

Towards Criminalization of Witchcraft and Sorcery in Iraq's Criminal Legislation

By

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Abstract

This research deals with the issue of legal adaptation of witchcraft and sorcery in Iraq's criminal legislation in the light of the provisions of the Iraqi criminal justice represented by the judiciary of the Federal Court of Cassation. As the Iraqi criminal legislator did not criminalize these acts with an explicit punitive text, neither in the amended Iraqi Penal Code No. (111) of 1969 nor in any other special penal law. Thus, it becomes imperative for us to study and analyze the position of Iraq's criminal jurisdiction regarding acts of witchcraft and sorcery when these acts are the subject of criminal facts that are presented to it and it shall look into them. Although witchcraft and sorcery pose a threat to social interests with possible harm and sometimes inevitable harm to these interests, whether we adopt the standard of the objective (material) doctrine or we adopt the standard of the personal doctrine. If we adopt the standard of the objective doctrine, we will find that acts of witchcraft and sorcery themselves involve a danger that threatens many social interests worthy of criminal protection. But if we adopt the standard of personal doctrine, we will observe that witches and sorcerers (imposters) are people whose delinquent behavior poses a serious threat to social interests, which are worthy of criminal protection. Despite this, acts of witchcraft and sorcery are still outside the circle of criminalization and punishment. This leads to the lack of accountability for those who perform witchcraft and sorcery, which inevitably leads to the increase of these acts and their wide spread within society as a result of this. The fact that acts of witchcraft and sorcery remain in the circle of permissibility and the decriminalization of such acts has resulted in an increase in the number of those performing these acts. As well as the increasing number of people who resort to it. The Penal Code, within the scope of its positive rules, is governed by the principle of legality in criminal, the principle that there is no crime or punishment except by law (the principle of legality of crimes and penalties). Therefore, we had to follow the judicial rulings issued by the Iraqi criminal judiciary represented by the Federal Court of Cassation. This for to find out the judiciary of this court regarding the legal description it gives to the acts of witchcraft and sorcery when these acts are the subject of the criminal facts before the criminal jurisdiction. The aim behind this is to highlight the dangers of witchcraft and sorcery and the Iraqi criminal legislator's call to criminalize it. Taking into account the legal descriptions reached by the Iraqi criminal justice system and found them to be more applicable to these acts, which makes the criminal legislation more in line with the exigencies and requirements of reality.

Keywords: Witchcraft, Sorcery, Criminal Danger, Social Interests, Legal Descriptions, Fraud, Criminal Protection, Witches, Charlatans, Harm Crimes and Danger Crimes.

Research importance

This research deals with the legal adaptation of acts of witchcraft and sorcery in the light of the judiciary of the Federal Court of Cassation. Moreover, this topic is one of the

important topics and its importance comes as it relates to patterns of social behavior that have been enshrined in certain social customs and traditions which are still widely practiced, some of them openly and others hidden or silent about them.

The acts of witchcraft and sorcery are among the acts that human has practiced since ancient times, so we find that the old Iraqi laws, foremost of which is the Hammurabi law, have singled out special punitive texts for these acts. This is a sure indication of the ancient human's practice of such acts.

Through contemporary reality experiences, it is clear that these works are still practiced in various social environments. As they are practiced in the city (the urban environment) and are also practiced in the rural environment, although the proportion of practice varies between the city and the countryside.

In addition, witchcraft and sorcery are resorted to and accepted by members of Iraqi society of various social hierarchies (workers, government employees, students, self-employed or other craftsmen). We also find various members of society, such as politicians, athletes, and others often resorting to witches and charlatans.

Also, these acts are equal for men and women both in terms of the persons doing these actions as we may find that the witch or sorcerer may be a woman or man, as well as whoever resorts to witches or sorcerers may be a man or a woman.

Since these acts have a significant impact on social behavior, especially when the intention behind them is to harm a particular person, himself or her, or his money or her. Here it is meant that the witch or sorcerer may resort to physical means such as placing certain substances in eating and drinking or even in the air such as igniting smoke or fumigating the place where the person to be exposed to witchcraft and sorcery is located. In addition to that, the allegation of unseen matters and hidden power that the witch or sorcerer claims to seek help from often affects the psychology of those exposed to them. Furthermore, many people who resort to witches and sorcerers may be exposed to direct physical or psychological abuse.

Based on the foregoing, the importance of the research topic that deals with social behavior emerge which can be described as a social phenomenon that is sometimes declared and hidden or kept silent about it at other times.

Research problem

The research problem is that the criminal legislator did not mention any punitive text criminalizing acts of witchcraft and sorcery. Since the Penal Code is governed by the principle of legality of crimes and penalties, the criminal judiciary cannot criminalize and punish these acts. Although witchcraft and sorcery are among the acts that harm society and threaten many social interests. Sometimes these acts represent real harm to the victim whom on him these acts or against whom these occur, and at other times these acts constitute a threat to social interests. Therefore, how can the criminal judiciary adopt the current punitive texts in a way that prevents harm to the protected social interest, or endanger it (possible harm)? Here the problem of research arises because, despite the danger of witchcraft and sorcery, the criminal legislator did not criminalize these acts. On the other hand, how can the criminal judiciary reach a legal adaptation of these acts through the judicial interpretation of the current punitive texts, without using the analogy with this interpretation and without expanding the interpretation of punitive texts in contravention of the principle of penal legitimacy?

Research questions

The research questions were divided into four sections so that each section includes questions related to a specific paragraph in the research and the questions are as follows:

Do acts of witchcraft and sorcery involve entail a criminal danger to social interests?

Do the perpetrators (witches and sorcerers) represent a threat to the interests of society and its members?

Did the Iraqi criminal legislature criminalize acts of witchcraft and sorcery?

In the event that they are not incriminating themselves, do these acts constitute a danger that makes them worthy of incrimination?

What is the position of the Iraqi criminal justice system regarding witchcraft and sorcery?

What is the legal adaptation that had been established by the Federal Court of Cassation's jurisprudence on these acts?

What are the social groups targeted by witchcraft and sorcery acts?

How widespread are these acts of witchcraft and sorcery in Iraqi society?

Research methodology

The descriptive-analytical approach will be adopted as a method consistent with the nature of the research topic. Which deals with the legal adaptation of witchcraft and sorcery in the light of the judiciary of the Federal Court of Cassation, where the nature of the topic will be indicated. In addition to studying and analyzing the judicial rulings issued by the Federal Court of Cassation regarding witchcraft and sorcery in order to find out what it has concluded regarding the legal adaptation of these acts. As well as indicating the necessity of the criminal legislator's intervention in order to criminalize the acts of witchcraft and sorcery itself, and it is not according to the results of these acts.

Research plan

This research will be divided into two requirements. We devote the first requirement to the study of the legal adaptation of the acts of witchcraft and sorcery as fraudulent means. As for the second requirement, we will address the legal adaptation of the acts of witchcraft and sorcery in the light Judiciary of the Federal Court of Cassation.

The legal adaptation of acts of witchcraft and sorcery as fraudulent means

The absence of a legal text criminalizing acts of witchcraft and sorcery makes it difficult and even impossible to legally describe it as a stand-alone crime. However, this does not preclude the fact that these acts are predominantly fraudulent means of obtaining money by deceiving people, especially since most of the victims of these acts are simple people.

The phenomenon of witchcraft and sorcery has clearly spread until this phenomenon become it has sheiks who practice it and they know as art and sports stars know. Indeed, their media appearance sometimes exceeds the appearance of art owners and politicians. We are not exaggerating if we say that the sheiks who practice acts of witchcraft and sorcery

have now established centers in the heart of the capital, Baghdad, and they have pages on social media platforms. In addition to their media appearances on satellite channels that agree with them to market their goods, which can be described as illusion goods. As this led to an obscene richness for the sheiks of witchcraft and sorcery and those who deal in it. Therefore, in the absence of a legal text, the legal description that applies to these acts is that they represent fraudulent acts and the provisions of article (456) of the Iraqi Penal Code apply to them (Mahmoud Najib Hosni. Explanation of the Penal Code the Special Section according to the latest legislative amendments. Judges Club Edition, Arab Al-Nahda House, Cairo, 2018, p. 1128. Also, see Ahmed Fathi Sorour. Mediator in the Penal Code Special Section Crimes of Assault on Persons and Funds. Judges Club Edition, Arab Al-Nahda House, Cairo, 2016, p. 617. Also, see Mamoun Muhammad Salama. Penal Code Special Section Part 2 Crimes of Assault on Persons and Funds. Salama for Publishing and Distribution, 2018, p. 229.), given that witchcraft and sorcery represent a form of fraud. A witch or sorcerer uses a lie, and this lie follows as a result that the person who deals with the witch or sorcerer will have fictitious doctrine, and this doctrine means being convinced of the truth of the lie, or making a mistake. In other words, the victim began to believe in the truth of the witch or sorcerer and then his belief in the truth of what he said to him (Article (456/1) of the Iraqi Penal Code No. (111) of 1969 stipulates that: ("Anyone who arrives at receiving or transferring possession of a movable property owned by another to himself or to another person by one of the following means: A- By using fraudulent methods, shall be punished by imprisonment").

Since the acts of magic and sorcery are not intended for themselves, but rather are a means to get the victim to deliver the money to the person in charge of witchcraft and sorcery. In the light of the foregoing, the perpetrator of acts of witchcraft and sorcery in order to deceive the victim and induce him to hand over money to him is guilty of fraud.

It should be noted that criminal jurisprudence is divided into two directions regarding determining the criterion of the gravity of fraud and scam. Where the proponents of the objective doctrine believe that it is necessary for fraud to be of a degree of mastery and slander to the extent that affects the persuasion of a person of average intelligence and acumen in order to achieve the crime of fraud. While proponents of personal doctrine see that what is important in the matter is that the act of fraud affects the victim in particular, regardless of whether this would deceive other persons who are more intelligent and acumen than the victim.

We believe that the criterion related to personal doctrine is what must be adopted and that acts of witchcraft and sorcery are adapted according to this criterion. The justification of our point of view is that this criterion achieves criminal protection for social interests, which exceeds that which is achieved if the criterion related to the objective doctrine is adopted. This is because the criterion related to the personal doctrine makes criminal protection extended to include all those who deserve it and most of them are naive and simple.

We also confirm the inaccuracy of the statement that the law does not protect the idiots, and the reality is exactly the opposite, as the simple and gullible are the people who are most deserving of legal protection and need it.

The legal adaptation of the acts of witchcraft and sorcery in the light Judiciary of the Federal Court of Cassation

It appears by extrapolating the rulings of the Federal Court of Cassation, the judiciary of this court settled on adapting the acts of witchcraft and sorcery according to the criminal consequences that these acts lead to or end with.

The Federal Court of Cassation ruled that the accused practiced legal ruqyah legitimacy treatment and his tingling the victim with a sharp injuring instrument while practicing the legal ruqyah treatment. Thus, this act is considered a component of the crime of beating that leads to death and applies to this the provisions of article 410 of the Penal Code.

This case, which was presented to the expanded body of the Federal Court of Cassation after the Criminal Court insisted on its decision, is summarized as follows:

On March 25, 2013, the Karkh Criminal Court decided to convict the accused in accordance with article (411/2) of the Penal Code for the crime of killing the victim by stabbing her with a metal wire in her cheeks and knees for the purpose of treating her with the legal ruqyah, which led to her death. Consequently, it sentenced him to simple imprisonment for one year, and when the file was received at the Federal Court of Cassation on 20/05/2013 and numbered (7978/Second Penal Commission/2013). The Second Criminal Commission of the Federal Court of Cassation issued its decision to rescind all judgments issued in the case and return the papers to its court to try the accused in the crime of beating that leads to death in accordance with article (410) of the amended Penal Code No. (111) of 1969.

However, the court of that case (Al-Karkh Criminal Court) decided to insist on its previous decision and considered that the act of the accused constitutes a crime of manslaughter in accordance with the provisions of article (411/2) of the Penal Code. When the file was received at the Federal Court of Cassation, the case was presented to the expanded body, which issued its decision to rescind all decisions issued by the Criminal Court. It was considered that the act of the accused was intentional because the accused committed a deliberate act that led to the death of the victim as he deliberately pricked the victim with a wounding instrument under the pretext of treating her with the legal ruqyah. As that this act applies to it the provisions of Article (410) of the Penal Code, as it constitutes a crime of beating that leads to death, and not a crime of wrongful killing (Federal Court of Cassation Decision, Resolution No. (282/Extended Penal Commission/2013) dated 27/10/2013. Quoted from Salman Obaid Abdullah Al-Zubaidi, Chosen from Decisions of the Federal Court of Cassation, Criminal Section, Part of Eight, Law and Judicial Library, Baghdad, 2015, pp. 99-100.)

In another decision of the Federal Court of Cassation, this court decided to ratify the decision of the Criminal Court, which convicted the accused of the crime of threat in accordance with the provisions of Article (430/1) of the Penal Code. The decision stated that the defendant's confession of performing witchcraft and sorcery, subpoenaing the jinn, and bringing love and sustenance for the purpose of entrapment of women and having sex with them after filming them using imaging devices as the camera of the mobile. This is what he did with the complainant the one he had sex with her, photographed her naked, and threatened to publish her pictures on social media, Facebook. Also, he admitted this during the investigation and the trial and that the evidence against him is sufficient to convict him according to the provisions of article (430/1) of the Iraqi Penal Code No. (111) of 1969 (Federal Court of Cassation Decision, Resolution No. (16081/Criminal Commission/2018) on 30/1/2019, citing Judge Hamza Jihad Alwan Al-Ziyadi, one hundred and fifty-two decisions and principles from the Federal Court of Cassation Judiciary - Criminal Section - Part One, Al-Sabah Library, Baghdad, 2020, p. 189).

From the foregoing, it clearly appears that the absence of a legal text criminalizing witchcraft and sorcery made the Federal Court of Cassation go to give a legal description of

these acts according to the criminal consequences actually achieved or resulting therefrom and The perpetrator's will goes to it.

Conclusion

Through this research, we reached a number of results and recommendations are mentioned as follows:

Results

1. The Iraqi criminal legislator did not criminalize acts of witchcraft and sorcery, neither in the Penal Code nor in other special penal laws.
2. The Iraqi criminal judiciary is represented by the Federal Court of Cassation and given the absence of a legal text criminalizing witchcraft and sorcery, so settled in its judgment on the adaptation of witchcraft and sorcery sometimes according to the criminal consequences that it entails and at other times according to the possible consequences thereof. This means that the Iraqi criminal justice, and its commitment to the principle of legality of crimes and punishments did not give a legal adaptation for acts of witchcraft and sorcery as constituting a crime in and of itself, but as the means used by the offender to commit the crime, the latter differs in kind and differs in nature according to the intent of the offender.
3. Through research, it appeared that if the acts of witchcraft and sorcery lead to certain criminal results, then the Iraqi criminal judiciary represented by the Federal Court of Cassation settled on giving a criminal description to it that is consistent with the criminal results that have been achieved. But if the acts of witchcraft and sorcery did not result in criminal consequences other than the obtaining of money by the witch or sorcerer (who performs witchcraft and sorcery), then these acts apply to them the description contained in the article (456) of the Iraqi Penal Code No. (111) for the year 1969 amended as the crime of fraud.
4. Acts of witchcraft and sorcery in themselves entail a criminal danger to social interests, especially since most of the people who fall victim to these acts are simple, naive, and poor people. Where witches and sorcerers seize their money through these actions. Therefore the target group for witchcraft and sorcery has priority over for receiving criminal protection, due to the simplicity of their thinking and the ease of deceiving them.

Recommendations

The most important recommendations that we believe should be adopted by the criminal legislator can be summarized as follows:

1. We call on the Iraqi criminal legislature to explicitly criminalize acts of witchcraft and sorcery by adding a legal text criminalizing and punishing these acts to the Iraqi Penal Code. In addition, the criminalization of these acts should be per se, regardless of the other criminal consequences that result from them.
2. We believe that the criminalization of witchcraft and sorcery per se should not prevent the perpetrator (the witch and sorcerer) from being punished for any more serious criminal consequences resulting from the witchcraft and sorcery. Furthermore, the established rules regarding the plurality of crimes are applied to the offender, whether the plurality is real or fictitious.

3. We believe it is necessary to the criminalization of witchcraft and sorcery should include both the witch and the sorcerer, as well as the persons who seek their help or resort to them as accomplices in the crime.
4. We recommend that the Iraqi criminal judiciary and the Iraqi criminal legislator should criminalize acts of witchcraft and sorcery and hold the offender (witch and sorcerer) accountable for the crime of fraud in accordance with article (456) of the Iraqi Penal Code. As well as holding the offender accountable for any other criminal consequences of acts of witchcraft and sorcery in accordance with the rules established in the multiplicity of crimes.

References

1. The text of Article 1/456 of the Iraqi Penal Code No. (111) in 1996 stipulates that “Any person who arrives at receiving or transferring possession of a movable property owned by another to himself or to another person, by one of the following means, shall be punished by imprisonment:
 - a) Using fraudulent methods
 - b) By taking a false name or an incorrect capacity, or reporting a false order about a specific fact, when that would deceive the victim and induce him to surrender.
2. Dr. Ahmed Fathi Sorour(2016), Al-Waseet in the Penal Code - Special Section - Crimes of Assault on Persons and Money, Dar Al-Nahda Al-Arabiya, 2nd Edition, 617-618
3. Dr. Mamoun Hamad Salameh(2018), Penal Code, Special Section, Part Two, Salama for Publishing and Distribution 255-257.
4. Dr. Mahmoud Najib Hussein, Explanation of the Penal Code, Special Section, according to the latest legislative amendments, Dar Al-Nahda Al-Arabiya, Cairo,1127-1128.
5. Federal Court of Cassation Decision, No. 1301/ Public Authority /2013 on 15/ 9/2013
6. The decision of the Federal Court of Cassation,18084/ Criminal Authority/2018, according to Judge Hamza Jihad Al-Sharawi, one hundred and fifty-two single decisions from the Federal Court of Cassation, Criminal Division, Part One, Al-Sabah Library, Baghdad, 2020, p189-190