

BALANCE AND IMBALANCE IN THE CONTEXT OF PENAL TEXTS

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Abstract

A flexible and balanced criminal policy against organized crime is the product of modern civilization, which uses all the technologies created by these civilizations that are difficult to track and stop. Therefore, it is necessary to review all laws of criminal law nature and compare them with all international conventions on human rights ratified or acceded by Iraq to fulfill its international obligations, so as to ensure that the legal guarantee for protecting individual rights is as important as protecting public interests, because the legal system particularly ignores the concept of balance, because laws aim to protect the interests of society. This study raises a basic question, that is, how to balance general rights and individual rights and freedoms in the text of criminal law. We have raised some research questions to answer these questions, the most prominent of which are: Does balance serve the legal security of society? Is this a difficult legislative and judicial process? How can Iraqi legislators abide by international instruments by balancing public rights and private rights? What are the legislative and judicial mechanisms for balancing events? Whether this balance is limited to criminal objective rules, or whether it is assumed that balance is as important as procedural rules? In order to eliminate the role of the balance process. These questions have been answered by descriptive methods and comparative analysis, and we have studied some conclusions and suggestions as follows:

INTRODUCTION

The balance and balanced application of criminal procedure have various interests in protection and influence, and we are faced with two possibilities: first, the conflict of interests is inevitable; Second, it is difficult to maintain the balance by combining two conflicting interests, because it may lead to negative results that affect the substantive function of criminal proceedings and hinder the realization of specific interests. If the public interest is achieved in taking criminal measures to fulfill the society's right to punishment, however, this may necessitate exposure to the interests of individuals in their personal rights and freedoms, and therefore the balance in the Code of Criminal Procedure is relatively and between similar interests, and in general it can be said that applications Few and exceptional balance. Moreover, criminal proceedings are only one of the means to balance public interests and private interests, because these proceedings are based on the procedural legality of their actions and a means to realize criminal justice based on the balance between rights and freedoms and national interests. The research question is to answer two important questions: First, is balance limited to criminal objective rules, or is it assumed that balance is as important as procedural rules? Secondly, whether the elimination of Iraq has played a role in maintaining the balance between public rights and private rights (freedom and individual rights).

The purpose of this study is to promote Iraq's gradual adoption of a piecemeal and balanced policy, and to encourage legislators to formulate this policy, especially to ensure that it achieves the goals of punishment, deterrence, rehabilitation and justice.

We also divide this research into three requirements. The first part introduces the application of balanced interests in criminal proceedings, the second part involves the application of balanced assets law in criminal proceedings, the third part introduces the judicial control of balance within the framework of criminal texts, and finally studies some conclusions and suggestions as follows:

THE FIRST REQUIREMENT

The Application of Interest Balance in Criminal Proceedings

Most constitutions, human rights declarations and principles emphasize the principle of balance and give it lofty legal value. Many countries modernize their criminal laws by following the new trend of criminal code construction consistent with these developments, so as to adapt to the development of social and scientific life. At the same time, we find that the principle of illegal legality embodied in the criminal code has been obliterated in other countries because it expresses the atmosphere of the government system and serves its policies and directions. We can see that legislators make any act that goes against the direction of the government as a criminal offence, even though it has no seriousness, stipulates severe punishment, and strengthens the sanctions for a large number of crimes, so that it is completely away from the spirit of criminal justice and the legislative confusion before 2003. However, after this date, the contradictory legislation is eternal, and the other is a bit formal. Their wording is weak, frail and vague, which does not reflect the needs of society and does not meet the urgent needs, without specific restrictions, we will declare these applications in the following two subsections:

FIRST SEGMENT

Balance Some Lawsuits by Moving

The general rule is to set up criminal proceedings ⁽¹⁾, which is for the benefit of the whole people. This interest requires criminal proceedings to move any crime from the moment it happens, because its motion means that society has the right to be punished, members of society have a sense of national existence, and its competent authorities are willing to prosecute criminals and have the ability to fulfill their responsibilities of protecting security, cracking down on crime and upholding justice ⁽²⁾. The exception to this article is the basic clause of article (3), which suspends the criminal proceedings against the complainant or his representative, which is an exception of special interests: when comparing the criminal proceedings with general or private complaints,

⁽¹⁾ See Article (1/a) of the Iraqi Code of Criminal Procedure No. 23 of 1971.

⁽²⁾ Mahmoud Naguib Hosni, Explanation of the Criminal Procedure Code, Dar Al-Nahda Al-Arabia, 2nd edition, Cairo, Egypt, no year of publication, p. 65.

There are few cases conducted through private complaints, which are not equal to or close to those conducted through general complaints, which means that legislators can reach a settlement through a balance of interests ⁽¹⁾.

In Article 47/2 of Iraq's Criminal Procedure Assets Law, Iraqi legislators also gave informers the right to request anonymity and not be regarded as witnesses in criminal proceedings in certain crimes. Informants should disclose their identities and be regarded as witnesses in proceedings so that defendants can discuss this matter when defending themselves. However, in order to make informers safe and secure and avoid reporting crimes, legislators have given such a guarantee between part of their interests and public interests ⁽²⁾. But at the same time, the balance between the rights of the defendant and the rights of society is lost in another part, that is, the defendant loses the opportunity to face the witness, argue with the witness and recognize his identity, because there may be opposition or previous hostility between them ⁽³⁾.

These cases also involve some preliminary investigation procedures, that is, very serious pre-trial procedures in the preliminary investigation stage, which is the most important stage of criminal proceedings and poses the most serious threat to individual rights and freedoms, because these procedures infringe on personal freedom and home during arrest, detention and search, and take longer than investigation and evidence collection ⁽⁴⁾.

⁽¹⁾ Dr. Ammar Abbas Al-Husseini, Principles of Criminology and Punishment, Islamic University - Al-Najaf Al-Ashraf - Studies and Research Unit Publications, 1st edition, 2011, p. 33.

⁽²⁾ In view of the fact that the reporting of the crime may raise disputes between the informant and the perpetrator and his family, and he may be subjected to retaliation and assault by them, as well as the reporting may cause suffering to the informant because of his repeated summons and appearance before the investigator, the investigating judge and the police station, and the limit may reach his accusation in some cases By committing the crime that he reported about, which constitutes a negative act that develops the negative role of the citizen because he believes that reporting about the crime is not in his interest, which leads him to hesitate and refrain from reporting the crimes. Consider this: Article (47/1,2) of the Iraqi Code of Criminal Procedure No. 23 of 1971.

⁽³⁾ d. Georgi Shafiq Sari, Balance Control within the Scope of Constitutional Law, Dar Al-Nahda Al-Arabiya, 1st edition, Cairo, Egypt 2000, p. 78 and beyond.

⁽⁴⁾Dr. Ammar Abbas Al-Husseini, previous reference, pg. 212.

However, within the framework of public interest in exposing crimes and seeking truth, they are necessary and legitimate, and legislators have provided them with a series of guarantees to balance between public interest and individual interests in protecting their rights and freedoms ⁽¹⁾. In the preliminary investigation procedure, the application of the balance of interests is to entrust (prosecute) the investigation or trial of certain crimes according to Articles 87 to 91 of the Criminal Procedure Law, because this procedure avoids the arrest of the defendant, so as to

find out that the defendant does not restrict his freedom, preserve his personality and prepare himself before appearing in court. The public interest will not affect his freedom of arrest when he is present and the judicial proceedings are going on normally. Moreover, in this case, the provisions of Article 96 of the same bill on the arrest of the defendant are also applicable. When the judge allows him not to arrest him, if he voluntarily appears before the judge, he should issue an attendance sheet or an arrest warrant to him, asking him to promise to release Cavell, or to appear in court at the time he requests without him ⁽²⁾. With regard to arrest and detention, according to Article 110/a of the Basic Law, if accused of a crime punishable by imprisonment for three years or less or a fine, the judge shall release the detainee with or without bail, and shall conduct a review according to certain conditions with a view to releasing the detainee ⁽³⁾.

⁽¹⁾ Dr. Rifai Sayed Saad, *Interpretation of Penal Texts (a comparative study)*, Dar Al-Nahda Al-Arabiya, 2nd edition, Cairo, Egypt 2008, p. 33 and beyond.

⁽²⁾ See the text of Article (96) of the Iraqi Code of Criminal Procedure No. 23 of 1971.

⁽³⁾ If the goal of the legislator in the procedures for arresting the accused is to ensure the presence of the accused before the judicial authorities at specific times, then this goal can be achieved by means of an undertaking provided by the accused with or without bail, according to the judge's discretion, and in specific crimes, not all of them, and at the same time the interest of the accused is achieved because he remains Free and free during that period, it is possible to avoid placing an innocent person in detention if his innocence is proven after investigation or trial. Article (110/a) of the Code of Criminal Procedure No. 23 of 1971 stipulates that (a- If the arrested person is accused of a punishable crime Imprisonment for a period of three years or less, or a fine, and the judge shall release him under a bond with or without bail, unless he deems that his release harms the progress of the investigation or leads to his escape.

Just like not arresting the defendant, a balance has been achieved among stakeholders, because Article 110/b of the Basic Law stipulates that legislators are obliged not to arrest people accused of crimes, and the object of balance is that the public interest of arresting the defendant lies in the judicial authorities' investigation, and in these illegal acts, it is not necessary to arrest the defendant ⁽¹⁾. The defendant's attendance at the trial also balances the public interest and private interest. As far as the public interest is concerned, the defendant's attendance is a factor to realize the normal and proper legal trial procedure. The defendant's attendance is to give the defendant an opportunity to deny the prosecution's evidence, and the court will discuss the witnesses and ask them questions to expose the truth, so that the court can appreciate the defendant's personality and correctly exercise its discretion, so that the defendant can put forward mitigating circumstances and request to use them when the defendant is convicted ⁽²⁾.

SECOND SECTION

The Balance between Interests in Simplifying Criminal Procedures and Individualizing the Execution of the Penalty

This balance is represented in the authority of the investigating judge to immediately adjudicate the crimes of violations for which he did not submit a request for compensation, or to return the money without making a decision to refer them to the junah court. ⁽³⁾ And the witness's

statements are sufficient when there is a compelling excuse ⁽⁴⁾.

The administrative difference between punishment and the balance of punitive treatment is that under the circumstances that public interests and private interests can be balanced, for example, under the circumstances of Articles 331-337 of the Basic Law and Article 84/II of the Juvenile Welfare Law, police release is a method of punitive treatment, not to terminate, stop or cancel punishment, but to modify its implementation mode, so only under the circumstances that police release is not cancelled.

⁽¹⁾ See the text of Article (110/b), which stipulates that (if the arrested person is accused of a violation, he may not be arrested unless he has a specific place of residence).

⁽²⁾ See Articles (145, 146, 148, and 168) of the Iraqi Code of Criminal Procedure No. 23 of 1971 and Article (270/2) of the Egyptian Code of Criminal Procedure.

⁽³⁾ See Article (134 / e) of the Iraqi Code of Criminal Procedure No. 23 of 1971. ⁽⁴⁾ Dr. Raouf Ebeid, On Management and Choice, Between General Philosophy and Philosophy of Law, The General Authority for Books and Scientific and Technical Devices, Ain Shams University Press, 1st edition, Egypt, 1971, p. 22.

Only those who are covered by the police release clause will be sentenced to penalties harmful to freedom ⁽¹⁾ if the interests require that the sentenced person must serve a sentence in a correctional institution for a period of time to achieve the purpose of punishment reform and rehabilitation, but the defendant who has served his sentence and met the prescribed conditions has achieved the purpose of social reform and rehabilitation ⁽²⁾.

According to article 300 of the Iraqi Criminal Procedure Law, this article stipulates: "The defendant dies or is found guilty or innocent, and the judgment or resolution will not be responsible for the alleged crime, or the crime will be finally released or publicly pardoned", "limitation of action", "derogation from article 9 (c) of the original, and amendments to articles 194 to 198 of the Criminal Procedure Law. We find that through the balance of interests, the legislator hopes to reconcile the situations in which the established criminal proceedings are in the majority of public interests, such as the judgment that he is convicted or innocent, the judgment that he is irresponsible for the alleged crime, or the judgment that he is finally released, and the scheduled exceptions to private interests, such as atonement, revocation, abandonment and special pardon.

As mentioned above, during the trial, the balance of the interests of the parties is achieved in the presence of the defendant, but if the defendant issues an order that violates the trial system, the law allows the court to shut the defendant out during the trial. However, the Egyptian Law of Procedure allows the court to exclude the defendant from the court until the defendant abuses his right to defense, because it has been proved that the defendant's appearance in court hinders the acquisition of the truth, because his appearance in court may have a negative impact on the normal conduct of the trial, because such appearance will make the same witness afraid and prevent him from saying what he wants to say.

⁽¹⁾ See Articles (331-337) of the Iraqi Code of Criminal Procedure No. 23 of 1971.

⁽²⁾ The legislator requires that the convict have served three-quarters of the custodial sentence

if he is an adult and two-thirds if he is a juvenile, provided that it is not less than For six months, but if the penalties are multiple, the period shall be calculated on the basis of their totality, regardless of the amount reached, even if it exceeds the maximum limit, since it has not been enforced by law. Consider this: Article (331/a) Fundamentalism. (3) See Articles (150-155) of the amended Iraqi Penal Code No. 111 of 1969. (4) The Iraqi law did not take into account the statute of limitations as a general principle, but it was adopted in special cases in some of the crimes mentioned in Article Three of the Iraqi Code of Criminal Procedure No. 23 of 1971, and in some special laws such as the Journalism Work Law in Kurdistan No. (35) Of 2007, And in Juvenile Welfare Law No. 76 of 1983.

In addition, in order to keep their interests in line with the interests of society, it is not allowed to expel defenders (lawyers) from court, because dismissal is a preventive measure, which does not include non-infringement acts, and the defendant must be informed of what happened in his absence and sent back to court when the reasons for dismissal terminate (1), which is similar to the position of Iraqi legislators, because when the witness is sworn in, he assumes that he believes his testimony and he has nothing to hide from the truth.

Although public trial is also an important guarantee for the defendant, it may adversely affect the interests of some parties in criminal proceedings or the interests of security and moral maintenance. Lawmakers allow the whole or some trials to be kept secret, just as if the subject of litigation is committing a crime that seriously violates morality and public morality. In order to reconcile public interests and private interests, the law of the court allows the trials to be kept secret, and the trials should be restored to a normal public state after the defense of confidentiality is over (2).

Criminal judgment is also the most dangerous criminal procedure, because it infringes on the defendant's personal rights and freedoms, especially when the judgment is convicted, because it shifts the defendant's focus from accused to defendant and infringes on his freedom or money, or both; At the same time, appealing against the judgment is also a dangerous action, because it has a negative impact on the stability and substance of the judgment, but legislators decided to adopt these methods in order to reach a settlement between the parties, that is, to stabilize the public interest of the judgment and the public interest of making a lighter judgment, as well as the interests of the defendant in retrial in court (3).

The Second Requirement Application of Balanced Partial Trial in Asset Law

It shows us that for the benefit of society (public interest), criminal action must be taken to investigate criminal acts and get the truth. These procedures violate the rights and freedoms of individuals (special interests). In order to reconcile stakeholders, legislators must formulate a series of safeguards for special interests to reduce criminal proceedings against them, but sometimes the problem will not end there.

(1) See Article (158) of the Iraqi Code of Criminal Procedure No. 23 of 1971, and Article (270/2) of the Egyptian Code of Criminal Procedure.

(2) See Article (19) of the Constitution of the Republic of Iraq for the year 2005. And Article (152) of the Iraqi Code of Criminal Procedure No. 23 of 1971.

(³) Dr. Ammar Abbas Al-Husseini, previous reference, p. 726.

Under special circumstances, the interests of society may require the cancellation of these guarantees, so that the relationship between conflicting stakeholders will not end, but will become an unbalanced relationship, which is one of the results of the balance of interests, and we will explain this in detail below.

FIRST SEGMENT

Empower Police Officers (Members of the Judiciary) With Investigation Authority or Investigator Authority

If the reason is that the investigation sometimes falls within the authority of the investigating judge or investigator, it is the guarantee that the legislator places for the benefit of the defendant, because the investigation at this stage needs conscience, legal investigation, high experience and special qualifications, which the judicial control personnel and the police do not have. Since criminal procedure is essentially an exception to the plaintiff, how to introduce the exception? In Article 50/A and B, criminal procedure improves this guarantee when necessary, so that when the investigating judge or investigator gives an order, or if the investigator thinks that referring the investigator to the judge or investigator will delay the proceedings, the investigation conducted by police officers will have the same legal effect and value as that of the investigating judge or investigator (¹).

SECOND SEGMENT

Grants the Judicial Officer the Authority to Carry Out Investigation and Investigation Procedures as an Exception

According to Article 52/a of the Basic Law, the investigating judge ordered a member of the jurisdiction to expose or testify against a person in a hospital outside the jurisdiction of the investigating judge, or questioned the defendant, regardless of whether this statement was true or not, which deprived the defendant of important protection.

(¹) Dr. Mahmoud Naguib Hosni, previous reference, p. 817.

Also, according to Article (43) of fundamentalism and based on many justifications, the law established powers for the member of the judicial police in the witnessed crime, and required him, upon being informed of its occurrence or communicating his knowledge of it, to inform the investigating judge and the public prosecutor of its occurrence and to move immediately to the scene of the accident, He records the victim's statement, questions the accused about the charge ascribed to him orally, seizes weapons and everything that appears to have been used in the commission of the crime, examines and preserves their material traces, proves the condition of persons and places, and all that is recorded in the discovery of the crime, and hears the statements of those who were present or from whom it is possible to obtain information. Clarifications regarding the incident and its perpetrator, and a report is drawn up (¹).

The researchers believe that all these powers are granted to members of the jurisdiction at the

expense of the protection of individual rights and freedoms, and there is a procedural necessity in formulating the text. However, today, with the development of and communication means, more and more law school graduates are qualified to be investigators, and they are assigned to police stations and other necessary places, and in this case, they are awarded to the investigation authorities. In contrast, the disciplinary action against officials who violate public duties does not constitute the seriousness of criminal investigation procedures; Officials who violate the rules must form an investigation Committee, which consists of a chairman and two experienced members, one of whom must hold a preliminary university law degree. Accordingly, if these justifications justify a reconsideration of Article (52 / a).

⁽¹⁾ See Article (52/c) of the Code of Criminal Procedure No. 23 of 1971, which obligates the investigating judge to move to the scene of the accident if he is informed of a witnessed crime whenever possible to take the procedures stipulated in Paragraph (b) and inform the Public Prosecution of that. These procedures are examining the location of the crime to take the procedures stipulated in Article (43) of the Code of Criminal Procedure, describing the material effects of the crime and indicating the apparent cause of death, if any, and organizing a profile of the place, in addition to the fundamental powers of the investigative judge represented by interrogation, arrest, arrest, search, and the like, but the judicial officer may not take the witness to the oath unless it is feared that it will not be possible to hear the testimony later, such as if the witness is on the verge of death or about to travel to a destination where it is not possible to summon him. For more on that, see: D. Majeed Khader Ahmed Al-Sabawi, Necessities in the Procedural Code of Procedure (compared to the Egyptian Code of Criminal Procedure), a research published in the Scientific Journal of Nawroz University communication, Dohuk, Iraqi Kurdistan, Issue (5) December, 2015, pp. 87-88.

⁽²⁾ See Article (10) of the Law on Disciplining State and Public Sector Employees No. 14 of 1991, published in the Iraqi Gazette, Issue: 3356 on 6/3/1991.

The Third Requirement

Balance of Judicial Supervision within the Framework of Criminal Law

Achieving a balance between the public and private interest requires, on the other hand, to maintain that by procedures that do not threaten this balance between interests in a manner that secures its continuity in accordance with legal and penal procedures that require protection of the interest that is subject to a breach of it, through judicial authorities monitoring and supervising the progress of judicial procedures, in order to maintain And follow-up and control over the safety of these procedures from arbitrariness in taking them against individuals and preventing the occurrence of a conflict between the interests approved by the legislator, and then to procedural penalties that ensure that the interests that are defined by the legal rule in the Code of Criminal Procedure are not prejudiced, and we will discuss this as follows:

FIRST SEGMENT

Automatic Judicial Review

In this way, the judicial organs supervise themselves without the defendant's intervention, such as gender-based discrimination as stipulated in Article 254 (a) of the Iraqi Criminal Procedure Law.

This is done to distinguish between death sentences and life imprisonment, even if there is no appeal against these sentences, and the discrimination court has the right to request any criminal litigation documents to intervene to review its judgments and decisions according to the provisions of article 264 of the law and the progress of the Iraqi courts in applying this principle according to the authority given by the law ⁽¹⁾. As for the Egyptian legislator's position on automatic judicial review, we find that he has taken this position when examining the legality of arrest. As far as its duration is concerned, in several cases: if the investigation is not over after the detention period of the criminal judge expires, the investigation documents will be submitted to the criminal court, and it is ordered that each document shall not exceed 45 days within the detention period (continuous detention period), if the interests of the investigation require it ⁽²⁾. An order to extend the arrest procedure after six months shall be submitted to the competent court for consideration for an extension of not more than forty-five days, and may be extended for a period of time or other similar periods ⁽³⁾.

⁽¹⁾ Decision of the Rusafa Federal Court of Appeal in its cassation capacity, (64/C/2008) on 25/08/2008, the website of the Supreme Judicial Council, <https://www.hjc.iq>. Date of visit: 4/1/2023: 5:00 p.m.

⁽²⁾ See Article (143/1 and 3) of the Egyptian Procedure Code.

⁽³⁾ See Article (202) of the Egyptian Code of Criminal Procedure.

SECOND SECTION

Judicial review based on appeal

The court exercises such supervision over actions that infringe on personal freedom on the basis of appeal on the illegality of these procedures, which is discriminatory ⁽¹⁾. Egypt's constitutional legislature ensures judicial supervision to protect personal freedom and prevent the authorities from arbitrarily taking actions to restrict personal freedom without judicial permission ⁽²⁾. Article 71 stipulates that everyone who is arrested or detained should be informed of the reasons for his arrest or detention, have the right to contact anyone and be informed of the charges against him, and he or she should be tried in the proceedings restricting his or her personal freedom. From this text, it shows us that the constitutional legislation guarantees the right to try the proceedings restricting his or her freedom, whether it is arrest or detention, and this right is not limited to the arrested or detained person, but applies to others ⁽³⁾. As for the Iraqi Constitution, there is no text about this guarantee, so the legislative defects of the Constitution on this issue must be filled, although some people think that the Constitution leaves this matter to the criminal assets law. Article 265 challenges the Iraqi Criminal Procedure Law, which stipulates: "They have the right to appeal to the criminal court within 30 days after the judgment and ruling of the criminal court and the ruling of the investigating judge ⁽⁴⁾. Article (4) of the Law authorizes the defendant to "appeal to the discrimination court against the criminal court and the decisions of the criminal court if they violate the law" ⁽⁵⁾, and points

out that Iraqi legislators, as discriminatory individuals, are allowed to lodge discriminatory appeals to the criminal court to investigate some important decisions and search decisions made by the authorities in accordance with Article 86 of the Basic Law relating to the personal freedom of the defendant.

(¹)Dr. Ammar Abbas Al-Husseini, previous source, p. 13.

(²)Dr. Majeed Khader Ahmed Al Sabawi, previous reference, pg. 98.

(³)Dr. Ahmed Fathi Sorour, Constitutional Guarantees for Personal Freedom in Criminal Litigation, research published in the Journal of Modern Egypt, p. 348, p. 63, April, 1972, p. 272.

(⁴)See Iraqi Central Criminal Court Decision No. 792/Penal Authority/2005 on 7/8/2005, (unpublished).

(⁵)See Wasit Criminal Court Decision No. 757/C/2005 on 9/6/2005 (unpublished).

Therefore, the Federal Court of Appeal held that the differential treatment was discriminatory. "In the review and deliberation, the differential treatment was neither the buyer nor the civil responsible person, and he had no right to appeal against the differential treatment decision. Therefore, the differential treatment rule decided to adopt the form stipulated in Article 249 of the Criminal Procedure Law No.23 of 1971 (¹). In another decision, the Karkh Federal Court of Appeal, in its cassation capacity, ruled that "after checking and deliberating... the cassation appeal was found to have focused on the decision of Junah Al-Karkh Court dated 3/4/2012, which included the referral of case No. 902/C/2011 to Junah Al- Bayaa Court for consideration. According to the spatial jurisdiction, and since the decisions issued in matters of jurisdiction do not accept the cassation appeal individually according to the provisions of Paragraph (c) of Article 249 of the Code of Criminal Procedures No. 23 of 1971, as amended, it was decided to reject the cassation appeal in form (²).

EPILOGUE

1. Conclusions

The balance of criminal assets law is only achieved by balancing similar or equal interests. According to this law, balance usually leads to mediation contracts and sometimes leads to imbalances between conflicts of interest, as such conflicts the degree to which individual rights and freedoms are directly infringed upon through criminal measures, and the means by which legislators balance interests through this law is a guarantee provided by the law for the party whose interests are affected by criminal measures. The more legislators can provide more protection for the latter, the closer the budget results on the balance line are to balance, otherwise it is closer to imbalance.

(¹) The decision of the Wasit Federal Court of Appeal (Discrimination Commission) No. (48/junah/2011) is being considered on 5/22/2011, published on the website of the Supreme Judicial Council: <https://www.hjc.iq>, date of visit 4/2/2023, 11 am.

(²) The decision of the Federal Court of Appeal of Karkh (Discrimination Commission) No. (140 / junah / 2012) is being considered on 6/13/2012, published on the website of the Supreme Judicial Council: <https://www.hjc.iq>, date of visit 4/2/2023, 4 p.m.

1. Since the process of balancing interests is an intellectual process, it does not lead to balance in its linguistic sense (equivalence or equality), but rather to figurative or legal balance, and by comparison between achieving balance as one of the outputs of balancing interests in the two laws, penalties and penal assets, achieving it in the latter is more difficult, because the penal procedure's infringement of rights and freedoms in the fundamentals law is direct and between similar interests, as the balance between interests in this law in most cases leads to conciliation (relative weighting), and sometimes to imbalance, which is the lowest outcome of the balance.
2. The budget may lead to imbalance when the legislator is forced to give preference to one interest over another or to sacrifice one of them in order to protect another that is more important than it in terms of social necessity, but sometimes the state of imbalance is achieved either as a result of the legislator's failure to achieve balance or even a contract to reconcile conflicting interests, as stipulated in Article (108) which allows the arrest warrant to use force that enables him to arrest the accused if he resists or tries to escape, provided that it does not lead to his death, but as an exception he permits the use of force that leads to death if he is accused of a crime punishable by death or life imprisonment if he resists or tries to escape, The legislator here has completely sacrificed the interest of the accused, despite the fact that he is accused and not convicted, and this is a blatant contradiction with the constitutional principle, the accused is innocent until proven guilty.
3. Imbalance (complete weighting) is achieved in two cases, the first case is represented by the result of balancing social interests, when the law decides to give full weight to one interest over the other in response to the case of necessity, and in most cases the public interest is preponderant and in favor of which the criminal rule is decided, but sometimes it is Imbalance as a result of the legislator's failure to determine the necessary guarantees or as a result of determining exceptions in favor of the party determined by the criminal rule, and as a result, the guarantees provided for the weak party are weakened.
4. The budget also leads to imbalance when the legislator takes a specific method by estimating the protection of interests based on a specific criterion, such as increasing the protection of a particular interest by increasing the penalty with the severity of the attack or the danger to which that interest is exposed, then the legislator changes his method for other considerations that he assesses, despite the increase of the seriousness of the assault on the interest, for example: the provisions of Article (394/2/a, b, c, e) are penalties, which intensified the punishment with the increase in the seriousness of the crime, except that in Paragraph (3) of the same article it stipulated that: (And when the act leads to the death of the victim) it ceases to be strict, despite the fact that the gravity of the crime is greater, and despite the extent of the harm caused by the act to the benefit of the victim, which also leads to her demise.

Second – suggestions

1. The researcher proposes to the Iraqi legislator to work on developing the substantive and procedural criminal rule in accordance with societal changes and values, and according to the interests achieved at all times and on the basis that the criminal texts will involve the development of society and are in line with the changes that occur in the concept of protected interests and values. This is achieved through The House of Representatives formed permanent committees to study penal laws, and amend them in line with the laws of comparative countries, with an emphasis on resorting to a new pattern of social alternatives to punishment and in accordance with modern trends to reform the offender in line with the development that occurred in many Western legislations, which is to work in the public interest by assigning him With compulsory work, hours, days, months, depending on the circumstances, according to the following text:(The court may replace the imprisonment sentence, which is not less than a year, with working for the public interest without pay for a period ranging between (40) hours as a minimum and (240) hours as a maximum, provided that it does not exceed one year, if the following conditions are met:
 - a) **The sentenced person did not return, that is, he was never sentenced to a felony or misdemeanor for more than three years, and was sentenced to a commutation of his sentence for more than one year;**
 - b) **The sentenced person was not less than 18 years old at the time of committing the alleged crime.**
 - c) **The explicit consent of the sentenced person or his agent before a court with jurisdiction does not serve the public interest in accordance with applicable international practices.**

The sentenced person enjoys social security and accident insurance.

1. The researcher suggests canceling the text of the fundamentalist Article (108), to replace it with the following: (a: If the person accused of a felony or misdemeanor resists arrest or tries to escape, then the one authorized to arrest him legally may use the appropriate force that enables him to arrest him, and prevents him from b: If the fugitive who is sentenced to death or life imprisonment tries to resist his arrest, then whoever is legally authorized to arrest him may use the appropriate force that enables him to arrest him after it is impossible to arrest him otherwise). As a guarantee for the accused and for balancing interests.
2. The researcher suggests amending the text of Paragraph (C) of Article (109) of Fundamental Law, and replacing it with the following text (the total period of detention may not exceed a quarter of the maximum penalty, and in no case shall it exceed six months, and if necessary, the extension of detention shall be more than six Months, the judge must present the matter to the Criminal Court to authorize the extension of the detention for an appropriate period, provided that it does not exceed one year for junahs and two years for felonies, or decide to release him on bail, or without it, taking into account Paragraph (b) of that article) in order to reflect more accurately the balance between interest .

3. The researcher proposes to amend the text of Paragraph (b) of Article (110) of fundamentalism, by adding this phrase to it (provided that the investigating judge decides on his matter within a period not exceeding 48 hours from the time of his arrest) to read as follows (if the arrested person is accused For a violation, it is not permissible to arrest him, unless he does not have a specific place of residence, provided that the investigating judge decides on his order within a period not exceeding 48 hours from the time of his arrest), because the stay of the accused of a violation for more than this period without deciding on his order does not serve the balance between interests with criminal law.

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