
The Judicial Standard for Distinguishing Between Acts Affecting Sexual Freedom

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Abstract

This research deals with the topic of the judicial standard for distinguishing between acts affecting sexual freedom, within the framework of Iraqi and comparative criminal justice. The criminal legislator in Iraq and in other countries, when drafting criminalization and punishment texts related to acts affecting sexual freedom, did not provide a reliable standard for the adaptation of acts that would constitute a crime of violating sexual freedom. In Iraq's criminal and comparative legislation, we do not find a standard that distinguishes between acts that constitute an infringement of sexual freedom and represent a crime of attempted rape or indecent assault, or that they constitute a crime of attempted indecent assault or an indecent act. Therefore, the research for the standard that the criminal justice in Iraq and the comparative criminal justice have settled on is of great importance, since it is this standard that defines the legal description of the act. When criminal justice establishes a standard against which to determine the legal description of acts affecting sexual freedom. Moreover, it derives that standard from the values and principles of society and the prevailing concepts in it, and these, in turn, differ according to time and place. The criminal justice, through its rulings, is the mirror that reflects the reality of society.

Keywords: Judicial Standard, Sexual Freedom, Indecent Assault, Breach of Modesty, Rape, Standard of Awrah, Degree of Obscenity, Casual Modesty, Reason of Criminalization, Criminal Justice.

1. Introduction

1.1 The Importance Of The Research Topic

The research deals with the topic of the judicial standard for distinguishing between acts affecting sexual freedom. Where this is a very important topic because the criminal legislator in the Penal Code of Iraq and other countries did not set a clear and precise standard that can be based on to differentiate between the legal descriptions that can be given to acts that violate sexual freedom. If some of the forms of these acts that affect sexual freedom clearly indicate the crimes they represent in view of the degree of obscenity they involve. However, there are many forms of sexual acts that it is difficult to give an accurate legal description of them in line with their truth and the intention of the perpetrator behind them.

In addition, if the forms of sexual acts that achieve the crime of intercourse without consent (the crime of rape), the criminal legislator defines its conditions in the Penal Code, and the criminal judicial, as well as criminal jurisprudence, have settled on them when it crime occur in full.

This is not the case when the offender does not reach the completion of the crime of rape and it stands at the start of the implementation or before that in the previous attempt stage prior to the start of the implementation. The question often arises as to whether these acts constitute an attempted crime of rape, or are no more than being represented offenses of defilement. This makes it even more difficult for the criminal justice in Iraq, as well as the comparative criminal justice, where it was wobbly in adopting a specific standard to differentiate between the acts affecting sexual freedom that constitute the crime of attempted rape and those acts that represent offense of defilement. This is according to the standard adopts in the description or legal adaptation to which it ends up in the facts before it.

Sometimes the standard of the personal doctrine is adopted, and at other times, the standard of the objective doctrine. Which are applied to identifying the acts affecting sexual freedom that constitute an attempted rape or that constitute the crime of offense of defilement.

The situation is not much different if we incline the party towards the standard of differentiation and distinction between acts affecting sexual freedom that constitute a crime of offense of defilement or attempted criminal offense of defilement. In addition, it is just an indecent act or it does not constitute a crime. Criminal justice in Iraq, as well as comparative criminal justice, sometimes we find it adopts the standard of (the awrah), and every act touches a part of the human body (a man or a woman), and this part represents awrah. Thus, this is considered an act of offense of defilement. But the criminal justice, when found that there are acts that do not affect the awrah of the victim's body, but that they are characterized by clear obscenity. Therefore, it decided that the standard of the awrah is not a general rule and if every compromising of the awrah is an offense of defilement, however, the offense of defilement is not limited to compromising the awrah of the victim. Moreover, there are acts, even if they do not touch the awrah of the victim that is considered an offense of defilement due to the serious breach of casual modesty that they entail.

Therefore, this research is important in trying to stand on the most important principles that the Iraqi criminal justice has settled on, as well as the comparative criminal justice regarding the distinction between acts affecting sexual freedom. In order to determine the judicial standard on which it depends in differentiating between the multiple legal descriptions, they apply to the acts affecting sexual freedom.

2. Research Problem

We have already said when talking about the importance of research that the criminal judiciary in Iraq, as well as the comparative criminal judiciary, was not able to establish a specific standard for differentiating between acts affecting sexual freedom. This is because of the adoption of a formal material standard that determines the gravity of the breach of casual modesty to the victim. This is by stipulating that the action takes place on a specific part of the victim's body that represents his awrah and this is what has been termed (the standard of the awrah). But this standard cannot achieve the desired justice, because the awrah itself does not have a single customary connotation, but rather has different connotations, as its connotations vary. What it is awrah in the countryside may not be the same in the city, and what is awrah in one society may not be the same in another society, or in the same society, but in other circumstances. As is the case for the one who is in the city center in full clothes, and when he is on the beach or in the pools, he takes off his clothes. Therefore, the difference in the meaning of the awrah according to the different environment, time and circumstances may lead to different standards adopted by the criminal judge. This is what harms criminal justice because the fate of the accused will differ according to the standard adopted and preferred by the criminal judge, then there will be a discrepancy and inconsistency conflict in the penal provisions. Moreover, the accused's environment, values, norms, and social upbringing differ from those of the victim, or vice versa. Then the question revolves around whether the criminal judiciary applies the environment standard that is appropriate and compatible with the environment of the accused or the environment of the victim, or whichever is closer to the environment of the judge himself.

If the inevitable matter is that the criminal judiciary is the one who has the discretionary authority to assess the gravity of the breach of modesty and then give a legal description of the act that involved this breach. In order to impose the appropriate punishment on the offender and in line with the reality of the gravity of the act. Therefore, it becomes necessary for the criminal judiciary to rely on specific controls through which it can determine the standard for distinguishing between acts affecting sexual freedom. Thus, the burden of this falls on the Federal Court of Cassation, as it is the judicial oversight body for the judgments of the criminal courts. Where the latter must respect the principles on which the Federal Court of Cassation rests. This is in order to achieve criminal justice and in a manner that ensures the activation of criminal protection for social interests. This is the objective protection decided by the criminal legislator in the Penal Code, especially since the transition from the abstract criminalization contained in the provisions of the Penal Code to punishment can only take place through the criminal judiciary.

3. Research Methodology

The descriptive-analytical method will be adopted because it is consistent with the topic and nature of the research. As we will study the topic of the judicial standard for distinguishing between acts affecting sexual freedom by determining its nature, whether a personal standard is adopted based on the opinion of the personal doctrine in determining the seriousness of the act, or whether was it adopted by an objective material standard based on what the supporters of the materialist doctrine see in determining the seriousness of the act on the right that has been infringed upon. Or is this standard independent from previous trends and the criminal justice adopts it according to its judicial conviction in the circumstances of the facts presented to it when viewed from the angle and perspective of the social values prevailing in the social environment in which the

act occurred this regardless of the values and norms of the offender or victim, or does the latter have a role in determining that standard?

In addition to analyzing the relevant judicial rulings related to the topic. The comparative approach will also be adopted by comparing the judicial rulings issued by the Iraqi criminal justice, with the rulings issued by the comparative criminal justice. Through this comparison, the most important principles on which the criminal judiciary has settled in its various directions are determined.

4. Research Plan

This research will be divided into two topics. In the first topic, we will address the definition of acts affecting sexual freedom, as for the second topic, we will dedicate it to studying the standard of differentiation between acts affecting sexual freedom in the light of the different trends in Iraq's criminal and comparative justice.

4.1 The First Topic: The Definition Of The Acts Affecting The Sexual Freedom Of Women And The Reason For Their Criminalization

Acts affecting the sexual freedom of women are represented by acts of rape, indecent assault, and indecent acts. Accordingly, we divide this topic into two requirements. We devote the first requirement to studying the definition of the act of rape and the reason for their criminalization, while the second requirement we will devote to studying the definition of acts of indecent assault and indecent acts and the reason for their criminalization.

4.2 The First Requirement: The Definition Of The Act Of Rape And The Reason For Their Criminalization⁽¹⁾

Criminal jurisprudence defines rape as the sexual intercourse of a man with a woman against her will⁽²⁾. Also, it is defined as complete sexual intercourse between a man and a woman without the proper consent of the woman⁽³⁾. Thus that rape is a crime, and the criminal consequence (which is the case of sexual intercourse) is integrated into the act and it is assumed that sexual intercourse, which is the act that completes the crime and is illegal. As for the connotation of sexual intercourse, it refers to the natural meeting of the genitals of a man and a woman, and thus rape is achieved, whether fully or partially, and whether sexual intercourse results in the rupture of the hymen or not. It also does not require ejaculation (ejaculation of seminal fluid), as the legal meaning of rape is achieved even if it has not been ejaculated⁽⁴⁾, and rape is achieved even if the accused does not reach his lust⁽⁵⁾. Therefore, the process of artificial insemination that occurs for a woman, even if this does not result in her getting pregnant, is considered rape⁽⁶⁾. The basic principle is that rape presupposes sexual intercourse between a man and a woman and that the perpetrator is the man and the victim is the woman. Therefore, if the sex of the offender and the victim are united, rape is not realized, as if the offender and the victim were men or women. Since the offender is the man and the victim is the woman, the man is the one who forces the woman (the victim) to have sexual intercourse, and then rape is not achieved if the woman is the one who made the man have sexual intercourse with her⁽⁷⁾. In the cases in which a woman causes a man to contact her sexually, as is the case if the woman intends to deceive the man or inducements held out to him, the act here is considered indecent assault, not rape. Thus, it is necessary to achieve rape when to be intercourse is illegal. Then rape is achieved if it was committed by the fiancé on his fiancée before the marriage contract or by a man who divorced his wife the irrevocable divorce, whether it is minor or major⁽⁸⁾. In order for rape to occur, it is required that the victim be a living woman, as she is the one who has sexual freedom. But if sexual intercourse takes place on the body of a dead woman, it is not considered rape. Moreover, it also does not matter whether the victim is a married or unmarried woman, an honorable woman, or a prostitute. As long as the reason for criminalization, as we will see later, is not the protection of marriage or the prevention of mixing of lineages. It is the same whether the woman is honorable and of good reputation and behavior or if she is notorious and behavior, rather, rape is achieved even if the woman is a prostitute⁽⁹⁾.

The intercourse between a man with his wife is considered legitimate intercourse, but there is an opinion in the criminal jurisprudence that goes to say that if the man (husband) if is infected with a communicable disease and has intercourse with his wife, then this act is considered rape. Supporters of this view justify their opinion by saying that if a man has a communicable disease, he is not allowed to have intercourse with his wife without her will because in this sick condition he does not have the right to have intercourse with her⁽¹⁰⁾.

As for the age of the offender and the victim, the young age of the victim does not prevent the rape from taking place⁽¹¹⁾. As for the offender, the important thing is that the young age does not make it physically impossible to carry out the rape⁽¹²⁾.

On the rationale for the cause of criminalization, rape is considered the most serious act among the forms of acts that represent an assault on honor. This is because the offender forces the victim to engage in sexual behavior without her consent and her will did not go to him, thus confiscating her sexual freedom. In addition to the assault on women's sexual freedom, rape represents a flagrant violation of the immunity of the victim's a woman's body and may result in harm to psychological health or mental health. Rape also represents an attack on a woman's honor which leads to a decrease in the chances of her marriage, but if she is married, it may lead to a mixing of lineages. Furthermore, it also leads to the loss of family stability for the victim's family and causes harm to the woman in both moral and material terms ⁽¹³⁾.

We add to the above regarding the reason for criminalizing rape and the interests of criminal protection in the crime two basic points that were not mentioned by criminal jurisprudence, whether in Iraq or outside Iraq. The first basic point, there is a real and serious danger to a woman who is subjected to rape, as she may not be able to prove coercion, especially if the rape occurred by trick or deception. Then her life will be in danger, especially in Iraqi society, as the social customs and traditions related to shame washing may lead to a woman's family killing her under the pretext of washing shame. Therefore, the chances of a woman being killed increase if we know that the Iraqi criminal legislator, influenced by gender norms has legalized murder in order to wash away shame. He considered it an honorable motive and one of the legal excuses for mitigating punishment.

If we go beyond the issue of the danger that threatens the life of the woman who was the victim of rape. The second basic point is that there is another interest, which is exposing the woman of rape to at-risk and possible harm. This interest is represented in the risk of a rapist woman who has been raped, and rape results in pregnancy, and thus she tries to end the life of her pregnancy. Consequently, this will harm her and the fetus as well. As for the harm caused to a woman who rapes and bears and kills her newborn baby, it will expose itself to legal accountability ⁽¹⁴⁾. Likewise, if she aborts herself ⁽¹⁵⁾, in some cases, the newborn child or the fetus will lose his life. Returning to Islamic law, which is the main source of legislation, we find that it does not recognize abortion and emphasizes the protection of the fetus's right to life. As well as the right of the child to life and the need to respect his dignity as a human being, as long as there is no medical necessity related to the life of the mother ⁽¹⁶⁾.

Therefore, it is not permissible under any circumstances to kill the child or the fetus which the woman is pregnant after raping her. This confirms the right of the fetus to life as a human being. While rape exposes women, as we have mentioned, and in particular in Iraqi society, to the danger of being murdered out of shame. It also threatens the life of the fetus and the newborn child from pregnancy after rape. These are core interests that rape threatens to harm.

The second requirement: Acts of indecent assault and breach of modesty

To study the acts of indecent assault and acts against public morals, we divide this requirement into two branches. We dedicate the first branch to studying the definition of indecent assault and acts against public morals and the cause of criminalization. While the second branch will be devoted to studying these acts which are located through the means of modern information technologies.

First branch: Definition of acts of indecent assault and breach of modesty, and the cause of criminalization

The act of indecent assault represents an assault on sexual freedom, and it is in this description that it shares with rape, as each of them represents an assault on the sexual freedom of the victim. However, indecent assault does not require sexual contact between the offender and the victim. Rather, it is sufficient for a sexual act to occur given that the act of indecent assault constitutes a grave violation of the victim's sexual freedom. According to the normal course of things, a sexual act paves the way for sexual intercourse, or it leads to excitement about the idea of sexual intercourse with the victim and it is the contact that the victim does not desire. The act constituting indecent assault is a sexual act committed on the body of the victim without his consent and against his will. The act of indecent assault also represents a violation of the honor of the victim, the immunity of his body, and his freedom in general. This meaning is achieved when acts of indecent assault occur by force or threat, or even without them if the victim is young ⁽¹⁷⁾.

According to the foregoing, what distinguishes the act of indecent assault is its harm to the victim's body, since it is not sufficient for the act of indecent assault to involve an offense to the morals of the victim such as displaying sights, images, or sounds with sexual connotations to his hearing or sight ⁽¹⁸⁾.

It is not necessary for the offender to perform a positive action on the victim's body, but the indecent assault can be achieved without that as if the offender forced the victim to perform the act on his body, i.e. the body of the offender himself. In addition, the offender asks the victim to be naked in front of him, or force him to remain naked, or to go out naked so that people can see his awrah.

The act that constitutes indecent assault must involve a gross breach of modesty. In contrast to that, that is, if it does not involve a gross breach of modesty, then no indecent assault may take place, even if the offender's intent behind it is a sexual purpose. In this case, an indecent act is achieved, not an indecent assault ⁽¹⁹⁾.

As for the act against public morals that of violating modesty, it is the intentional act that violates the modesty of the person whose senses touch it. This definition includes acts against morals that violate the modesty of the overt and non-overt. The reason for the criminalization lies in the fact that the act that violates modesty constitutes an assault on the modesty of the one who touches the act with one of his senses. The same applies to the victim being a specific person or a group of people. There are several differences between the crime of an act that violates public modesty and an act that violates non-public modesty, including that the first considers publicity as a pillar in it and does not exist in the second. Also, in the first it is that the person against whom the act is fell on him is satisfied with it or not, whether it is female or male are equally. The crime is realized even if the act occurred as a result of a legitimate relationship and link between the two parties, such as the husband and wife. As for the crime of act that violates non-public modesty, the act must take place without the consent of the victim, and the act in itself must be illegal. As we have said above, if the act in the two crimes violates modesty, then in the public scandalous act it violates the modesty of the masses of public people, while in the non-public act, it violates the modesty of the victim.

If the reason for criminalizing a non-public obscene act is clear as long as it occurred without the victim's consent, then it represents an attack on the victim's sexual freedom in the comprehensive sense, because the fact this act is a prelude to more obscene acts are approaching acts of indecent assault. This is according to the normal course of things, even if the perpetrator's intention is not to do, as long as it involves coercing the victim to the practice of a verb with a sexual connotation.

The rationale for the public criminalization of the indecent act raises some difficulties. Where the interest, subject to criminal protection, may be represented in protecting the moral purity of public places. However, this crime may take place in a private place if someone outside this place can touch it by hearing or watching. It is worth noting that criminal protection by criminalizing this act is not for virtue and public morals, as the act itself may be an expression of a legitimate relationship such as a relationship between a married couple. But, criminal protection refers to the sexual freedom of those who witnessed the act involuntarily, as it suggests to them in a certain way what the exercise of their sexual freedom might be like, and this means interference with this freedom. In addition, criminal protection extends to include the protection of sexual moral values in society ⁽²⁰⁾.

Since the indecent act in breach of modesty does not require a significant level of indecent assault, it does occur, even if it is small. Therefore, if the elements of the crime of rape, indecent assault, or attempted rape are not available, then the crime of indecent acts in breach of modesty is realized.

The second branch: Acts of indecent assault and breach of modesty that located through the means of modern information technologies

The question arises as to the extent to which the crime of indecent assault or breach of modesty can be realized through modern information technology means using mobile phone technologies or via the Internet and broadcast, audio, and visual satellite broadcasts. In fact, there is nothing to prevent the crime of indecent assault or breach of modesty through the aforementioned means. This is because these means are no more than a means for the offender to rely on in committing the crime, and therefore they do not change the nature of the crime. Even if the crime that occurs through these means faces a number of problems that are not related to the subjectivity of the crime from an objective point of view, i.e. in terms of criminalization and punishment. However, these problems relate to defining the scope of criminal responsibility and the availability of procedural attribution conditions, as well as the issue of applying the rules of law enforcement in terms of place and determining jurisdictional competence. In France, for example, the Supreme Court of Toulouse ⁽²¹⁾ decided to suspend the temporary search of illegal messages. However, the problem facing this ruling is that if the French judiciary has the power to criminalize and punish the French service provider or the owner of French or non-French content that broadcasts messages and content that violates French law within the geographical scope of France. But, he cannot do that with regard to messages that are transmitted from outside

France, and the French judiciary has succeeded in obliging the company (yahoo) to purify everything it broadcasts and remove what violates French law ⁽²²⁾. However, this coincided with a later ruling from the American courts based on the fact that the content that is broadcast falls within the freedom of expression of opinion ⁽²³⁾. Therefore, one of the appeals courts in France, in response to the content of the American courts' ruling, ruled that freedom of expression does not prevent the broadcasting and dissemination of illegal messages if the content of these messages violates the sanctity of the private life for individuals ⁽²⁴⁾. Especially with the ongoing confrontation between freedom of expression of opinion and the sanctity of private life ⁽²⁵⁾. Therefore, we see that the crime of indecent assault and breach of modesty act is conceivable to take place through the means of modern information technologies. As mentioned above, it raises problems related to the applicability of the law in terms of location and determination of criminal responsibility.

Second Topic: The standard of differentiation between acts affecting sexual freedom in the light of different trends in Iraqi and comparative criminal justice

The research and study of the criterion of differentiation between acts affecting sexual freedom in criminal justice are based on the answer to the following question: Is the distinction criterion adopted by the criminal justice system to distinguish between acts affecting sexual freedom based on an objective criterion relating to the substance of the crime and the nature of the acts committed, or is it a personal criterion based on personal elements that lie in the perpetrator's intention and intent to act?

If some acts are not problematic in determining whether they are characterized as rape or indecent assault, there are many acts affecting sexual freedom that gives rise to many problems with their legal description. Whether it constitutes an offense of attempted rape or a total offense characterized as an offense of indecent assault, or whether it constitutes an offense of attempted assault or a total offense described as a crime of indecent assault.

Therefore, to examine and study different judicial trends on the criterion of distinction between acts infringing upon sexual freedom, this topic will be divided into two requirements. We devote the first requirement to examining the criterion of distinction between acts affecting sexual freedom in comparative criminal justice. The second requirement will address the criterion of differentiation between acts affecting sexual freedom in the Federal Court of Cassation's judgment.

First requirement: The standard of distinction between acts affecting sexual freedom in comparative criminal justice

In some of its decisions, the Egyptian Court of Cassation went on to adopt an objective doctrine regarding the determination of the attempted crime of rape and the determination of the commencement of its execution. This court ruled that pulling a woman from her hand and clothes does not constitute the beginning of the crime of rape, the fact that requesting indecency from a woman or pulling her from her hand and clothes is merely a preparatory act⁽²⁶⁾. However, this court appears to have reversed the adoption of the thematic doctrine in determining the commencement of the investigated execution of the attempted rape and has turned to the personal doctrine, and according to this doctrine, the start of execution is achieved by any act that immediately and directly leads to the completion of this crime is initiated as a threat to the victim's sexual freedom in the crime of rape. Having held that the act of violence was committed by the perpetrator, regardless of its gravity, to induce the woman to surrender or threaten her to do so or to give her an intoxicating or narcotic substance or to hypnotize her in preparation to rape⁽²⁷⁾. An attempt is also made if it is established that the victim overcame the perpetrator or that someone scrambled to find her and the perpetrator could not complete the act of rape⁽²⁸⁾.

As for the criterion for determining which acts constitute an offense of indecent assault, the Egyptian Court of Cassation has adopted the criterion of indecent assault in some of its rulings. It has ruled that the sudden kissing of a girl on her cheek without holding her or touching his hand on any part of her body does not achieve an offense of indecent assault, but a crime of obscene act. The Egyptian Court of Cassation has stated in favor of this provision that any prejudice to a part of the human body that is considered an obstacle would constitute an offense of indecent assault and that the determination of what is involved in indecent assault is subject to social custom⁽²⁹⁾.

But the Egyptian Court of Cassation later found that the criterion - al-Awra - is not enough to limit the crimes of indecent assault, as the act may not affect the human body - the victim - but it involves a great deal of obscenity and disturbance of life.

The Egyptian Court of Cassation stated that the criterion - the Al- awrah - did not specify the cases that fall within the crime of indecent assault. Rather, it is a partial principle that represents the most common indecent assault, because such abuse must inevitably be considered a crime of indecent assault. However, this does not mean that the crime does not occur except in this way, rather it may occur by actions that do not affect one of the awrah of the victim's body. Nevertheless, the crime of indecent assault is considered real as long as the act involves a major indecency that violates the casual modesty of the victim, even if nothing of his private parts is touched. As if the offender places his genitals in the victim's hand, mouth, or any other part of his body, it is not considered an 'awrah, it was a crime of indecent assault⁽³⁰⁾. It further ruled that the offender's scratching his genital in the shoulder and the semen coming out to her clothes constituted an indecent offense⁽³¹⁾, it also decided to place its genital in the victim's mouth as an insult to his honor⁽³²⁾. In Kuwait, the Court of Cassation ruled that the indecent assault of any act contrary to public morality is on the victim's body and often touches his private parts⁽³³⁾. It also ruled that indecent assault occurs as soon as the offender reveals the awrah of the victim⁽³⁴⁾, and also ruled that the offender taking off the clothes of the victim and photographing him naked is considered an insult to his honor⁽³⁵⁾.

As for the indecent act of indecency, the Egyptian Court of Cassation considers that language and words, however outrageous they may be, do not constitute a breach of modesty⁽³⁶⁾, it also ruled that the crime of indecent and indecent act was achieved if obscene views were shown on stage in a theatrical novel, a show, or an obscene dance show. It also verifies that a person appears naked in a public place or reveals his or her awarah and the Egyptian Court of Cassation adapts acts to whether or not they constitute an offense of indecent assault subject to the discretion of the trial court by the circumstances of each case. The Court ruled that the appreciation of the acts was linked to the essence of Egypt's evolving values and traditions relating to the sense of modesty and its sensing of all manifestations of sexual connections. Any act which has a sexual connotation shall be included in this scope according to the ordinary course of matters in preparation for a sexual act. Thus, the assessment of such acts varies by different circles, environments, and self-willingness in the social environment and their sense of modesty to be influenced by such acts⁽³⁷⁾, and it is the act of disturbance that scratches the ear and eye⁽³⁸⁾.

It is evident from the foregoing that the standard for differentiating between acts affecting sexual freedom in the aforementioned comparative criminal justice has settled in adapting the acts of attempted rape by adopting the philosophy of the personal doctrine which is considered the action starting with the execution of the crime and then an investigator for its initiation if it leads inevitably and directly to the offender perpetrating the material element of the crime. If the act itself does not form part of the material element of the crime, and in fact, this standard does not represent an officer ruling all cases, what is considered an attempt to commit the crime of rape in certain cases, it may not be considered so in other cases, but it is considered a complete indecent crime, and this depends on the assessment of the trial court of the circumstances and circumstances of each incident to infer the intention of the offender from the material acts he committed.

As for the offense of indecent assault, we found that the Egyptian Court of Cassation, beginning with its reliance on the criterion of Al-awarah, and then it quickly reversed that criterion to determine the violation of the victim's awarah constitutes an offense of indecent assault. In other words, any violation of a part of the victim's body constitutes an offense of indecent assault, but this does not mean that the offense of indecent assault is limited to cases of infringement of the victim's awarah. However, there are acts that do not touch the private parts of the victim, but they are of a high degree of obscenity. Therefore, according to the Egyptian Court of Cassation, such acts inevitably constitute a crime of indecent assault.

It is clear from the foregoing that qualification acts as constituting an indecent assault crime is not subject to a specific criterion, even though prejudice to the awrah - the criterion of the awrah – as the predominant cases in these crimes is one of the criteria that can be relied upon in estimating the acts that achieve the crime of indecent assault. Hence, it can be said that determining the acts that constitute a crime of indecent assault and distinguishing them from attempted rape at times and from the crime of indecent and indecent act at other times is subject to the discretionary authority of the trial court according to the circumstances of each case.

As for acts of breach of public morals, they are also subject to the discretionary authority of the trial court, and the acts of breach of public morals are the most detrimental to sexual freedom in terms of being subject to the discretionary power of the trial court, which should exercise this power in light of the prevailing custom in society. The extent of his sense of shyness from the actions of the subject of the crime and brought before the court. Especially since the indecent acts differ from one country to another, and even in the same country, they differ from one social environment to another. What is prevalent in villages and rural areas of customs, traditions, and customs is not the same as prevailing in the city, and what is unacceptable today may be

acceptable in the future. That is, social values are developed, renewable, and changeable with the change of time and place, and since the values of modesty are part of the system of social values, so they must obtain their share of change, this change that would change the concept of indecent acts.

The second requirement: The standard for differentiating between sexual acts affecting sexual freedom in the light of the judiciary of the Federal Court of Cassation

The Federal Court of Cassation's jurisprudence on the distinction between acts infringing upon sexual freedom has established that the court of the subject has discretion in adapting the acts to the circumstances and circumstances of each offense. However, the Federal Court of Cassation has enshrined some legal principles by which we can invoke the criterion it has adopted in distinguishing between attempted rape and indecent assault. It ruled that the accused's attempt to intercept the victim, thereby removing the victim with his finger, made what the defendant did a single offense of indecent assault, not an attempted rape⁽³⁹⁾.

It appears through this decision that the Federal Court of Cassation adopted the objective doctrine criterion in determining the attempted crime of rape, and therefore it went to the conclusion that what the accused had done did not constitute an attempt to commit the crime of rape, but rather achieved a crime of indecent assault. Our interpretation of what we have said about the distinction standard adopted by the Federal Court of Cassation regarding the legal description of acts infringing upon sexual freedom, and the acts committed by the perpetrator in the above case is in accordance with the personal doctrine in determining the attempt of the crime are an act of rape. The attempt of the perpetrator to break the virginity of the victim with his in preparation for her intercourse, although not part of the physical element of the crime of rape - unlawful interception without the victim's consent - is an act that inevitably and directly leads to the commission of the material component of the crime. This is the criterion for the attempt of an offense adopted by the Iraqi Criminal Legislature in article (30) of the Penal Code, the first part of which stipulates that the attempt ((the initiation of an act with intent to commit a felony or misdemeanor if it is stopped or disturbed for reasons of the perpetrator's will)), especially since it was the creation of the victim that prevented the completion of the crime of rape. In our view, the adoption of the objective criterion in determining the attempt on the crime of rape on which the Federal Court of Cassation relied was not successful in this decision, as it contravened the criterion of personal doctrine adopted by this Iraqi criminal legislature on the one hand. On the other hand, the adoption of the criterion of objective doctrine, particularly in sexual offenses, significantly weakens the criminal protection of protected interests by restricting the scope of criminalization and excludes many cases from criminalization beginning or at least the very least from changing the descriptions of certain sexual acts to those of a lesser seriousness and lesser degree of punishment.

In other decisions, we found that the Federal Court of Cassation adopted the criterion of the objective doctrine in determining the attempted crime of rape and applied the criterion of the personal doctrine, which is a trend we support for the reasons we mentioned above, as the Federal Court of Cassation ruled that upon examination and deliberation, it was found that the trial court had adopted the action of the accused in accordance with the first paragraph of Article (396) of the Penal Code, considering that what was issued by the accused is nothing more than an assault on the honor of the victim, although the accused did not get up from his bedding at the dawn of the day of the incident and went to the victim's room and her bed just to touch her body until it was said that his action was nothing but indecent assault especially since the victim confirmed that the accused had tried to tell her about herself and wanted to have sex with her. However, he was unable to do so for a reason beyond his control, which was the victim's feeling that he had come to her bed, resisted her, and then begged her, so that the act of the accused constitutes an offense to attempt to sign the victim without her consent and not to attack her offer⁽⁴⁰⁾.

When compared with the previous judgment, the facts of the first offense are more clearly indicative of the fact that the crime of rape was attempted than in the second offense. Nevertheless, the Federal Court of Cassation considered that the accused's acts in the offense were the subject of the first judgment and did not constitute a commencement of the crime of rape and did not investigate either the offense of indecent assault, whereas the acts of the accused in the offense were the subject of the second judgment and it does not constitute an indecent assault on the victim, but an attempt to commit the crime of rape.

It seems to us that the basis for this difference in the legal qualification is due to the different criteria of distinction adopted by the Federal Court of Cassation to distinguish between acts affecting sexual freedom. In the first ruling, it adopted the criterion of the objective doctrine, as in the second ruling, it adopted the criterion of personal doctrine, as previously explained.

The Federal Court of Cassation confirmed the last direction in which it adopted the criterion of personal doctrine in determining the attempted crime of rape in subsequent decisions. In a case summarizing the facts, the accused tried to lift the victim's clothes and asked her to act as a denier - in the victim's words - telling her that he had not come to bring "Al-Jedria" and his uncle didn't send him for this purpose at all, but his purpose in coming to her was to have sex with her.

After that speech, he grabbed the victim by the hand and took a sense of position from her body, and he pushed her and she fell on her young son, who woke up and screamed. She, in turn, screamed and called for help. The Federal Court of Cassation ruled that, according to the facts mentioned, the accused could not have made all this trouble by climbing the wall of the house after the victim refused to open the door to him, invoking a false pretext and taking advantage of the absence of his uncle from the house only to feel the positions of the victim's body to adapt his action as a crime of indecent assault, he is act constitutes an offense of attempted rape, especially since the accused escaped after resisting the victim, shouting and demanding help ⁽⁴¹⁾.

In the same context, the Federal Court of Cassation ruled that upon scrutiny and deliberation, it was found that the facts of the case are that the accused was sleeping on the roof of the house from which he rents a room, and the complainant, who is from the same house, slept with her child inside ((all)). She felt someone lift her dress from her, and when she called for help, the accused ran away. He was seen fleeing by the owner of the house. The accused did not leave his bed at night and sneak into the bed of the complainant and then raise her dress to the chest area just to commit an indecent act. Rather, he wanted to have intercourse with the complainant, and this prevented her from waking up from sleep and calling for help, so the accused was forced to flee, so the act of the accused is considered an initiation of intercourse, and the provisions of the provisions Article (393) about Article (31) of the Penal Code⁽⁴²⁾.

As for the criterion for differentiating between sexual acts that constitute a crime of indecent assault and those that constitute a crime of indecent assault, the Federal Court of Cassation ruled in one of its decisions that the accused kissing the victim under duress constitutes a flagrant act in violation of modesty that applies with the provisions of Article (400) of the Penal Code and is not a crime Indecent assault⁽⁴³⁾, as it ruled that the accused summoned the complainant to his room and closed the door on her and began to harass her, beginning with words, and then taking her kiss from her cheek and her mouth, lifting her clothes and pushing her on the hood - the sofa - and placing his head between her thighs, but she resisted the accused and he was unable to complete his act because of her resistance, making the accused's actions constitute an attempt to the crime of indecent assault⁽⁴⁴⁾.

It also ruled in its decision that the accused entered the complainant's room at night after climbing the wall of the house wearing only his underwear and was arrested. After the complainant's plea without being able to touch the victim's body, and the intended purpose of entering the house was not clear, then the act of the accused constitutes a crime of violating the sanctity of the property of others⁽⁴⁵⁾.

In the same context, the Federal Court of Cassation ruled that if it was not proven that the accused's intention to enter the complainant's house at night was not to assault her honor, then he shall be punished for the crime of violating the sanctity of the property of others and not for the attempted indecent assault of the victim⁽⁴⁶⁾. The criminal contribution to acts that infringe on sexual freedom is conceivable if the conditions for criminal participation are met, whether the criminal contribution is original or dependent, depending on the circumstances. In this regard, the Federal Court of Cassation ruled that each of the accused who succeeded in forcibly signing the early victim was an original perpetrator of the crime of removing the victim's virginity, even though one of them was the one who dissolved it because they were all taken with the probable intention of removing the virginity and were responsible for compensating for the removal of the victim's virginity⁽⁴⁷⁾. To this effect, we note that the Federal Court of Cassation's pursuit of criminal and civil liability for the act of removing the victim's virginity as indigenous actors based on their respective probable intent. Rather, it is true based on the possible outcome that article (53) of the Penal Code explicitly stipulates that: ((The contributor to an offense shall be punished by the offense which was committed, albeit unintended, whenever the offense which occurred as a possible result of the contribution made)).

Even if the philosophical rooting of the text is attributable by some to the notion of probable intent, the text should explicitly be referred to in the Court's report as making the criminal contribution possible. The rationale for the criminal legislature's prescription of the possible intent in the article (34) of the Penal Code lies in the determination of the intent of the offense in the absence of direct criminal intent. According to the facts of the crime, the latter is available to the contributors. With regard to the punishment of acts infringing upon sexual freedom, the Federal Court of Cassation found that the victim's bad morals or behavior are one of the circumstances that require mitigation ⁽⁴⁸⁾.

It should be noted that the Iraqi Criminal Code enshrines sexual freedom in the Penal Code by making sexual acts between a man and a woman or between two men or between two women. If each of them is a rational adult and has obtained consent between them outside the scope of criminality unless their act achieves the crime of public disturbance. This legislative trend was endorsed by the Federal Court of Cassation, which enshrined the free exercise of sexual acts by the above requirements.

In this context, the Federal Court of Cassation ruled that there is no punishment for one who has sexual relations with a female over the age of eighteen and with her consent without promising her marriage⁽⁴⁹⁾. It also ruled that the accused removed the victim's virginity with her consent when she was an adult and of sound mind, and she allowed him to have intercourse with her because of a love bond between them. The authorities were not informed until five months later that she had become pregnant, so the victim was satisfied with the act of sexual intercourse, and then the said act did not constitute any crime⁽⁵⁰⁾.

We have the position of the Iraqi criminal legislator regarding his position on sexual acts that take place between adults and with consent, this legislative position has no justification as it weakens the criminal protection of social interests. Especially since interests are subject to protection by criminalizing acts of sexual intercourse, sodomy, indecent acts, and marital adultery, even if they are to a certain degree related to a person whose sexual freedom and public freedom are violated. However, it is not possible to negate the social nature of the interests that are the subject of criminal protection. In addition, it is necessary to restrict social behavior to the values and norms of society, and not to leave this behavior, especially when it comes in the form of sexual acts to the choices of individuals and their freedoms, otherwise, this means opening the door wide so that immorality spreads in society.

In addition to the foregoing, the legalization of sexual acts as advanced, even if the woman's virginity is removed on the pretext that she agrees, has a negative effect on the woman who will become pregnant illegally. The fetus or child is born from an illegal, the woman's family as well as the mixing of lineage and its high risk to society as a whole. We, therefore, call on the Criminal Code to reconsider this matter and develop legal texts that would provide criminal protection to social interests without placing social interests at the mercy of individuals' whims and whims. In particular, the Iraqi Penal Code establishes a general principle of criminal liability that the victim's consent should not be invoked, which should be the case for acts infringing upon sexual freedom.

5. Conclusion

Through this research, we reached many results and recommendations, which are listed in succession:

First: Results

The most important findings of this research are:

1. The legal descriptions of acts that infringe on sexual freedom are varied according to the gravity of the accidental disturbance or assault of the victim's offer. There is the crime of unlawful intercourse - rape - the crime of indecent assault and the crime of indecency.
2. If the crime of rape does not pose any problems in the legal adaptation if it occurs completely, it is different if the offender does not commit the offense whether he is guilty of the offense of attempted rape or whether his act constitutes an offense of indecent assault as well as the offense of indecent assault. There is no specific criterion applicable to all acts constituting the offense of indecent assault (except in cases where obscenity is of such gravity) that it is inevitable and necessary that it constitutes an offense of indecent assault.
3. The formal standard adopts the standard of "Al-awrah" in determining what constitutes an offense of indecent assault, since any act that affects a part of the victim's body is considered to constitute an offense of indecent assault, and the officer does not investigate all cases. Some acts do not affect the victim's distress. However, the offense constitutes an offense of indecent assault, given the gravity of the offense.
4. In the Penal Code, the Iraqi Criminal Code does not specify a specific standard for determining the legal descriptions of acts that infringe sexual freedom except in cases where the crime of rape constitutes a total occurrence. As for rape-free acts, their legal adaptation was at the discretion of the Criminal Court.
5. In some decisions, the Iraqi Criminal Court has adopted a legal description of acts that infringe sexual freedom without usurping the criterion of personal doctrine in determining the attempt to commit an offense and has considered that the commencement of execution is achieved by any act that inevitably and directly leads to the commission of the material element of the offense even though the act is not part of the material component of the offense. In other resolutions, however, it has adopted the criterion of objective doctrine -

materialism - in determining the commencement of the investigated execution of the attempt on the crime and requiring that an act which is part of the material component of the crime of rape take place for the act to be regarded as a commencement of the crime of rape.

Second: Recommendations

The most important recommendations that we believe should be adopted by the Iraqi Criminal Legislature in Iraq's Penal Code and Criminal Justice in its application of the provisions of the Law are:

1. We call on the Iraqi Criminal Justice not to adopt a formal standard in determining the legal description of acts that infringe sexual freedom, in particular in determining which acts constitute an offense of indecent assault and distinguishing them from those that violate it. This is because this criterion necessitates that violating the private parts of the victim be considered a crime of indecent assault, and other than it is a crime of indecent assault. This is an unrealistic criterion since, while there are acts that do not affect the victim's body, they are of a great degree of obscenity and gross disturbance of the victim's accidental life, which must be considered an offense of indecency.
2. We call on the Iraqi Criminal Justice to adopt a realistic criterion in identifying acts that infringe on sexual freedom and by the following:
 - a. The criminal justice system takes into account the circumstances of the act, its circumstances, values and traditions of society, and the extent to which it feels shyness with regard to the offense.
 - b. The criminal justice system makes the legal characterization of society's values and values a priority as the social environment in which the disturbance occurred, even if the acts of the perpetrator or the victim or both do not give rise to a sense of living, as long as the members of the social environment feel it.
3. We call on Iraq's criminal justice to be stable in relying on the standard of personal doctrine in determining what acts constitute attempted rape, as this fact is in line with the explicit provisions of the Penal Code, in which personal theory was adopted in determining the attempt. Moreover, the adoption of this doctrine in identifying acts of attempt provides broader criminal protection for interests protected by criminalization and would prevent the perpetrators' impunity since the adoption of an objective doctrine in determining the acts of attempted rape leads to many cases of attempted crime being removed and then from the scope of criminalization according to this legal description.
4. We call on the Iraqi Criminal Code to criminalize the practice of sexual acts even with consent among adults. Keeping the practice of sexual acts in accordance with the above description outside the circle and scope of criminalization threatens and affects social interests from several aspects, including:
 - a. The woman was murdered out of shame.
 - b. The woman was killed under the pretext of suddenness.
 - c. Abortion of the embryo consists of consensual intercourse-illegally.
 - d. A mother killed her newborn child when she was pregnant illegally.
 - e. The sinful man was killed in retaliation.
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