts.⁴⁸

The Code of Criminal Procedure established the principle of mandatory reasoning of judgments in Article 379, which considers the reasons to be the basis of the judgment, without, however, providing or defining a precise meaning of reasoning. Accordingly, the reasons referred to are those upon which the operative part of the judgment is based, both objectively and legally.⁴⁹

While Article 379 of the Code of Criminal Procedure provides for the reasoning of judgments in misdemeanors and contraventions, Article 521 of the same Code provides for the reasoning of decisions of the Supreme Court. As for the Criminal Court, its judgments deciding the civil

⁴⁴ The reasoning of judgments thus establishes communication between the judges of the Supreme Court and the judges of lower courts, which helps avoid errors and clarify undefined legal concepts. See for details: Taheri Hussein, *op. cit.*, p. 81; Azmi Abdel Fattah, *op. cit.*, pp. 250–254.

⁴⁵ Issued pursuant to Law No. 16/01 of 6 March 2016, Official Gazette of the People’s Democratic Republic of Algeria, No. 14, issued on 7 March 2016.

⁴⁶ Corresponding to Article 144 of the 1996 Constitutional Amendment.

⁴⁷ The French draft amendment to the Code of Criminal Procedure provided, in its third article, that no authority may impose a decision on any citizen without stating the reasons for such decision. This rule is considered a general principle of the Code of Criminal Procedure. The drafters of Article 3 went further by emphasizing that the reasoning must be specific, precise, detailed, related to the facts at issue in the case, and consistent with the operative part of the judgment.

Accordingly, the reasoning should not be general, that is, formulated according to a standardized model, clause de style, applied in the same manner regardless of the nature of the case under consideration. Since this concerns a general rule, the requirement of reasoning applies to all decisions issued by all judicial bodies, which must likewise be reasoned. See:

Michele-Laure RASSAT, *Propositions de réforme du Code de procédure pénale*, Dalloz, 1997, pp. 54–55.

⁴⁸ Mohamed Fahim Darwish, *op. cit.*, p. 724.

⁴⁹ Article 379 of the Code of Criminal Procedure provides: “Every judgment must state the identity of the parties and their presence or absence on the day of pronouncement of the judgment. It must contain the reasons and the operative part, and the reasons shall constitute the basis of the judgment.”

action are reasoned pursuant to Article 316 of the Code of Criminal Procedure. However, judgments deciding the public action, prior to the amendment of the Code of Criminal Procedure introduced by Law 17/07, were not reasoned; rather, they were required to contain the questions submitted and the answers given to them, which constituted their reasoning.

However, Law 17/07, amending the Code of Criminal Procedure, established the principle of reasoning criminal judgments. Article 309 thereof requires the criminal judgment to be reasoned through a reasoning sheet, which must be prepared and signed by the president or one of the judges delegated by him within a maximum period of three days from the pronouncement of the judgment. This sheet explains the reasons that led the Criminal Court to reach its decision, whether conviction, as inferred from the deliberation, or the principal reasons for acquittal, or the reasons that led the court to conclude that the accused had materially committed the acts and the reasons on which the exclusion of his liability was based.

Fourth: Conditions for the Validity of Reasoning:

For reasoning to be valid, the reasons must be present in the judgment (I), and these reasons must then be sufficient (II).

I/ The Condition of the Existence of Reasons:

For reasoning to be valid, the reasons must appear in the same enforceable instrument for which the law requires reasoning. A judgment may not derive its reasons from another judicial judgment, since the principle is that the judgment itself must be sufficient and must independently contain all its reasons, whether they are stated expressly or implicitly.⁵⁰ The general rule is therefore that the reasons must be expressly stated in the same enforceable instrument. However, even where they do not appear in the same instrument, this may be permissible if the judgment refers to another document, such as a previous judgment between the same parties and concerning the same action or to an expert report, provided that the conditions for such reference are satisfied. The rationale for requiring the reasons to be included in the same instrument is the necessity for the procedural act itself to contain within it evidence of its validity.⁵¹

The reasons may also be implicit, meaning those that emerge from the judgment as a whole. This occurs when the judgment does not clearly and expressly state specific reasons for each of its elements. It is considered that an implicit reason exists in two cases: first, where there is a direct connection that unifies the reason and the operative part; and second, where the existence of the implicit reasons can be inferred through reasoning. This may be because the reasons by which the judge justified his decision regarding certain claims are also applicable to other claims, or because the reasons justifying the judgment as a whole are applicable to claims for which no specific reasons were provided.⁵²

The reason may also be general, where the court responds to several claims with a single reason, and this reason is applicable to the other claims even if they are not directly connected to one

⁵⁰ See: Mahmoud Al-Sayed Omar Al-Tahyaw, *Issuance of Judicial Judgments in Light of Jurisprudence and Judicial Rulings – An Analytical and Applied Study*, First Edition, Al-Wafaa Legal Library, Alexandria, Egypt, 2011, p. 87.

⁵¹ See for details: Azmi Abdel Fattah, *op. cit.*, pp. 267–287; see also: Mahmoud Al-Sayed Omar Al-Tahyaw, *op. cit.*, p. 88.

⁵² See: Azmi Abdel Fattah, *op. cit.*, pp. 279–294.

another as in the case of an implicit reason. In other words, a general reason is a single reason by which the judge responds to several claims, and the general formulation adopted by the judge to reason the different elements of his decision is applicable to them.⁵³

II/ The Condition of Sufficiency of the Reasons:

The first condition for the validity of reasoning, as we have seen, is the existence of reasons. Their absence results in the total or partial non-existence of reasons. The second condition for the validity of reasoning is the sufficiency of the reasons. In this section, we shall clarify the meaning of sufficiency of reasons (1), and then identify the conditions for their sufficiency (2).

1/ Meaning of the Sufficiency of Reasons:

Reasons are sufficient when they establish that the fact necessary for applying the legal rule has been established. Conversely, reasons are insufficient when this cannot be established from them because they fail to state the factual elements necessary to justify the legal rule applied by the judge.⁵⁴

The condition of sufficient reasoning presupposes that the judgment contains reasons. However, the mere existence of reasons does not mean that the reasoning is valid. The reasons must be sufficient, meaning that they must clearly and in detail demonstrate, on the basis of legally established and sound evidence and facts, how the judge reached the conclusion contained in his decision. They must demonstrate that he examined the dispute before him carefully and that he applied the provisions of the law in reaching his decision, so that the Court of Cassation can review the method followed by the judge in reaching his decision and verify respect for the rights of defense.⁵⁵

Reasoning is sufficient when the judge states the information necessary for the reasoning process,⁵⁶ including the sources of reasoning in terms of facts and law. For reasoning to be correct and sufficient, the judge must indicate the sources from which he derived the factual and legal reasons for the judgment and rely on the evidence presented by the parties in the case, so as to ensure that his conclusion does not merely express an individual opinion that he seeks to impose upon the parties. This means that the judge's conviction must derive from procedures whose legal regulation provides the judge with sufficient information to reach the truth. The judge must also rely on the evidence presented before him. He may not rely on evidence relating to another case, even if it involves the same parties. The judge must also respect the substantive and procedural rules of evidence contained in substantive legislation.⁵⁷

⁵³ See for details: Ibid., pp. 294–296.

⁵⁴ See: Said Khaled Al-Sharabi, op. cit., p. 715.

⁵⁵ See: Mahmoud Al-Sayed Omar Al-Tahyawi, op. cit., pp. 78–79; Azmi Abdel Fattah, op. cit., pp. 363–364; Abdel Hamid Al-Shawarbi, Procedural and Substantive Civil Nullity, Mansha'at Al-Maaref, Egypt, no publication year, pp. 274–283.

⁵⁶ Such as those relating to the form of the judgment, including its issuance in the name of the people, the name of the court, the date of issuance of the judgment, and the name of the judge who rendered it, etc. Others relate to identifying the parties to the proceedings, including their capacities, identities, domiciles, presence or absence, and the name of the Public Prosecutor who expressed his opinion in the case. Others concern presenting a summary of the facts of the case, the claims of the parties, and a brief summary of their defenses. The omission of any of these essential particulars results in the nullity of the judgment or decision. See in this regard: Azmi Abdel Fattah, op. cit., pp. 363–364.

⁵⁷ Ibid., pp. 363–364; Abdel Hamid Al-Shawarbi, Procedural and Substantive Civil Nullity, op. cit., pp. 274–283.

2/ Conditions for the Sufficiency of Reasons:

Sufficient reasoning is achieved when it fulfills its functions, namely:

A/ Enabling Verification of the Legality of the Judgment:

When the judge takes an initiative on his own, such as reopening the pleadings, for example, and explains how he analyzed the assumptions necessary for the correct application of legal rules, while demonstrating the elements establishing or necessary for the creation of the right on which he ruled or which constitute a condition thereof.⁵⁸

B/ Respect for the Rights of Defense:

The judge is required to state in the reasons for his judgment or decision his response to the claims and defenses presented by the parties. The matter differs depending on whether there is a single party⁵⁹ or multiple parties. In both cases, the decision issued by the judge accepting or rejecting the claimant's request constitutes a judicial act relating to the right of defense, and the judge must state the reasons for his decision or judgment, unless the matter falls within a case in which reasoning is exempted. Where the judge responds to more than one party, there is a difficulty arising from the contradictory assertions made by the parties. Before determining the correct facts, the judge must exclude facts about which the parties do not disagree. After determining the correct and established elements, the judge proceeds to identify the relevant facts, that is, those that are important for resolving the dispute because they correspond to the elements necessary for applying the law.⁶⁰

Fifth: Consequences of Failure to Comply with the Obligation to Give Reasons:

The reasons may be completely absent. This may occur either because the judgment is entirely devoid of reasons, or because the absence exists despite the presence of reasons, where those reasons contradict one another to such an extent that nothing remains upon which the judgment can be based. The absence of reasons may also be partial where there are valid reasons sufficient to justify the judgment with regard to some claims or substantive defenses, but not others.⁶¹

Failure to comply with the obligation to give reasons may result in the judgment being affected by the defect of absence of reasons (I), the defect of defective reasoning (II), as well as the defect of insufficiency of reasoning (III), as will be explained below:

⁵⁸ Azmi Abdel Fattah, op. cit., pp. 371–372.

⁵⁹ Where the work issued by the judge is, in most cases, a non-contentious act or an investigative procedure.

Ibid., p. 373.

⁶⁰ If the judge grants the plaintiff's claims, the factual grounds must express the relevant factual elements alleged by the plaintiff and disputed by the parties. He must also explain in his reasoning why he rejected the defendant's defense. As for the legal grounds, they must be presented in a manner demonstrating the existence of the necessary elements of the legal rule applied by the judge, and that there has been a comparison between the elements of this rule and the disputed facts, point by point. If he rejects some of the claims, he must justify his rejection of the grounds on which the plaintiff's evidence was based and which the judge was not convinced by. As for the legal grounds, they must include an analysis of every potentially applicable rule and a comparison with the facts disputed by the plaintiff, since the judge is not bound by the legal characterization that the parties attribute to the facts, nor by the legal provision that they claim should be applied. For details on the role of reasoning in respecting the rights of defense through responding to the claims and defenses of the parties, see: Taheri Hussein, op. cit., pp. 82–83; Azmi Abdel Fattah, op. cit., pp. 374–375; Mahmoud Al-Sayed Omar Al-Tahyawi, op. cit., p. 80.

⁶¹ See for details: Azmi Abdel Fattah, op. cit., p. 297.

I/ The Defect of Absence of Reasons:

This consists in the judgment lacking the reasons that justify the decision reached. Absence differs from insufficiency of reasoning, both of which constitute defects in the judgment,⁶² and it also differs from failure to rule on some substantive claims. The defect of absence of reasons is characterized by the fact that it does not arise where the judgment contains any reason whatsoever.

The existence of such a reason may give rise to another defect, but not the defect of absence of reasons. The court hearing the appeal in cassation may replace incorrect legal reasons with other correct reasons, but it cannot do so in the case of absence of reasons, particularly where the absence is complete. It is also characterized by the fact that the judgment's lack of reasons constitutes a violation of a legal obligation relating to public order. Nevertheless, the Court of Cassation cannot raise it of its own motion, and reliance on nullity does not justify quashing the judgment unless the omission has caused harm to the party invoking the nullity.

Accordingly, a judgment lacking reasons cannot be remedied by an interpretative judgment issued subsequently, because an interpretative judgment is issued to clarify a matter of doubt and not to supplement or amend the previous judgment. A defense based on the judgment's lack of reasons must be examined before examining the merits and before examining other defects in reasoning, because once the formal defect is established, there is no need to examine the position adopted by the judge in his decision. The examination must focus on the operative part and the reasons in order to determine whether the reasons are absent.⁶³

The absence of reasons takes the following forms:

1/ Complete Absence of Reasons: This rarely occurs, such as where the judge deliberately refuses to give reasons, or does not understand the scope of the legal obligation to provide reasons and believes that he is exempt from it in a particular case, or due to inadvertence, negligence, or lack of awareness.⁶⁴ The majority of legal scholars consider a judgment to be devoid of reasons where it contains reasons that contradict one another or contradict the operative part, leaving nothing upon which the judgment can be based. For the contradiction to result in the absence of reasons, the contradiction must be certain and must occur between the

⁶² See: *Ibid.*, p. 297. However, some rightly consider that the defect of insufficient reasoning is not a formal defect but rather a substantive defect, given that the reasons exist formally but are substantively insufficient or inadequate to achieve the purpose intended by the legislator in requiring judgments to be reasoned. See: Taheri Hussein, *op. cit.*, p. 103.

⁶³ See for details: Azmi Abdel Fattah, *op. cit.*, pp. 301–303.

⁶⁴ For example, where the appellate court upholds the judgment of the court of first instance but fails to state in the draft of its judgment that it has adopted the same reasons set out in the appealed judgment. Among the judicial applications concerning the case where a judgment is devoid of reasons is where a decision admitting the appeal merely states that the appeal is well-founded, or where a judgment in favor of a person merely states that such person is entitled to a right, or where intervention is rejected without stating the reasons for the rejection. In the same context, a decision of the Supreme Court, issued by the Criminal and Misdemeanors Chamber on 29/05/1984, No. 27148, *Judicial Journal*, Issue No. 1, 1990, stated: "A decision of the judicial council that is devoid of reasoning and upholds a judgment of first instance that does not indicate the acts attributed to the accused or the legal provisions applicable thereto shall be considered devoid of reasons and shall warrant cassation." See other judicial applications concerning cases where a judgment is entirely devoid of reasons: Mestari Adel, *Judicial Logic and Its Role...*, *op. cit.*, p. 210; Azmi Abdel Fattah, *op. cit.*, pp. 304–308.

reasons necessary for the judgment, rather than between such reasons and additional or secondary reasons. It must concern the factual reasons, because contradiction between legal reasons, or between legal and factual reasons, does not result in the contradiction that renders the reasons nonexistent. This is because the Court of Cassation can replace an incorrect legal reason with another correct reason, whereas it cannot do so with respect to factual reasons.⁶⁵

2/ Partial Absence of Reasons: This occurs when the court fails to comply with its duty to respond to some of the parties' claims, defenses, pleas, or substantive documents. A claim is the procedural act by which a party brings his allegations to the attention of the court and presents the arguments supporting those allegations. This constitutes a formal defect because it is sufficient to reveal it by comparing the reasons stated by the judge to justify his decision with the various elements of the operative part, without examining the substance of the judgment itself.

Each element of the original claim must correspond to a part of the operative judgment, and the judge whether at the court of first instance or the appellate court must provide distinct reasons for each element of the original claims where each is based on an independent legal ground. He is also required to respond to alternative claims and documents where such claims are submitted in the form required by law.⁶⁶ However, the court is not required to respond to statements submitted by the parties that do not rise to the level of claims and merely constitute arguments supporting a particular position.⁶⁷

II/ The Defect of Faulty Reasoning

Faulty reasoning renders the judgment, in its statement of the facts of the case, as though it were unreasoned, and it constitutes one of the defects that invalidate a judgment.⁶⁸ The logical consistency of the reasons is one of the conditions for the validity of a judgment. If a judgment lacks logical consistency, it reflects disorganized thought and is affected by the defect of faulty reasoning, that is, the illogicality of the conclusion reached by the judgment in its operative part in light of the premises of the syllogism undertaken by the judge. The conclusion is considered logical or illogical on the basis of reason and the conduct of the judge as an ordinary judge; thus, reasonableness is the sole criterion in such cases.⁶⁹

The general rule is that errors relating to factual reasons do not affect the judge's reasoning, because they are remotely connected with the question of whether the judge thought correctly, or with the issue of whether he failed to express an idea correctly. Although this is the general rule, there are certain cases relating to facts in which an error leads to faulty reasoning. However, stating that every error in the interpretation of facts leads to faulty reasoning would necessarily contradict the consideration that trial judges are the masters of fact. Therefore, not

⁶⁵ See for details: Ibid., pp. 308–323.

⁶⁶ Such as the requirement that it be presented in the presence of the opposing party or notified to them, that it be presented clearly, unequivocally, and effectively in the proceedings, that it be directly related to the subject matter thereof, and that such claim or defense be supported by evidence in the case so that it is not frivolous. See for details: Ibid., pp. 348–361.

⁶⁷ See: Taheri Hussein, op. cit., p. 112; Azmi Abdel Fattah, op. cit., pp. 326–348.

⁶⁸ See: Shaaban Mahmoud Mohamed Al-Hawari, op. cit., p. 333.

⁶⁹ See: Azmi Abdel Fattah, op. cit., pp. 480–487.

every error relating to the court's interpretation and understanding of the facts results in faulty reasoning.⁷⁰

Among the forms of faulty reasoning based on an error in the interpretation of facts is the judge's basing his judgment on a fact that he has inferred from a source that does not exist, or that exists but contradicts what it establishes, or that does not contradict it but from which it is logically impossible to infer such a fact. The error in the interpretation of facts that leads to faulty reasoning takes three forms:

1/- Error in the interpretation of facts due to an error in the evidence: established by the facts, its invalidity, failure to respect the adversarial principle when it is presented, or its objective unsuitability as a basis for conviction.

2/- The court's failure to understand the facts: since erroneous understanding necessarily leads, by logical necessity, to the erroneous conclusion reached by the judge, thereby affecting the judgment with faulty reasoning.⁷¹

3/- The court's reliance on contradictory facts:⁷² The application of a legal rule to facts presupposes that the judge examines and selects the rule to be applied to the dispute, then analyzes the complex ideas constituting the rule into their primary elements, and subsequently compares the elements of the rule with the data existing in the particular case to which the law is to be applied in order to reach a resolution of the dispute. In other words, the judge undertakes selection, analysis, and comparison. The error may occur at the first stage, where the judge errs in selecting the express legal provision or in interpreting it; it may concern the application of an inappropriate legal provision; or it may result from an erroneous comparison between the elements of the legal rule and the circumstances of the particular case to which the provision is intended to apply.⁷³

It follows from the foregoing that a criminal judgment requires an understanding of the facts of the case and the extraction of established and relevant facts in accordance with reason and sound logic. If the court draws conclusions that do not follow from the premises by logical and rational necessity, the judgment is affected by the defect of faulty reasoning. This means that the Supreme Court's review extends to the judicial logic contained in the reasons for the judgment through review of the soundness of the reasoning and the requirement that it be consistent with reason and sound logic.⁷⁴

III/ The Defect of Insufficiency of Reasons

If the judge bases his judgment on a fact that he has inferred from a source that does not exist, or from a source that exists but contradicts what it establishes, or from a source that does not contradict it but from which it is logically impossible to infer that fact, the judgment is defective. A judgment must, in itself, provide the reader with assurance that the court has thoroughly

⁷⁰ See: *Ibid.*, pp. 489–490.

⁷¹ This means that the judge's understanding of the facts and evidence must be reasonable and consistent with the rules of reason and logic. See: Taheri Hussein, *op. cit.*, p. 123.

⁷² See for details of these forms: Abdel Hamid Al-Shawarbi, *Civil Nullity...*, *op. cit.*, pp. 336–338; Azmi Abdel Fattah, *op. cit.*, pp. 489–493.

⁷³ See for details of these forms: Abdel Hamid Al-Shawarbi, *Civil Nullity...*, *op. cit.*, pp. 338–340; Azmi Abdel Fattah, *op. cit.*, pp. 493–494.

⁷⁴ Mestari Adel, "The Supervisory Role of the Supreme Court in Guaranteeing...", *op. cit.*, p. 132.

examined the evidence submitted to it and has employed all means capable of enabling it to reach what it considers to be the factual reality. Ambiguity and obscurity constitute defects in a judgment, as does the absence of a connection between its reasons and its operative part, such that the reasons do not lead to the conclusion reached.⁷⁵

Insufficiency in the factual reasons results in the invalidity of the judgment for insufficiency of reasoning.⁷⁶ The invalidity may result from faulty reasoning, as it is established that the reasons for a judgment are affected by faulty reasoning when they contain a defect affecting the soundness of inference. This occurs where the court bases its conviction on evidence that is objectively unsuitable for forming a conviction, or on a failure to understand the factual elements.⁷⁷

Invalidity may also result from contradiction in the reasons, where those reasons are mutually destructive and none of them can serve as a basis for the operative part of the judgment. The contradiction that invalidates judgments occurs in two forms. The first is when it exists within the reasons of the judgment itself, such that it becomes impossible to understand the basis upon which the court reached the decision stated in its operative part. In this case, the judgment is considered as though it were devoid of reasons, and the Court of Cassation annuls it. The second occurs when the judgment is rendered contrary to a previous judgment, provided, in this case, that the previous judgment is a final judgment determining the subject matter of the dispute between the two parties. When the Court of Cassation finds that this condition is satisfied, it orders the annulment of the second judgment and declares that the first judgment is the one to be enforced.⁷⁸

Finally, the invalidity of reasoning may result from a contradiction in the operative part, where it becomes impossible to understand the basis upon which the court rendered its decision in the operative part. Contradiction in the operative part constitutes one of the grounds for an appeal in cassation.⁷⁹

It is clear from the foregoing that if the legislator requires judgments to be seriously reasoned, this is intended to achieve the purpose of such reasoning. Therefore, the reasons should not be

⁷⁵ See for further details: Abdel Hamid Al-Shawarbi, *Civil Nullity...*, op. cit., pp. 253–322.

⁷⁶ The French jurist “Faye” classifies cases of insufficient reasoning into five cases:

First: Where the judgment presents the reasons in a complex and interrelated manner such that it is impossible to determine whether the judge has ruled on the facts or on the law.

Second: The generality and ambiguity of the reasons, such as where the judgment refers to documents without indicating the nature of such documents, or states, for example, that the appellant was reckless.

Third: Where the reasons do not explain a fundamental fact necessary to justify the legal characterization applied by the judge to the facts, such as where the judgment establishes the occurrence of fault and damage but does not address the causal relationship between the fault and the damage.

Fourth: Insufficient specification of the facts, such that the Court of Cassation is unable to effectively review the application of the law to the facts, such as where the judgment determines that no force majeure existed without indicating the circumstances on which it based that determination.

Fifth: Where the judgment is based on irrelevant or unproductive reasons, leaving the disputed issue unresolved, such as where the judgment excludes certain facts on the ground that they are unproductive when, in fact, the opposite is true. See in this regard: Said Khaled Al-Sharabi, op. cit., pp. 715–716.

⁷⁷ Abdel Hamid Al-Shawarbi, *Civil Nullity...*, op. cit., pp. 340–349.

⁷⁸ *Ibid.*, p. 349.

⁷⁹ *Ibid.*, p. 356.

ambiguous, obscure, incomplete, or contradictory in a manner that causes them to cancel one another out. It is not sufficient for judges merely to repeat the statement: “the action was brought on a sound basis...”⁸⁰

Subsection Two: Judicial Conviction and the Elements of Judicial Certainty in Criminal Matters

The scientific method of reasoning charts the path for the formation of the judge’s conviction, proceeding from the known to the unknown. The known may constitute either direct evidence of a particular act, or a presumption by which that act is inferred through a mental process linking different data with the nature of things, or with human nature and ordinary or circumstantial conduct, in order to form a particular conviction as to whether the act occurred or not, or whether the person was connected to the act or not.⁸¹

The judge’s personal conviction is an important matter in the assessment of means of proof, which differ in criminal matters from civil matters in several respects. Means of proof are freely admissible in criminal matters, whereas they are restricted in civil matters.⁸² What, then, is meant by personal conviction? What are the elements of criminal judicial certainty? We shall attempt to answer these questions by addressing the concept of personal conviction (First Branch), and then presenting the elements of criminal judicial certainty (Second Branch).

First Branch: The Principle of the Personal Conviction of the Criminal Judge

The system of personal conviction of the criminal judge is among the most widespread systems in comparative law in the modern era. Under this system, the judge enjoys broad discretionary authority, both with regard to the admission and number of evidence and with regard to his personal assessment of the value of each item, according to what satisfies him.⁸³

On the basis of the criminal judge’s personal conviction, the latter has the right to form his belief from all the evidence, and his authority to seek the truth is unrestricted according to what his conscience dictates. He may disregard any evidence that does not satisfy him. No particular evidence is imposed upon him, and he has full discretionary authority to weigh the evidence

⁸⁰ See: Ahmed Abu Al-Wafa, “Reasoning of Judgments,” *Journal of Legal and Economic Research*, Alexandria, Seventh Year, Issues 1 and 2, 1956, 1957, pp. 85–86.

⁸¹ See: Mustafa Al-Awji, *op. cit.*, pp. 663–664.

⁸² Mamdouh Khalil Al-Bahr, *op. cit.*, p. 330.

⁸³ See: *Ibid.*, p. 331. However, it is well known that the system of legal evidence governed, under the former French law, both criminal proceedings and civil proceedings.

At that time, the French legislator established precise rules by which the probative value of each means of evidence was determined in advance and in a prescribed manner, and the criminal judge had no choice but to comply with the evidentiary framework established by the legislator. However, the system of legal evidence entailed serious defects that subsequently justified its abolition. It constituted a danger both to society and to the accused. If one of the required legal conditions was absent, the accused might escape punishment even if the judge was convinced of his guilt. Conversely, if the evidence presented met the required legal conditions, the danger was even greater, as innocent persons could be convicted despite the criminal judge’s lack of conviction as to their guilt. See: On the development of the system of legal evidence in France until its replacement by the system of personal conviction: Mohamed Marwan, “The Basic Principles Governing the System of Evidence in Criminal Matters under the Algerian Code of Criminal Procedure,” *Journal of Legal Studies*, Faculty of Law, Beirut Arab University, Issue No. 1, 2003, Al-Halabi Legal Publications, Beirut, 2004, pp. 53–54.

and determine its value. He may coordinate the evidence presented and draw from it a logical conclusion upon which he may rely in determining the accused's guilt or innocence.⁸⁴

Supporters of the principle of personal conviction defend it by arguing that moral conviction impresses everyone when it arises from feeling. Conviction cannot be ordered or inspired, and this is the proper criterion of human truth. Proof in criminal matters concerns material and psychological facts rather than legal acts. Moreover, criminal proof is characterized by greater difficulty, given the various means employed by criminals to evade the reach of the law. This has led to efforts to facilitate proof by allowing any evidence capable of leading to the truth. The judge, therefore, is the one who assesses the value of the evidence and may infer the guilt or innocence of the accused on the basis of his inner conviction.⁸⁵

Critics of this principle argue that it undermines the precision of the legal rules governing the burden of proof in criminal matters arising from the presumption of innocence. Since the judge is free to form his conviction, it does not matter whether the source of conviction is evidence submitted by the prosecution or by the defense. It also renders meaningless the rule that doubt should be interpreted in favor of the accused, since the judge may, by declaring his personal conviction, interpret doubt against the accused. The personal assessment of evidence does not, in practice, allow any review by the Court of Cassation of the evidentiary value of the evidence, since the trial judge may justify his judgment by relying on a factor that is objectively extremely weak.⁸⁶

Moreover, although this principle is intended to serve the interests of the accused, it actually undermines the rights of the defense, because it allows the judge to rely on a confession that has been retracted. It also obstructs the freedom of defense because it leaves the accused uncertain as to the impression that one item of evidence or another may produce on the judge's mind, thereby placing the accused in a situation in which it becomes difficult to determine the conduct he should adopt in defending himself.⁸⁷

In addition to all the foregoing, this principle deprives the judge himself of a means of protection against the risks of error and failure to consider all the evidence of the case, which adversely affects justice. Therefore, some consider that the absolute control of the trial judge over the persuasive value of the elements of evidence in the case is incompatible with the guarantees granted by the European Convention on Human Rights, among the most important of which is the presumption of innocence.⁸⁸

Second Branch: Elements of Criminal Judicial Certainty

The elements of judicial certainty consist of the personal element (First) and the objective element (Second), as follows:

First: The Personal Element

⁸⁴ Mamdouh Khalil Al-Bahr, *op. cit.*, p. 332.

⁸⁵ *Ibid.*, pp. 334–335.

⁸⁶ Although cassation jurisprudence or the jurisprudence of the Supreme Court has no right to review the judge's personal conviction itself, it does review the legality of the process of adducing the evidence upon which the judge relied in forming his conviction. If it finds that such process is defective, it annuls what was based on the defective process because it is itself defective. See: Mustafa Al-Awji, *op. cit.*, p. 666.

⁸⁷ Mamdouh Khalil Al-Bahr, *op. cit.*, p. 339.

⁸⁸ *Ibid.*, p. 340.

The personal or subjective element is based on the idea that the judge renders the judgment according to what he has been convinced of, or according to what the evidence presented before him has generated in his mind, because the judge may feel within himself that the accused is guilty without being able to substantiate this with the necessary evidence and may subjectively reach a degree of certainty.⁸⁹ This means that the personal element of judicial conviction consists in the judge's conscience being at ease with regard to the conviction of guilt.⁹⁰

In this regard, Dr. Mustafa Al-Awji defined the judge's conviction as: "a mental state that causes the judge to believe and feel the correctness and reasonableness of a particular fact or situation, so that he bases his decision on this belief and feeling, with a reassured conscience that what he decides is based on a truth from which doubt as to its correctness has been excluded, with certainty prevailing over it."⁹¹

The judge is therefore free to resort to his conscience as long as the fact presented before him cannot be verified except through that means. However, his drawing of conclusions must not depart from the requirements of reason and sound logic, such as when the judge relies on his conscience to become convinced of the truthfulness or falsehood of a witness. All procedures undertaken by the criminal judge outside this rational framework are subject to review by the Supreme Court with regard to the conclusion reached by his conviction.⁹²

Second: The Objective Element

The objective element of judicial certainty is based on the premise that the judge is required to attain certainty and to base his judgment on conclusive proof relying on objective foundations. Where the legislator requires the judge to rely on specific evidence for proof, or where evidence having absolute probative force is presented before the judge, he must adopt or apply it literally even if it conflicts with his conviction.⁹³ Accordingly, the objective element presupposes that the judge is convinced by the evidence because it is considered among the best evidence capable of proving the fact, such that any person who applies reason and logic would be convinced by it. In other words, the judge derives the characteristics of the persuasive force from the evidence itself, which contains them inherently. On this basis, the evidence should lead the judge to complete conviction by verifying its suitability to constitute acceptable grounds either for proving or disproving the fact, and its acceptance should constitute a truth based on reason and logic.⁹⁴

The importance of the objective element of judicial certainty is apparent in the right to be assured of the soundness of judgments through the existence of evidence of guilt. On this basis,

⁸⁹ See: Marouk Nasr El-Din, op. cit., p. 624.

⁹⁰ This element is originally derived from the jury system in Britain, whose members adjudicate according to their absolute consciences and feelings without stating the reasons. This is consistent with the selection of jurors from among members of the middle class who have no connection with the law, and therefore they cannot be required to provide grounds for the correctness of what they have been convinced of. Accordingly, they alone, rather than judges, enjoyed this absolute freedom in expressing their opinions. See: Mamdouh Khalil Al-Bahr, op. cit., pp. 368–369.

⁹¹ See: Mustafa Al-Awji, op. cit., p. 664.

⁹² Mamdouh Khalil Al-Bahr, op. cit., p. 369; Mestari Adel, *Judicial Logic and Its Role in the Soundness of the Judgment...*, op. cit., p. 42.

⁹³ See: Marouk Nasr El-Din, op. cit., p. 624.

⁹⁴ See: Mustafa Al-Awji, op. cit., p. 666; see also: Mamdouh Khalil Al-Bahr, op. cit., p. 370.

and given that the judge has an interest in ensuring that the judgment he renders enjoys the confidence and respect of the parties to the dispute, it is the judge's duty to justify his conviction by providing reasons for his judgment.⁹⁵

Subsection Three: Restrictions on the Judge's Freedom of Proof in Criminal Matters and the Limits of His Authority in Forming His Personal Conviction

We have previously seen that proof in criminal matters is linked to the extent of the judge's conviction in the evidence and the extent to which he relies upon it in rendering his judgment, whether acquitting or convicting. We have also seen that the criminal judge has full authority to determine whether the facts attributed to the accused have been established or disproved, on the basis of the means of proof presented before him. However, several restrictions apply to the judge's freedom to assess means of proof in criminal matters (First Branch), in addition to the existence of limits and controls relating to his authority to form his personal conviction (Second Branch). These will be addressed as follows:

First Branch: Restrictions on the Judge's Freedom of Proof in Criminal Matters

Proof of non-criminal matters related to the public prosecution constitutes one of the exceptions to the rule of freedom of proof in criminal matters. Jurisprudence has established the principle that the judge is bound, in non-criminal matters, by the specific means of proof applicable to such matters. This approach was subsequently enshrined by virtue of Article 10 bis of the Code of Criminal Procedure, issued by Law 06/22 dated 26/12/2006,⁹⁶ which provides: "After ruling on the public action, the investigation procedures ordered by the criminal judge concerning civil rights shall be subject to the rules of civil procedure."⁹⁷

This means that where the criminal judge has jurisdiction to rule on civil claims, he applies the rules of civil evidence to them. Accordingly, the parties to the criminal proceedings are required to follow the means of proof prescribed by the relevant special law.⁹⁸

This is the principle established by the Supreme Court. For example, with regard to the offense of breach of trust, it held that proof thereof requires two matters: first, verification of the existence of the contract pursuant to which the property was delivered to the accused, which

⁹⁵ See: *Ibid.*, p. 371.

⁹⁶ Law No. 06/22 of 20/12/2006 amending and supplementing Ordinance No. 66/155 of 08/06/1966, concerning the amendment of the Code of Criminal Procedure, Official Gazette of the People's Democratic Republic of Algeria, No. 84, issued on 24/12/2006.

⁹⁷ It appears from an examination of this provision that, despite the general nature of its wording, it has defined its scope of application, addressing in a focused and fundamental manner the civil matters upon which the determination of the criminal action depends, and subjecting them to the rules of civil evidence, since the latter are related to the nature of the subject matter to which they apply rather than to the type of jurisdiction deciding it. The aforementioned article emphasized the judge's obligation to comply with the rules of civil evidence when rendering a judgment of conviction. By implication, the law does not bind the court by civil rules except in cases of conviction, as a precaution in the interest of the accused, such that his liability and punishment may only be established on the basis of evidence recognized by law. In all cases, the criminal judge is not bound by the rules of civil evidence unless the civil fact constitutes a necessary element for the commission of the offense, which may be implicitly inferred from the provisions of this article. See: Abdel Hamid Amara, *Safeguards of the Parties During...*, op. cit., pp. 436–437. See also, for a detailed discussion of the obligation of the criminal courts to adhere to the means of proof prescribed under civil law: Mohamed Zaki Abu Amer, op. cit., pp. 892–893.

⁹⁸ See in this regard: Nahed Yousri Hussein Al-Eisawi, op. cit., p. 114; Mohamed Zaki Abu Amer, op. cit., p. 892; Marouk Nasr El-Din, op. cit., p. 476.

must be one of the contracts exhaustively enumerated under Article 376 of the Criminal Code; and second, proof of the other elements of the offense, such as the act of misappropriation or dissipation to the detriment of its owner or possessor. While these latter elements may be established by all legal means, including witness testimony and presumptions, pursuant to Article 212 of the Code of Criminal Procedure, proof of the existence or non-existence of the contract is subject to the rules of civil law. Civil means of proof are not matters of public order and, consequently, the parties may expressly or implicitly agree otherwise.⁹⁹

The following will highlight the restrictions imposed on the judge's freedom of proof in criminal matters by addressing the restriction consisting of the necessity to comply with the evidence and means prescribed by the legislator, as is established in proving the offense of adultery (First), and the restriction requiring the judgment to be based on valid objective evidence (Second).

First: The Restriction Consisting of the Necessity to Comply with the Evidence and Means Prescribed by Law

The judge's freedom of proof in criminal matters is subject to exceptions or restrictions relating mainly to means of proof. The means prescribed by the legislator for proving certain offenses, such as adultery and the offense of carrying a weapon without a license, constitute an exception or restriction on the principle of freedom of proof and, at the same time, on the principle of personal conviction.¹⁰⁰

Pursuant to Article 341 of the Criminal Code,¹⁰¹ the legislator intended to restrict the evidence admissible against a person who committed the offense of adultery and to narrow the scope of proof thereof, such that it may only be established by the methods exhaustively set out in Article 341 of the Criminal Code, namely reports of flagrante delicto drawn up by an administrative police officer, a confession, and written documents issued by the accomplice.

Accordingly, the judge must be convinced that the offense of adultery occurred and may not accept any evidence whatsoever, nor may he interpret the facts in a manner detrimental to the interests of the family. Rather, he must verify and ascertain the admissibility of the evidence concerning the offense of adultery. As for the existence of a case of flagrante delicto in adultery, its assessment is likewise left to the trial judge, who may verify the report of flagrante delicto and the status of the person who drew it up. He may not rely in forming his conviction on a report prepared in violation of the law or by an unauthorized person. He must also assess the value of the circumstances in which the accused was observed and their significance in establishing the commission of the act, in order to derive therefrom the evidence required by law to establish the charge against him.¹⁰²

⁹⁹ See: Abdel Hamid Amara, *Safeguards of the Parties During...*, op. cit., pp. 435–436; Marouk Nasr El-Din, op. cit., pp. 479–480.

¹⁰⁰ See: Mohamed Marwan, op. cit., p. 60.

¹⁰¹ Which stipulates that: "The evidence admissible for the commission of the offense punishable under Article 339 shall consist either of an official report drawn up by a judicial police officer concerning a case of flagrante delicto, or of an admission contained in letters or documents issued by the accused, or of a judicial confession."

¹⁰² See: Iman Mohamed Ali Al-Jabri, op. cit., pp. 169–170.

The same rule applies to the offense of carrying a weapon without a license, embodied in Article 37 of Ordinance 97/06,¹⁰³ since proof of this offense depends upon the condition that the weapon be seized from its carrier or possessor.

Second: The Restriction Requiring the Judgment to Be Based on Valid Objective Evidence

This restriction means that, in all cases, the judge's conviction must be based on valid objective evidence, and that a mere presumption alone is insufficient and may not constitute the basis of a judgment, although it may be used to reinforce evidence.¹⁰⁴ The criminal judge is legally bound to base his conviction on "evidence," that is, on an effect or set of material and psychological traces establishing with certainty the occurrence of the crime and its attribution to the accused. If such traces fail to provide this certainty, the conviction may not be based upon them merely as a "presumption." This is what the Algerian legislator intended under Article 212/2 of the Code of Criminal Procedure.¹⁰⁵

The evidence on which the judge relies in forming his conviction must possess the following characteristics:

I/ It Must Be Judicial Evidence

In implementation of the principle of the judge's freedom of conviction, in pursuit of justice, and as a guarantee of the right of defense, the judge may not rely on non-judicial evidence or render judgment on the basis of personal knowledge that he acquired about the crime and the accused outside the courtroom. The judge must derive his conviction from judicial evidence that has been discussed before him during the hearing. To achieve this, and to enable the judge to gather the elements of the charge and reach the truth, he must personally conduct the investigative procedures. Hearing the witness who takes an oath before him enables the judge to question him and infer the truthfulness of his account of the facts from his facial expressions and tone of voice, thereby providing grounds for conviction whether of guilt or innocence which constitute the essence of the judicial judgment.¹⁰⁶

II/ The Evidence Must Be Lawful¹⁰⁷

¹⁰³ See: Ordinance No. 97/06 of 21/01/1997, concerning war matériel, weapons, and ammunition, Official Gazette of the People's Democratic Republic of Algeria, No. 06, issued on 22 January 1997.

¹⁰⁴ See: Mohamed Zaki Abu Amer, *Criminal Procedures*, op. cit., p. 897.

¹⁰⁵ See: Abdel Hamid Amara, *Safeguards of the Parties During...*, op. cit., p. 439.

¹⁰⁶ It is not sufficient for evidence to be presented during the hearing and for the parties to be allowed to discuss it publicly; rather, for such evidence to be relied upon, it must have a basis in the case file, that is, it must be recorded in the minutes of the hearing, so that it may be said that the judge referred to it and examined it before rendering his judgment. Thus, testimony that has not been recorded may not be relied upon in the judgment, even if it was heard in the presence of the parties. See: Mamdouh Khalil Al-Bahr, op. cit., pp. 348–349; see also: Denis SALAS, *Du procès pénal, éléments pour une théorie interdisciplinaire du procès*, 1st edition, Presses Universitaires de France, Paris, 1992, p. 74.

¹⁰⁷ English courts have traditionally applied the rules of common law, which require, for the admission of evidence, only that it be relevant to the fact sought to be established, regardless of the manner in which the evidence was obtained, even if it was obtained unlawfully. One judge in the nineteenth-century Western world went so far as to state that it was unnecessary to obtain the evidence by any particular means, even if the means involved stealing it, provided that it was admissible, that is, capable of having an effect on the proof. In application of the rules of common law, it is not the function of the court to review the acts of police officers with regard to the legality of their activities; rather, the court's function is limited to reviewing the use of

This matter derives from the general principles requiring the judge to recognize only lawful procedures. The judge must not rely on evidence for a conviction except through lawful procedures that respect the freedoms and guarantees established by law. The criterion for the integrity of sources of criminal evidence consists in respecting the guarantees established by law to safeguard the freedom of the accused, who is presumed innocent until convicted by a final judgment. The law permits interference with liberty within certain limits in order to uncover the truth; however, it surrounds such interference with guarantees that must be observed so that the authority of punishment does not prevail over respect for liberty.¹⁰⁸

Accordingly, the accused's confession in the interrogation report may not be relied upon if the court finds that his will was impaired when it was made, whether as a result of violence, torture, or threats. Likewise, evidence derived from an invalid search or from a document challenged as forged may not be relied upon. Evidence obtained through procedures contrary to public order or public morality is inadmissible and is considered tainted evidence, as is evidence obtained through deception or fraud. The State has no interest in imposing punishment on innocent persons while leaving criminals unpunished. Therefore, the judge must exclude the defective evidence and remove it from the body of evidence; otherwise, his judgment is invalid, even if he relied, in rendering it, on lawful evidence alongside the invalid evidence. This is because evidence in criminal proof is mutually supportive, and the judge forms his conviction from it as a whole.¹⁰⁹

In this regard, Article 6, paragraph 1, of the European Convention on Human Rights provides that the lawfulness of evidence must be maintained throughout all stages of the proceedings and under all circumstances, including the methods by which it is obtained, in addition to the procedures followed therein.

The European Court of Human Rights also ruled, in the case of *Khan v. the United Kingdom*, that the use of interception procedures as evidence to establish the accused's involvement in drug trafficking was unlawful, following the evidence used by the British police when they installed interception and recording devices to listen to conversations between the accused and his alleged accomplice the drug consumer. The European Court of Human Rights considered that such conduct infringed the right to respect for private life, home, and correspondence. It further held that the invalidity of these procedures was linked to the accused's inability to challenge the accuracy of the recordings, which should also be subject to review by the various levels of jurisdiction. Accordingly, the European Court of Human Rights held that secret recordings were incompatible with the requirements of the right to a fair trial. The use of such secret recordings also conflicted with the principle of equality of arms, because the prosecuting authority must provide the defense with a copy of these recordings, which may be favorable or unfavorable to the accused. Moreover, the unlawful use of secret recordings infringed the accused's right of defense, because the latter could not access the evidence. The prosecution

evidence during the trial. See in detail: Ahmed Awad Bilal, *The Rule Excluding Evidence Obtained by Unlawful Means in Comparative Criminal Procedure*, 2nd revised edition, Dar Al-Nahda Al-Arabiya, Cairo, 2006, pp. 41–42; see also: Iman Mohamed Ali Al-Jabri, *op. cit.*, pp. 489–490.

¹⁰⁸ See: Nahed Yousri Hussein Al-Eisawi, *op. cit.*, p. 116.

¹⁰⁹ See: Iman Mohamed Ali Al-Jabri, *op. cit.*, pp. 351–354; Mohamed Zaki Abu Amer, *Criminal Procedures*, *op. cit.*, p. 902.

could not justify denying the defense access to it on grounds of the public interest in protecting the identity of an informant or the identity of an undercover police officer, because this would upset the balance between the right of defense and the procedures followed by the authorities.¹¹⁰

III/ The Evidence Must Be Submitted for Adversarial Discussion

It is not sufficient for evidence to have been obtained lawfully; it must also be presented during the trial hearings before the parties. This is expressly addressed by paragraph 2 of Article 212 of the Code of Criminal Procedure, which provides: "... The judge may not base his decision except on the evidence presented during the pleadings and which was subject to adversarial discussion before him." This means that the judge may base his judgment only on evidence presented before him at the hearing and subjected to discussion by the parties, because he is not free to form his conviction from any evidence whatsoever. Nor may he act simultaneously as judge and witness, and he may not rely on his personal knowledge or base his judgment on information obtained outside the courtroom.¹¹¹

On this basis, the judge must present the evidence contained in the reports of preliminary inquiries, investigations, or trial proceedings. He may not base his judgment except on evidence presented at the hearing, so that he does not render judgment on the basis of his personal knowledge. Accordingly, what matters in criminal trials is the judge's conviction, based on the evidence presented to him, of the accused's guilt or innocence. He may not be required to adopt a particular item of evidence. The trial court has complete freedom to derive its conviction from any evidence that satisfies it, provided that such evidence has a proper basis in the case file. The judge may obtain factual elements connected with the subject matter of the dispute before him that the parties did not present because they chose not to do so and did not rely upon them before him, and which were not subject to proof. This may lead to altering the facts and to the possibility of the existence of a legal position or right different from that claimed by the parties and from that which they established.¹¹²

Conversely, where necessary, the judge may complete the formation of his conviction by referring to the preliminary investigations and to the elements available in the case. He may also form his opinion on the basis of information obtained while sitting in court during the consideration of the case, because what he obtains in this manner does not constitute personal information that may not be relied upon in his judgment.¹¹³

VI/ Prohibition of Resorting to Certain Evidence

Most methods of proof applied in ancient societies, such as divine proof and judicial combat, have been excluded in modern times.¹¹⁴

The decisive oath is also excluded from criminal proof, as it cannot be directed to the accused, unlike the situation in civil cases, in which the Civil Code establishes the conditions under

¹¹⁰ See: Christopher M. MAHER, op. cit., pp. 112–113.

¹¹¹ See: Marouk Nasr El-Din, op. cit., p. 638; Mamdouh Khalil Al-Bahr, op. cit., p. 350.

¹¹² See: Iman Mohamed Ali Al-Jabri, op. cit., pp. 407, 409.

¹¹³ See in detail: Mohamed Zaki Abu Amer, Criminal Procedures, op. cit., p. 900; Iman Mohamed Ali Al-Jabri, op. cit., pp. 489–490.

¹¹⁴ Mohamed Marwan, op. cit., p. 46.

which the decisive oath may be directed and specifies the effects of refusing to take it by the person to whom it is directed.¹¹⁵

Second Branch: Limits of the Judge's Authority in Forming His Conviction

Conviction is a logical mental process for analyzing evidence, identifying its content, and determining the consequences arising from it. Through this conscious and disciplined analysis, governed by the rules of reason and logic, the judge can assess the rational value of the evidence presented to him.¹¹⁶ Although the general rule is the judge's freedom to form his conviction without being bound by particular evidence, this freedom is neither arbitrary nor unregulated. Rather, it is a freedom subject to principles and controls. Accordingly, the judge's freedom to form his conviction is subject to several controls:

First: The Conviction Must Be Based on Certainty and Conviction

As previously mentioned, the objective pursued by procedural legislation is for the judge to reach the truth in his judgment, whether of guilt or innocence. Truth cannot be reached in a judgment of conviction except on the basis of a conviction founded on certainty and assurance, given that conviction is an exception to the presumption of innocence enjoyed by the accused. The existence of doubt is therefore sufficient to return to the original presumption, in accordance with the rule that doubt is interpreted in favor of the accused. This rule entails that the judge need not rely solely on evidence to render a judgment of acquittal; it is sufficient for him to have doubts concerning the evidence of proof presented before him.¹¹⁷

Second: The Conviction Must Be Logical and Acceptable to Reason Free from Improper Adjudication¹¹⁸

The conviction formed by the judge on the basis of his freedom of conviction does not mean that the judge is absolutely free, because this would inevitably lead to judicial arbitrariness. The freedom granted to him is only that which is consistent with reason and logic. This means that the evidence relied upon by the judge must, through the use of reason, be capable of leading to the conclusion reached in his judgment. The judge's freedom to assess evidence is therefore restricted by the soundness of such assessment and reasoning. Accordingly, the judge may not base his conviction on an erroneous inference involving a violation of logic and reason, or on an unsound assessment that lacks strong foundations and solid bases; otherwise, his judgment is subject to cassation.¹¹⁹

The justifications for this restriction arise from numerous considerations, foremost among them being that, in a criminal case, the judge rules according to his conviction with complete freedom

¹¹⁵ See: Mamdouh Khalil Al-Bahr, op. cit., p. 351; see also: Mohamed Marwan, op. cit., p. 46.

¹¹⁶ See: Nahed Yousri Hussein Al-Eisawi, op. cit., p. 113.

¹¹⁷ See in this regard: Iman Mohamed Ali Al-Jabri, op. cit., p. 296; Mamdouh Khalil Al-Bahr, op. cit., pp. 344–345; Mestari Adel, Judicial Logic and Its Role in the Soundness of the Criminal Judgment..., op. cit., p. 74.

¹¹⁸ The process of reaching certainty requires the judge, in forming his conviction, to adhere to a rational and logical method based on induction and deduction in order to construct a true mental representation free from doubt, while observing the legal and procedural rules governing the admissibility of any evidence. The law also requires the judge to reach judicial certainty rather than personal or arbitrary certainty. See: Iman Mohamed Ali Al-Jabri, op. cit., p. 315.

¹¹⁹ See in this regard: Mamdouh Khalil Al-Bahr, op. cit., pp. 354–355; Mestari Adel, Judicial Logic and Its Role in the Soundness of the Criminal Judgment..., op. cit., p. 74.

based on what is presented before him at the hearing pursuant to Article 212/2 of the Code of Criminal Procedure.¹²⁰

Pursuant to this article and in application of the aforementioned restriction, the court has the right to establish the factual picture through deduction, induction, and all intellectual means based on the statements of witnesses and all other elements submitted for examination, in accordance with its conviction, and to reject what contradicts it in a sound manner that does not depart from or violate rational and logical requirements, provided that this is reasonable and based on evidence that is acceptable in reason and logic and has a basis in the case file, and provided that the judgment is based on facts established by admissible evidence.¹²¹

Accordingly, the criminal judge is free to form his conviction even if the judgment he renders contradicts a previous judgment issued by another court against another accused person concerning the same facts, provided that the judge relies on evidence that satisfies him and reassures his conscience. He may not base his judgment on the opinion of another.¹²²

Third: The Judge's Conviction Must Be Based on Evidence

Based on the presumption of innocence, the criminal judge should rely on evidence in forming his conviction. It is not sufficient, for example, for the judgment of conviction to be based on one of the procedures of preliminary inquiry. Accordingly, the legislator has not specified the evidence of criminal proof, as is the case with civil proof. The judge may rely in his judgment on any evidence whatsoever, but some evidentiary presumptions do not rise to the level of evidence and cannot be relied upon independently. The accused's silence cannot be regarded by the judge as an admission of what has been attributed to him. Nor may the court consider the absence of the defendant during the trial as a sufficient presumption for rendering a judgment against him without evidence. Testimony not supported by an oath may be taken as preliminary evidence but is not sufficient, on its own, to constitute evidence of guilt.¹²³

Fourth: Conviction Based on Awareness of All the Evidence

This refers to conviction based on the general rule known as the principle of the mutual support of evidence, according to which evidence in criminal matters is mutually supportive and the court forms its conviction from the evidence as a whole. Accordingly, the judge should not, on the basis of his freedom of conviction, consider one item of evidence to the exclusion of the other evidence. If the judge discards or excludes an item of evidence, he must reconsider whether the remaining evidence is sufficient to support the conviction, because the evidence complements one another and, taken together, forms the judge's conviction.¹²⁴

Accordingly, the judge must complete the investigation into the facts presented before him and must not discontinue it on the grounds that he fears prolonging the trial. He may not dispense with any productive investigation that is relevant to the case and affects its course. Nor may he assess the statements of witnesses before hearing and discussing their testimony. Consequently,

¹²⁰ See: Abdel Hamid Amara, *Safeguards of the Parties During...*, op. cit., pp. 439–440.

¹²¹ See: Mohamed Zaki Abu Amer, *Criminal Procedures*, op. cit., p. 905; see also: Abdel Hamid Amara, *Safeguards of the Parties During...*, op. cit., p. 440.

¹²² See: Iman Mohamed Ali Al-Jabri, op. cit., pp. 317–318, as well as p. 489.

¹²³ See: Mamdouh Khalil Al-Bahr, op. cit., pp. 347–365.

¹²⁴ See: Mestari Adel, *Judicial Logic and Its Role in the Soundness of the Judgment...*, op. cit., p. 74; Marouk Nasr El-Din, op. cit., p. 634.

his judgment would have been rendered prematurely if he confined himself to some of the evidence and decided the subject matter of the case before examining the other evidence.¹²⁵

¹²⁵ See: Christopher M. MAHER, op. cit., p. 354.