

THE POLICY OF CRIMINALIZATION IN THE IRAQI DOCTORS PROTECTION LAW (ANALYTICAL STUDY)

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Abstract

This research, tagged with (the policy of criminalization in the Iraqi Doctors Protection Law - an analytical study), deals with an important and vital topic of criminal law jurisprudence, and related to the legislator's criminal policy in the Doctors Protection Law, because the legislator's reliance on a successful criminalization policy in this law will inevitably lead to Securing a degree of appropriate protection for this important segment of society in order to give them a measure of freedom to practice their lofty work away from fears of attacks or illegal clan claims, as We divided the study into a prelude to clarifying the nature of the criminalization policy in general, in which the concept of criminalization policy was addressed and its criminal distinction on the policy of punishment, and then they complement each other, as there is no criminalization without punishment and no punishment without criminalization of a specific behavior, to follow it with two demands, the first of which came under the title of criminalizing illegal clan claims, which was divided into two branches. One of the innovations in the criminalization policy in this law is that the Iraqi legislator had previously criminalized this act and punished it with almost the same penalty, according to Revolutionary Command Council Resolution No. 24 of 1997, as for the second section, we discussed in its framework the pillars of this general and specific crime represented by the victim's status in this crime and his being a doctor. In it the legislator referred to the provisions of Articles (229-233) of the Iraqi Penal Code in terms of showing the forms of assault and its criminal penalties, in which the behavior expands to include several forms, the most important of which are insulting the doctor, assault, resistance and intentionally preventing him from performing his duties. The second section is devoted to examining the elements of the crime of assaulting doctors; let's end our research after that with a conclusion that includes our conclusions and suggestions

Keywords: criminalization, law, doctors.

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Introduction

First: Defining the topic and its importance

The safety of every individual in any country depends on the extent of his criminal policy, whether with regard to identifying criminal phenomena or determining the legal or social reaction to them. As for

determining the criminal phenomenon, the matter depends on the legislator's policy of criminalizing harmful acts, and this policy on which the legislator is based. When approving any punitive law, it is based on several factors, the most important of which are religion, morals, social traditions, politics and the public interest. Interests in the criminal policy of the legislator have increased because of its great importance. The importance of the topic of our research stems from the importance of the problems it deals with, as the legislator's adoption of a criminal policy Successful in the Doctors Protection Law will result in securing appropriate protection for this segment with an effective human role and resulting from its interaction with the human body, the nation and its ills, and then it will be positively reflected in giving them a great deal of freedom in exercising their humanitarian duty away from the fears of attacks and illegal clan claims. And to encourage doctors who immigrate outside the country to return to it and give them the privileges to ensure their return and benefit from services accused.

Second, the scope of the search

The subject of the criminalization policy in the Law on the Protection of Physicians falls within the framework of the criminal law, and therefore the cornerstone and focal point of the research is the Doctors Protection Law No. 26 of 2013 in addition to the Iraqi penal legislation represented by the Iraqi Penal Code No. 69 of 1996 as amended and the Code of Criminal Procedure No. 23 of 1971 The amendment is to the extent that allows studying the criminal policy of the legislator in protecting doctors.

Third: the research problem

The research deals with a basic problem of great importance, which is what is the criminal policy adopted by the Iraqi legislator in allocating a special law to protect doctors, does this give meanings or indications of interest in protection, or is keeping the objective protection for doctors in the general law (penalties) better? Or would it have been better to amend the provisions of the General Penal Code in a way that provides greater protection for employees in general and for doctors in particular? These are roughly the research questions and its main problems, which we are trying to highlight in our research.

Fourth: Research Methodology

The approach most consistent with the nature of the subject of the research is based on following the analytical approach based on the analysis of the criminalization texts stipulated in the Iraqi Doctors Protection Law and the relevant texts in the general penal legislation, in order to arrive at an evaluation of the criminalization policy in combating crimes against doctors, leading to a criminal policy It is successful in combating crime and protecting doctors from all attacks to which they are exposed because of their work or on the occasion of carrying out their work.


1. Literature Review

1.1 What is the criminalization policy

Before entering into explaining the criminalization policy of the legislator in the Doctors Protection Law, it is necessary to clarify the subjectivity of the criminalization policy in general by clarifying its concept and distinguishing between it and the policy of punishment.

First, the concept of criminalization policy

If the criminal policy is "the set of means that can be taken at a particular time and in a given country from In order to combat crime" or "to keep pace with the criminal law for the renewed social necessities" (Ahmed, 1972). The criminalization policy is one of the branches of the criminal policy agreed upon in jurisprudence, where states carry out their penal function in protecting the social interests that dominate society, so they choose the most effective penalty and the closest to expression. On the extent to which society appreciates the importance of these interests, if the legislator assesses that this interest requires the highest levels of criminal protection, he expresses that with punishment (Ahmed, 1972). The traditions of society and its political, economic and social system (Fatima, 2007) If we extrapolate the historical development of interests protected by the Penal Code, it will become clear to us the extent to which they are affected by human societies and the elements of their life, where social changes in general reflect the extent of transformations that occur in social values, and the latter represents in its essence The set of beliefs or types of behavior accepted by members of a society, and their manifestations appear in their way of life and the expression of their opinions, until the nature of each social change is determined. It is necessary to establish a relationship between the rules of behavior



in a complex and the structure of social relations in it, for the rule of social behavior represents a situation acceptable to the group or society that established it, as social relations represent the path taken by individuals or groups in a society, which may be acceptable. Or it is not acceptable according to the prevailing values in this society (Ahmed, 1981). Every society maintains its rules and ideas, which are an integral part of its various values that control its social system. Social rules regulate the behavior of individuals or groups that represent them and some of these rules are concerned with the policy of criminalization, and they are transferred to the Penal Code until they are associated with punishment, so the crime occurs when the violation occurs. (Akram, 2006). The rules of criminalization are then social rules, affected by social variables that reflect what is happening in society in terms of changes in moral, political, cultural and other values. The efficacy of criminal policy is linked in an important part to the policy of criminalization, so it is necessary that the criminalization policy be based on studied scientific foundations that take into account The interests of society by criminalizing what causes it harm and criminalizing what prevents it as well (Ahmed, 1972). Criminalization varies from one criminal policy to another despite the attempt to unify criminal legislation at the global level, as it is impossible to draw up a list of the acts or behaviors that were the subject of criminalization because that changes with the change of time or place, and therefore what is permitted in one country may be prohibited in another. (revolutionary, 2018). The policy of criminalization is based on the idea of harm, whether direct or indirect harm, and the broadest meaning of harm is that of wasting the values or social interests that the legislator protects (Muhammad, 2002). From all of the above, criminalization is intended to confer penal protection on a specific social interest of interest to society and to prevent harm to it, whether by wasting it or destroying it in whole or in part, or threatening to violate it, as behavior that violates social life results in general and private harm. This protection is achieved. With the criminal penalty that is through imposing a penalty or a precautionary measure on the perpetrator of the behavior that harms this interest (Haidar, 1999). Criminalization must be based on foundations or goals that achieve the protection or security of society in general (Munzer, 1979), and among these foundations or principles is the principle of legitimacy, which is one of the constitutional principles as stipulated by most of the world's constitutions (Ali, 2015), as well as the principle of non-violence, Retroactivity of criminal law to the past, which is a logical consequence of the principle of criminal legality.

Second: The distinction between the policy of criminalization and the policy of punishment

The policies of criminalization and punishment constitute the objective elements of each criminal rule. The criminal rule includes two parts, the first of which is the assignment of a specific social behavior, and the second part is the criminal penalty that results from violating this mandate, which is punishment (Abdel-Fattah, 1967), and from here it appears to us the extent of the relationship or close connection Between the assignment and the penalty, since each complements the other, and one of them does not exist without the other, in addition to that, criminalization means, as we have shown, giving the maximum levels of legislative protection to a certain interest, and since the method of expressing that protection is the criminal penalty, so it must be in the awareness The author of the criminalization policy is the content of this penalty and the extent of its seriousness, in order to best express the scope of criminalization that the legislator wants. On the other hand, the penalty, regardless of its type, is what indicates the element of obligation in the criminal rule. When this assault occurs, and therefore the punishment and its type should be present before the legislator when criminalizing (Ahmed, 1972), and therefore the principle of legality of crimes and penalties is an obligation on the criminal legislator to specify precisely what The acts that are considered crimes in order to provide the maximum levels of protection for social interests, and the criminal penalty for doing them, so that those who are addressed by the objective criminal rule know the penalty that will affect them if they violate this rule, which will undoubtedly contribute with it to achieving general deterrence, which is one of the The main objectives of the penalty, because it includes a warning to the addressees of the criminal rule not to violate it and warn them of the consequences of committing an act prohibited by law, in order to achieve a fair and contemporary criminal policy, according to which the policy of criminalization and imposing and implementing penalties is determined, and where determining penalties is complementary to the criminalization that does not exist alone without punishment, which is called individualization Legal (Abdel-Fattah, 1967)

1.2 Criminalization of illegal clan claim


Addressing the provisions of the illegal clan claim crime requires us to divide this requirement into two branches. We dedicate the first section to explaining the concept of pain, A student of illegal tribalism, while the second section is devoted to examining the elements that must be available for the commission of this crime.

1.3 The concept of illegal clan claim

Due to the dominant clan or tribal nature in Iraqi society in particular and Arab societies in general, we find that the phenomenon of clan claims is one of the prevailing and even prevalent phenomena in society in a way that hardly any public employee or a public servant is spared, as the prevailing belief among the majority of the members of society is that it is a prank to solve some problems without the help of the clan or tribe and a reference to its customs and traditions, and the doctors segment did not escape from these clan demands, which prompted the Iraqi legislator to criminalize this behavior in an explicit text in the Doctors Protection Law, where it says “punishable by imprisonment, Anyone who claims a clan-based or illegal claim against a doctor for the results of his medical actions.” However, he did not define the term “tribal claim” and did not specify the forms of its occurrence, although it was referred to more than once in the body of the law. In fact, this crime was not one of the innovations of the policy of criminalization in the Iraqi Doctors Protection Law, as the Iraqi legislator had previously criminalized the act of clan claims against those who carried out an act in implementation of the law or an order issued to him by a higher authority, according to the dissolved Revolutionary Command Council Resolution No. 24 of the year 1997, which means that the provisions of this decision apply to doctors as they are public servants if the tribal claim was made for the results of their medical work in the institutions of the Ministry of Health, or if they were entrusted with a public service if the clan claim was made for the results of their medical work in their private clinics. We believe that the legislator in the Physicians Protection Law was not accurate by using the term (or illegal) because all crimes are illegal actions, and that mentioning this phrase in the inability of Article 5 is such as the achievement or increase that is not justified to mention. Is there a legal clan claim? Hence, we believe that the criminalization contained in the aforementioned Revolutionary Command Council resolution was more accurate in this regard. And if the law in question, and the decision of the Revolutionary Command Council before it, did not define the tribal claim, and this is desirable, because the definitions are important to jurisprudence and not legislation, so some have defined it as “objection to the behavior or behavior of a person or more from a particular clan or tribe towards Another person or more from another tribe or from the same tribe, and the case for a clan session is similar to a trial and may end with the payment of blood money.” Medically, in accordance with tribal customs that are not in accordance with the legal rules in force.

1.4 Elements of the crime of illegal clan claim

Through our extrapolation to the text of Article Five of the Law on the Protection of Physicians, we find that the establishment and realization of this crime requires the availability of general elements (Abdel-Fattah, 1985) for it, in addition to the necessity of the availability of some special elements. The criminal claim and the causal relationship between them and this applies to the crime of clan claim, as we find that its material pillar is the issuance of an act or statement from the offender that includes the claim for an illegal order. We find that clan claims have several manifestations, the most important of which are clan separation, evacuation and Atwa (Nisreen, 2015), which means that the material element of the crime can be achieved in any form if this claim is of the seriousness that inspires in the victim (the doctor) terror or fear of the perpetrator’s oppression or his clan, and whether the claim is verbal or deed, whether it is verbal or written, and whether it is in the form of symbols or drawings, because the legislator, as we mentioned, did not mention examples of forms of criminal behavior nor of the way to carry it out. Therefore, the absolute It is based on its release, and it is possible to achieve the material element in everything we mentioned or otherwise, as for the criminal result, which is meant by the change that occurs in the external world as a result of criminal behavior, and it achieves an aggression that obtains the interest that the legislator assessed its worth of protection (Ali, 2015). The legislator has focused most of his attention on her criminal behavior and that the mere serious claim of the clan



claim is sufficient to complete the crime, but if the criminal allegation or behavior does not meet the elements of a harmful criminal outcome, it does not exist, as is the case if the claim, for example, was only as a joke with the victim. That is, the legislator made the crime of clan claim a crime of conduct and not a crime of consequence, any of the crimes of danger that threaten the protected interest and not a crime of harm (Fakhri, 2007). As for the third element, which is represented by the causal relationship between behavior and the result, and it means the link that links the criminal behavior and the criminal consequence as the association of the cause with the effect (Ali, 2015), The necessity of the clan claim. This and that the crime is realized and completed requires the availability of the moral element also next to the material one, because the crime is a psychological entity based on the moral element that links the materiality of the crime with its psychological elements (Ali, 2015). Perception (discrimination), and the sinful will in intentional crimes takes the form of criminal intent, but in non-intentional crimes, it takes the form of error, and since the crime of clan claim is a premeditated crime, then it can only be achieved by the availability of the general criminal intent of the offender represented in the direction of the offender's intention to Carrying out an act of claim while being aware of the effect or effect it will give What he spreads of panic or fear in the victim's soul, even if his intention is not to implement the order he demanded, and this is clear from the explicit text of the criminalization contained in Article 5 of the Law on the Protection of Physicians, and in Revolution Command Council Resolution No. 24 of 1997. The legislator did not require criminal intent especially to investigate the crime.

The establishment of the crime in question requires the availability of special pillars (Fakhri, 2007) next to the two general pillars, the most prominent of which is the character of the victim. Governmental health institutions who are approved for the description of a public employee according to the administrative and criminal concepts, or who were doctors working in non-governmental health institutions, in accordance with the explicitness of Article 2 of the law, which specified the personal scope of the law. As for the character of the offender in this crime, if the legislator did not explicitly stipulate the necessity of having a specific character in him, unless we look closely at the text of the criminalization, we find that the legislator implicitly intended that the offender in this crime must be either the patient or the patient's family, and this is clear from The text of the fifth article that made this tribal claim about the results of the medical work of the doctor, as well as the first article, in its first paragraph of the same law, which stipulated "the protection of doctors ... from the results of their medical work." In addition, the reasons compelling the law also referred to this by the phrase "for the purpose of protecting Doctors... about the results of their work."

1.5 Criminalizing attacks on doctors

The concept of assault on doctors

Physicians are exposed to great risks and serious damages arising from the repeated and varied attacks they are exposed to in different forms and manifestations, some of which may compromise their right to life, their physical or psychological safety, or their freedoms. It suffices with what is stated in the general laws by using a broad, flexible and absolute term, which is assault, without specifying the forms or extent and scope of this assault and without knowing it. Some defined it (Hamdi, 1988) as "all the actions and behaviors that harm the victim's feelings by causing pain that did not exist before or increasing the pain he was suffering." We see that assaulting doctors is nothing but criminal behavior by committing an act that ends The life of the doctor or lead to compromising his physical or psychological integrity or compromising his freedom or any other psychological harm. The repetition of the text on this crime in the Physicians Protection Law came in contradiction to what was intended to strengthen the objective criminal protection of doctors from the phenomenon of repeated assault, because if the doctor works in a governmental health institution, he is a public employee, and if he works in a non-governmental health institution, he is Assigned to a public service, and in both cases, the general criminalization provisions related to assault crimes against employees and others entrusted with a public service that are included in the provisions of Articles (229-232) of the effective Iraqi Penal Code shall apply to him. As for the text of Article VI of the law in question, it narrowed The scope of the application when it stipulates that "those who assaults an employee during the performance of his job or because of it shall be punished," as if it removed the person charged with a public service from the scope of

protection granted to him by the general text, or that it equated the meaning between the two words, and this is unacceptable because the public employee has an understanding it differs from the concept of a person charged with a public service, so it would have been more appropriate for the legislator if he had at least referred the entirety of the special text to the general text without being satisfied with referring only the penalty, and in view of the current status of the text, we suggest that the explainer amend Article VI of the Law Protecting doctors in order to be (anyone who assaults a doctor... shall be punished for anyone who assaults an employee or a person charged with a public service while performing his job or because of it).

2. Elements of the crime of assaulting doctors

This crime, like the previous one, requires the availability of general and special elements (represented as the perpetrator and the victim of the crime), but we have avoided repetition and have already been addressed when talking about the special elements in the crime of illegal clan claim, we will suffice to address the two general elements in this crime, as far as the matter is concerned. In the material corner, as previously mentioned, it consists of three elements, the most important of which is criminal behavior, and given the referral of Article VI of the Law on the Protection of Physicians to the Penal Code, and by extrapolating the texts of Articles (229-231) of the Penal Code, we find that assault has several forms, including: Insult, assault or resistance and intentionally preventing one from performing the duty. As for the first picture (insult) (Ibrahim, 2006), it was included in Article (229) of the Iraqi Penal Code as stipulating that "...anyone who insults or threatens an employee or any person in charge shall be punished," By serving ... while performing their duties or because of that." Therefore, deleting the word (threat) from the legal article does not affect the text, but rather may expand the scope of its application, and criminal jurisprudence has defined insult with many definitions (Mustafa, 1963). Positive or negative, it apparently carries contempt for the doctor or disregard for his dignity or consideration, even if it does not reach the level of obvious insult or slander. As for the second picture, Article (230) of the Penal Code stipulates that: "Anyone who assaults an employee or any person charged with a public service shall be punished...and the penalty shall be ... if the assault and resistance occurred with an injury or harm." During the advanced text that the sloop As the criminal in this picture includes either: Assault and is carried out by any criminal behavior to which the doctor is subjected, does not fall within the scope of insult and does not rise to the level of wounding or beating, nor does it reach the point of preventing the doctor from performing his functional duties, but the doctor can continue to perform his work despite As long as the legislator did not specify the means of assault, it expands to include any assault on the doctor, as if the patient had twisted the doctor's hand, pushed him, spit in his face, tore his clothes, pulled him by his hair...etc. As for the other case, it is resistance, and this is done with a positive criminal behavior issued by the offender taking a defensive appearance as a reaction to what the doctor does when performing the duties of his job, as if the patient or accompanying him paid the doctor during treatment or when tooth extraction and others. There is an opinion in jurisprudence that the assault and resistance do not necessitate falling directly on the victim's body, but may focus on what he uses to carry out his work duties, as in the case of the patient tearing the prescription in front of the doctor or breaking one of the devices that the latter relies on in his work (Hamdi, 1988). Finally, the criminal behavior in crimes of attacking doctors may take the form of intentionally preventing the doctor from performing his duty, which is what Article 231 of the Penal Code referred to in its text: "Anyone who intentionally prevents an employee or any person charged with a public service from carrying out his duty shall be punished." The offender's activity is represented in any positive or negative behavior that would prevent the doctor from carrying out his duties because the legislator did not specify a specific means of prevention and did not expand the text of the criminalization to include the form of assault that unjustly coerces the doctor to perform work or postpone work unjustly (Sabah, 2004). Examples of this include assaulting the doctor and preventing him from treating the patient due to a personal enmity between him and the patient, or as if the offender refused a medical examination before the forensic doctor and was unable to take a sample of his hair, blood, or nails for analysis. In order to complete the material element in the crimes of assault on the doctor, the aforementioned forms of criminal behavior (insult, assault or resistance, prevention from performing the duty) must result in a criminal result harmful to the doctor, because this crime is one of the crimes of harm (Fakhri, 2007).

with the existence of a relationship Causality between criminal behavior and its consequences. As for the moral element, the crime of assaulting doctors is a premeditated crime, and therefore the criminal intent must be present, which varies according to the different forms of criminal behavior mentioned above. From the offender intentionally insulting expressions or references to the doctor, meaning that his will is directed to do that behavior, and the same is the case in the form of assault and resistance. The offender must know that his behavior would harm the doctor's body or health, and that his will is directed to achieving these actions in order to complete the two elements of criminal intent, either. In the case of preventing the performance of the duty, it requires, in addition to the general criminal intent, a special intent as well, and this is clear from the text of Article (231), which referred to it by the term (intentionally), meaning that the offender's intention is to cause a specific result by preventing the doctor from performing the duties of his job. Finally, it remains to point out that the legislator has stipulated that in order to criminalize assault on doctors, that the assault be on them during the performance of their job or because of it. It requires that the assault take place during the time or period of time during which the doctor exercises the duties of his job, that is, the officer is in that time period. As for the other condition (the assault occurred due to the performance of duty), its condition is causal and not spatial or temporal, meaning that it cannot be considered that the assault occurred against the doctor except in the presence of a causal relationship between the practice of his job and the crime of assault on him, the motive for the assault is due to the work The job of the doctor even if it is not during the performance of the duty or at his place of work, as if the family of the deceased patient assaulted the doctor because of the patient's death.

Conclusion

In the conclusion of our tagged research (criminalization policy in the Doctors Protection Law, an analytical study), we would like to review the most important results we have reached during the research, and make a set of recommendations that we hope the legislator will take into account in the future.

Results

- 1- The policy of criminalization followed by the Doctors Protection Law is based on the provision of the two crimes of illegal clan claims and the crime of assaulting doctors without providing for other aspects of criminal behavior to which doctors are exposed, but rather leaving them to the general provisions contained in the Iraqi Penal Code, and therefore the policy of criminalization is marred Legislative shortcomings because the legislature did not provide special guarantees for doctors when many crimes were committed against them.
- 2- The crime of illegal clan claim is not considered one of the innovations of the Doctors Protection Law, as the legislator had previously used this term in the dissolved Revolutionary Command Council Resolution No. 24 of 1997, and that the legislator in both cases did not define the clan claim and did not specify its forms, but the text came absolutely Which means the expansion of criminal behavior to include all manifestations or forms of tribal claims that are common in Iraqi society.
- 3- We concluded from the formula in Article (5) of the law, "Anyone who claims a clan claim ... shall be punished" that the legislator has made this crime a crime of conduct and not the result, meaning that its establishment does not require the achievement of a specific criminal result. It is an intentional crime committed with a general criminal intent only.
- 4- The legislator has singled out a special text for attacking doctors, which is the text of the main article of the law without bringing anything new in this area because it is a legal It refers to the texts of assault on employees contained in the Penal Code in Articles (229-232), which apply to doctors as they are employees or assigned to a public service, and therefore the legislation of Article VI did not bring any additional protection justifying the text.

Recommendations

- 1- We suggest to the legislator in the Doctors Protection Law to add a text that makes the crime committed against doctors in accordance with the general criminalization provisions an aggravating circumstance that requires toughening the penalty in accordance with Article (136) of the Iraqi Penal




Code, since the law only addresses the two crimes of clan claims and assault on doctors Which referred to the punishment prescribed in the Penal Code, while there are many forms of criminal behavior that doctors may be exposed to and do not fall under the fifth and sixth articles of the law.

- 2- Concerning the sixth article of the law, we suggest reformulating it as follows: “Anyone who assaults a doctor while practicing his profession or because of its performance shall be punished with the penalty prescribed for anyone who assaults an employee or a person charged with a public service during or because of his job” for the reasons that we have indicated in their place from search.
- 3- We suggest to the legislator in the Doctors Protection Law to cancel the term (unlawful) contained in Article Five, as well as in the reasons necessitating the law, for the reasons we referred to in their place in the research.

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