

---

## The Constitutional And Criminal Grounds For Ensuring The Right To Health Security For Children With Disabilities

Assoc. Prof. Azhar Sabir Kadhim<sup>a</sup>, Assoc. Prof. Waleed Kathem Hussein<sup>b</sup>

<sup>a,b</sup> Wasit University, College of Law.

asabir@uowasit.edu.iq<sup>a</sup>, wkathem@uowasit.edu.iq<sup>b</sup>

---

### Abstract

This study aimed to check whether the Iraqi constitutional and criminal laws secure the health right for disable children. It also explored whether the Iraqi constitutional and criminal law provide the disable children with favorable conditions that enable them to develop physically, mentally, morally and spiritually in a natural and healthy way. The researchers obtained the descriptive analytical approach in investigating the constitutional and criminal texts that protect the right of children with disabilities to health security. In addition, the study compared between some Arab and foreign constitutions and criminal laws regarding the bases of the constitutional and criminal law responsible for protecting the right of disable children to health security. The study concluded that the Iraqi constitution of 2005 did not explicitly address the right of children with disabilities to health security, but rather included articles that dealt with the right of children in general to health security without discrimination. Likely, the Iraqi legislator has not legislated the Children Protections Law, which was referred from the Council of Ministers to the House of Representatives. The study indicates issuing an article in the Iraqi constitution that explicitly stipulates the right of children with disabilities to health security. It also recommends amending the Iraqi Law of Welfare for Persons with Special Needs (henceforth LWPSN) No. 38 of 2013 by issuing texts that explicitly punish anyone who endangers the health of a disabled child.

**Keywords:** Children, constitutional basis, criminal basis, people with disabilities.

### INTRODUCTION

The problem of children with disabilities is one of the serious problems that challenges any country. Moreover, this problem cannot be overcome, especially due to the increasing number of disabled in the world which reached 650 million people, and exceeded more than 5 million disabled in Iraq especially after 2003 due to terrorist operations that affected the Iraqi people of all categories and nationalities without exception. Furthermore, another reason is the deterioration of the health situation due to the lack of health services provided. All of these and other reasons led to maximize the number of disabled people, especially children.

One of the state tasks is to protect the rights of disable children and protect their interests in all aspects, especially with regard to health security. Due to the great development that took place in the means of modern science, and what was impossible in the past became possible in the present, therefore, the state must harness modern science and technology to serve the disabled in general and disable children in particular. They are the most deprived category because of their weakness and deprivation of the most important stages in their life, i.e., childhood. Therefore, the state's intervention is a must to provide health care for this category of society since it is a constitutional right. Otherwise, it will lead to the worst social and economic results. Amongst these results will be the complexity of the social and economic adjustment processes for families. Likely, parents will leave their work to devote themselves to taking care of their disabled children, and this will lead to an increase in the number of non-working parents which increase the poverty rate in the country.

The right of securing health is one of the most important social rights for children with disabilities; it has been stipulated in the national constitutions, including the Constitution of the Republic of Iraq for the year 2005 in Articles (30, 32). However, the provision of this right in the Constitution is not sufficient. Rather, it also requires developing a set of measures that lead to the drafting of legal and material guarantees for the implementation of this right.

## RESEARCH SIGNIFICANCE

Like normal children, children with disabilities enjoy equal rights to get protection and are entitled to receive special attention in terms of services, rehabilitation and quality education. Likely, at the primacy of these rights is health care. Without health care right, children with disabilities would not be able to benefit from the rest of the other rights. The importance of this research stems from the increased protection that the disabled people in general and children need in particular among the other segments of the population. Therefore, it is very important to consolidate and implement the protection at the state level, especially from a constitutional point of view because it is the supreme law. Moreover, it is difficult to violate or amend it except by complex procedures. Furthermore, the protection should be strengthened from the point of view of criminal law because it provides the necessary protection to those segments of society; it also punishes every person who violates the rights of this group and endangers their health. This protection must be activated through the development of economic, legal and other measures guaranteed by the state, which aim to create favorable conditions to improve the lives of disabled persons in general and children in particular.

## RESEARCH PROBLEM

Studying any academic topic requires the identification of the problems that this topic raises, regarding the topic of our research, the most important problems it raises is the effectiveness of the protection provided by both constitutional and criminal law to the right of children with disabilities to health security (*henceforth* RCDHS). It can be crystalized in the two questions:

1. Do the Iraqi constitutional and criminal law secure health right for disable children or do we need to amend or legislate new texts to ensure this protection?
2. Do the Iraqi constitutional and criminal law provide the disable children with favorable conditions that enable them to develop physically, mentally, morally and spiritually in a natural and healthy way?

## RESEARCH OBJECTIVES

This study aimed to analyze the constitutional and criminal texts related to the protection of children with disabilities with regard to health security and the extent of the commitment of the state to providing medical services for children with disabilities as one of their constitutional rights. It also aimed at proposing recommendations for developing legislation related to the RCDHS.

## METHODS

In the research, we used the descriptive analytical method in presenting the constitutional and criminal texts that protecting the RCDHS. In addition, the study compared between some Arab and foreign constitutions and criminal laws regarding the bases of the constitutional and criminal law responsible for protecting the right of disable children to health security.

## SEARCH PLAN

In order to fully look at the topic (the constitutional and criminal basis for protecting the right of disable children to health security), the research is divided into two sections: in the first section, the researchers deal with the constitutional basis for the RCDHS, while the second section is devoted to the basis of the RCDHS in the criminal law.

## 2. LITERATURE REVIEW

### 2.1 The constitutional basis for the right of disable children to health security

The right to get health care is one of the rights stipulated in international charters and national constitutions. There is hardly a national constitution devoid of a provision on health care as an important human right. This right is no longer an individual property of the person, but rather a right related to society as a whole. Therefore, one of the most important characteristics of this right is an inalienable right that is linked to a person even before his birth.

The right to health security is indispensable to the life and development of society, so the state, under constitutional provisions, has the responsibility to maintain and promote the health of its citizens. Good health is the motivation for economic and social development and the basis for the formation of a new generation capable of carrying the banner of leadership in the state. Likely, good health is a means of preparing a human force capable of economic renaissance and increasing the productivity of the individual (Metwally, 1997).

At the primacy of societal groups that deserve health care are children, especially children with disabilities who suffer from defects in their physical or mental integration.

National constitutions have been keen to establish the RCDHS. The constitutional legislator should explicitly stipulate the provision in the constitution. It should be a restricted on the ordinary legislator in what he enacts of rules and provisions within the limits of what the constitution stipulates for each of them in terms of its launch permissibility of legislative regulation.

If one of the legislations violates this constitutional guarantee, say restricting of freedom or a right that is stated in the constitution, such legislation is tainted by the defect of violating the constitution (Al-Qassas, 2020). Therefore, any legislation that includes a violation of the RCDHS is contrary to the constitution and must be repealed.

So far, the researchers brough a sufficient introduction of the topic, in what follows, we address the constitutional basis for protecting the RCDHS in two subsections: We address in the first sub-section the concept of the constitutional basis for protecting the RCDHS, and the second sub-section is devoted to the basis for protecting the RCDHS in the national constitutions.

### **2.1.2 The concept of the constitutional basis for the right of disable children to health security**

The constitutional basis refers to the source that created the right, that is, the reference to the source that created the right. With regard to the RCDHS, the basis for this right is the constitutional texts that dealt with it. Therefore, this right has a constitutional base which is a binding legal rule. In other words, it is an abstract and specific binding rule established and protected by the state. It aims to organize the social relations that are subjected to constitutional law through the consolidation of rights and obligations (Katkov & Korchigo, 1999).

We can define the constitutional basis for the RCDHS as: The binding constitutional rule that stipulates the protection and regulation of the RCDHS. Through this definition, it becomes clear to us that the characteristics of this rule are:

1. It is an abstract general rule that benefits everyone to whom the concept of a child with a disability applies. A disabled child is a person who has not reached the age of majority according to the law of his/her country and who is unable to fully or partially secure the necessities of his/her normal individual and social life because of a congenital or non-congenital deficiency in his/her physical or mental abilities (Article One of the 1975 Universal Declaration of the Rights of the Disabled).
2. It is a binding rule characterized by an element of obligation. The authorities are obligated not to violate this rule, and they are obligated to protect the rights of children with disabilities in general and their right to health security in particular, because they are in dire need of it. Therefore, the legislative authority must protect these rights through the issuance of special laws to care for disables. Likely, the executive authority must implement these laws in a way that achieves the welfare and good health of this weak group. Still the judiciary, especially the constitutional courts, must monitor all laws and decisions issued by the legislative and executive authorities and work to overturn everything that contravenes the constitutional rule that defines the rights of the disabled in general and the disabled child to health security in particular.
3. It is a rule which includes an element of penalty, and this penalty differs from the penalty offered by ordinary legal rules such as criminal law or administrative law. Rather, it is a penalty of a special kind represented by an unorganized penalty formed by public pressure or public opinion in the event of a violation of the constitutional rule. It is also an organized penalty represented by revoking the law or the decision that violates the constitutional rule, so any law or decision that violates the rights of children with disabilities in general or their right to health security in particular, the penalty is the reversal of this law or decision by the constitutional court (Abdel Khaleq, 2021).

### 2.1.3 The national constitutional basis for the right of disable children to health security

The right to get health security is one of the rights that are of paramount importance in legal systems, foremost of which are constitutional laws, as it is among the constitutionally enshrined rights. Health has been defined in the constitution of the World Health Organization as a state of complete physical, mental and social well-being, not merely the absence of disease or health.

The right of the disabled child to obtain the highest possible health care must be one of the important goals pursued by the state, so that the disabled child would not become a burden that leads to the disruption of economic growth (Ahmed, 2015). This right is considered as one of the most important human rights, especially for the disabled child. The 1989 Convention on the Rights of the Child obligated the state parties to provide free health care for disabled child. Furthermore, the convention stipulated encouraging of international cooperation through the exchange of appropriate information in the field of preventive health care and medical treatment for disabled children (Article 23 of the 1989 Convention on the Rights of the Child). Therefore, most of the constitutions either explicitly or implicitly, recognize the RCDHS. Based on the above demonstration, the researchers divide this subsection into two categories: In the first part, we deal with the constitutional basis for the RCDHS in foreign and Arab constitutions, and the second part is devoted to studying this right in the Iraqi constitution.

#### 2.1.3.1 The constitutional basis for the RCDHS in foreign and Arab constitutions

In this section, we will get acquaintance about some constitutions that dealt with the RCDHS, whether explicitly or implicitly. Among these constitutions are:

**1- The Constitution of the Russian Federation of 1993** did not address the rights of disabled children, but rather the constitution included them within this right to health care in (Article 41), based on the principle of equality. Article (41) stipulated that (everyone has the right to health care...). Thus, children with disabilities are covered by health care like the rest of the people, because Article (41) mentioned the phrase (for each individual). Furthermore, Article (41) stipulated that providing medical services free of charge to every citizen without exception, including disabled children.

As for Article (38/1), it stated (motherhood, childhood and the family are under the protection of the state), and by combining Articles (38/1 and 41) of the Russian Constitution, it becomes clear to us that the RCDHS is constitutionally protected even if the constitution does not provide it explicitly. In addition to what has been demonstrated, the text of the Russian Constitution in Article (17/1) recognizes the rights and freedoms of man and citizen that the constitution guarantees in accordance with the recognized principles of international law. Since the Russian Federation joined the Convention on the Rights of Persons with Disabilities of 2006, as well as the Convention Child Protection for the year 1989, the Russian Federation issued a set of laws that guarantee the RCDHS, including:

- The Citizens' Health Protection Law for the year 1993. It stipulated in Article 27 that (disabled persons, including disabled children, have the right to get medical assistance.... The state health institutions should provide them with medicines and prosthetic limbs, and this care must be provided free of charge).
- The Social Protection Law for the Disabled of 1995. Article (13) stipulated (Providing qualified health care for the disabled people free of charge...).
- The Law on Basic guarantees for the Rights of the Child in the Russian Federation of 1998. This law defined in Article (1) a disabled child as (those who suffer from disabilities in physical or mental development). This law explicitly imposed in Article (10) the governmental health institutions to sponsor and take the necessary measures to improve the condition of the child and prevent diseases, including medical supervision and medical rehabilitation for children with disabilities.

**2- The Constitution of the United States of America of 1787.** The American Constitution also did not explicitly legislate the RCDHS, but it can be induced from the rights and public freedoms stipulated in the constitution that American citizens enjoy without discrimination on the basis of color, religion, creed, or sex or other. The United States of America has issued a set of laws based on the American Constitution stipulating the RCDHS. These laws include:

- Social Security Act of 1935 which stipulated to provide medical assistance for children with disabilities.

- The Americans with Disabilities Act 1990. This law is considered the most important legislation that stipulates the rights of the disabled and includes all forms of civil rights protection and the provision of health care for people with disabilities, including children (Family Voices of California, 2015).

**3- The French Constitution of 1958** did not address the right of the disabled in general, and children with disabilities in particular to health security, as did the Russian and American constitutions. However, the French legislator made up for the shortcoming in the constitution by issuing the Social and Medical Procedures Law No. 2 of 2002, which provided for the inclusion of children with disabilities in health security.

**4- The Constitution of the Arab Republic of Egypt of 2014:** In contrast to the constitutions mentioned above (Russian, American and French), the Egyptian constitution came with explicit texts on the RCDHS, as Article (80) stipulated (...the state guarantees the rights of children with disabilities and their rehabilitation and integration into society). Likely, the same Article (80) stipulates that (every child has the right to health care) and by combining the two paragraphs, it becomes clear to us that the Egyptian constitutional legislature explicitly stated the RCDHS. The Egyptian legislator not only explicitly issued the constitutional text regarding this disabled children right, but it legislated a special law for the Egyptian child for the year 2008, but also it devoted Chapter VI of it to (protection and rehabilitation of the disabled child), as stated in Article (75) the state's guarantee to protect the child from disability and from any work it leads to harm to the health and his physical and mental development and to take the required measures to detect the early disability of the child. Article (76) of the Egyptian constitution mentioned that one of the rights of the disabled child is to enjoy health care, and also stipulated that the medical services and prosthetic devices provided to the disabled child must be free without charge.

**5- The Constitution of the People's Democratic Republic of Algeria of 1996:** The Algerian constitution did not explicitly address the RCDHS, but we can induce this right from among the rights stipulated in the Constitution, which included all citizens without discrimination, especially the right to health.

Article 54 of the Algerian Constitution stipulates (Health care is a right for citizens; the state undertakes the prevention and control of epidemic and contagious diseases). This article mentioned (citizens) and based on the principle of (equality), this right includes all citizens without exception, especially children with disabilities because they are the most vulnerable group in society.

Since persons with disabilities are a category no less than ordinary individuals without disabilities, the legal guarantees established by the Constitution are the same as those enjoyed by any ordinary person, and this is highlighted by Article 32 of the Constitution. It stated that all citizens are equal before the law without discrimination. Furthermore, it made the disability of any kind indistinguishable (Lakhdari & Ben Jeddou, 2018). On the legislative level, based on the constitution, the legislative authority issued a set of laws related to the rights of people with disabilities in general and children in particular, including the Protection of Persons with Special Needs Law (02-09) for the year 2009. The most important laws related to the protection of children with disabilities is Law No. (15/12), for the year 2015, in which the aspect of disability was taken into account, as Article (3) mentioned that the disabled child enjoys the right to care and treatment (Abdul Karim, 2019).

From the above demonstrations, it is clear to us that the Egyptian constitutional legislator was successful in addressing the RCDHS. Likely, the Egyptian constitutional was not only satisfied with stipulating this right in the constitution, but also resorted to the legislation of the Child Protection Law (CPL) and allocated a separate chapter to the category of disabled children in which he dealt with the right of disabled children to care health and treatment.

### **2.1.3.2. The Iraqi constitutional basis for the right of disable children to health security**

After Iraq joining to the Convention on the Rights of the Child for the year 1989, pursuant to Law No. 3 of 1994, as well as to the Convention on the Rights of Persons with Disabilities of 2006, pursuant to Law No. 16 of 2021, it was necessary for the Iraqi legislator to legislate laws that guarantee the rights of children in general and the RCDHS in particular. Thus, the question that arises is what are the measures taken by the Iraqi legislator at the legislative level to implement these two agreements?

To answer this question, it can be said that with regard to the Constitution of the Republic of Iraq for the year 2005, it began by its concern for the child in the preamble of the constitution, (Determining to take care

of the child and their affairs...) and certainly at the forefront of his affairs concern for the health status of the child, especially the disabled. Furthermore, for the provisions of this Constitution, the legislator was successful in protecting the RCDHS.

Article (30/ paragraph first) stipulated the right to health as one of the rights of every Iraqi without discrimination, including disabled children; it also stated in the same article that the state guarantees health insurance for the individual and the family, especially for the child and woman. The state takes into account the disabled and people with special needs. Thus, by combining these constitutional texts, it induced that the constitutional legislature stipulates the RCDHS. As for the ordinary legislative level, the LWPSN No. 38 of 2013 legislated and stipulated in Article (15/ paragraph first) providing preventive and curative services, conducting laboratory examinations and analyzes. It also stated the provision of medical rehabilitation services and therapeutic services. Furthermore, the text of this law seeks to secure treatment for them inside and outside Iraq.

However, the legislator till the writing this research, did not legislate the CPL, which was referred from the Council of Ministers to the House of Representatives after being scrutinized by the State Council. This draft law, in Article (8), addressed the right for children with disabilities to enjoy the necessary health security in all areas, including medical and health treatment. Article (17) obligated the responsible authorities to take all means of care of children healthily, including children with disabilities.

## **2.2 The criminal law basis for the right of disable children to health security**

The criminal basis refers to the texts that criminalize operations aimed at violating the right to health, i.e. the source of the criminal rule that criminalizes the actions that result from it. This rule may be objective or may be formal. The subjective rules represent the penal code, which can be defined as a set of legal rules that define crimes (actions and omissions) and the penalty (penalties and measures) that are appropriate for them (Al-Haidari, 2017). Besides, formal rules that represent the procedural rules, are defined as the rules that regulating the means of investigation and verification of the occurrence of the crime, the prosecution of the perpetrator and the imposition of the penalty against him (Al-Hiti, 2016).

After this introduction, what concerns us in this topic is to answer to the following question: What are the criminal rules that criminalize the assault on the RCDHS? To answer this question, we divide this part into two sub-sections: In the first, we address the criminal protection of the RCDHS in Penal Code No. 111 of 1969, and the second is devoted to the criminal protection of the RCDHS in special laws.

### **2.2.1 Criminal protection of the RCDHS in the Penal Code No. 111 of 1969**

The Penal Code did not directly stipulate a crime of violating the RCDHS, but the criminal protection for this right can be determined through a group of crimes stipulated by the criminal legislator in Penal Code No. 111 of 1969. These crimes are general, that is, they target everyone, whether adult or a child, healthy or disabled. Any act that leads to a breach of human health is a violation of his/her right to health security, including a disabled child. The breach of the health standard is achieved by any prejudice that affects the level (physical, mental, and psychological) and there is no difference between physical illness and mental illness, both of which represent ill health (Al-Asadi, 2002).

Through what has been mentioned, it is obvious that any attack on human health in general and a disabled child in particular is a punishable crime, given that the function of criminal law is a protective to values, interests, or rights that are so important and do not get sufficient protections prescribed for them under the articles of law. The protection of these rights is ensured by the imposition of criminalization on the acts that infringe on these rights, i.e., what we call (criminal protection) (Ateeq, 2010).

At the primacy and most important of these rights is the right to health security, especially for children with disabilities. Therefore, the penalties should be severe in the case if the criminal act is directed at a disabled child, and this does not contradict the principle of (criminal equality) because the weakness that characterizes some individuals, such as young people and those with deficiency in their mental or physical strength puts them in an unequal position with others, especially when crimes are committed against them (Al-Hammad & Naour, 2018).

Regarding the criminal protection of the RCDHS, there are no provisions in the Iraqi Penal Code that criminalizes the violation of this right. However, there are a group of crimes stipulated by the penal

legislator in the Penal Code that can be relied upon to punish whosoever violates the right of children with disabilities to security. Among these crimes are the crime of harm and the crime of refusing to provide relief. We deal with these two crimes in two separate sections.

### **2.2.1.1 Harm crimes**

Harm crimes are crimes that affect the human body and one's health; the legislator chose the term harm as a broad concept that includes everything that affects human health and the safety of human body. Furthermore, the right of the disabled to the safety of his body comes next to his right to life. The legislator, for this reason, guarantees to each member of society adequate protection that achieves the continuation of this safety and not to be affected in any way other than what is permitted by legal texts (Ahmed, 2015).

Among this infringement is the assault on the health of the disabled. The disabled have the right to maintain the level of validity of his body and all its organs that enable them to carry out their usual functions in a normal manner. Health refers to the set of capabilities that an individual enjoys; they make the body's organs able to carry out their bodily functions normally. Thus, any action that leads to a decrease in the health level as a result of contracting a specific disease is included in the harm crime stipulated in the Iraqi Penal Code (Abdul-Karim, 2005).

So, every person, including a disabled child, has the right to keep the share of health that he has. Hence, every act detracts this health, whether by the occurrence of a disease that did not exist previously or an increase in the amount of a disease that the victim was previously suffering from (Al-Haidari, 2012). With regard to harm crimes, the Iraqi legislator dealt with these crimes in the Penal Code in Articles (412-415), and each case has its own penalty.

**1- Felonies harm crime:** These crimes are stipulated in Article (412); the Iraqi legislator considered any offense of intentional harm that leads to permanent disability events; such crimes fall within the concept of harm crimes whether the offense is intended to cause permanent disability or not. If the penetrator intended, the penalty shall be imprisonment for a period not exceeding 15 years (412/1), but if he did not intend, he shall be punished with imprisonment for a period not exceeding 7 (412/2).

In this article, the Iraqi legislator specified the forms of permanent disability represented (cutting or separating a member of the body or amputating a part of it, losing a benefit or its deficiency, insanity or a disability in the mind, or permanently disabling one of the senses completely or partially, or distorting a body whose removal is not expected, or immediate danger for life). So, any harm on a disabled child that leads to permanent disability will be punished according to Article (412) in case the elements of the crime are available from the material element and criminal intent,

There is no provision in the special law, whether the crime was committed by beating, wounding, violence, giving a harmful substance or any act against to the law, and these actions led to the criminal result of injuring the victim (the disabled child) with a disease or permanent disability from which there is no hope of recovery. The permanent disability was defined as the loss of a member of the body or the loss of a part of it, or the loss of a benefit or its weakening, or the loss of a sense of the five senses or its permanent weakness (Al-Sammak, n.d).

**2- Misdemeanors of harm:** The Iraqi legislator identified the punishment of misdemeanors of harm with imprisonment for a period not exceeding 5 years whether it was intentional or unintentional. Imprisonment for a period not exceeding 1 year or a fine of not less than two hundred thousand dinars and not more than one million dinars. The amount of the fines was amended in the Penal Code in accordance with the Law to Amend the Fines contained in Penal Code No. 111 of 1969, as amended, and other special laws No. 6 of 2008. However, the legislator tightened this penalty by making the term of imprisonment not exceeding three years and a fine or one of these two penalties, if the crime resulted in a bone fracture, injury or disease that prevented the victim from carrying out his usual work for a period not exceeding twenty days. On the contrary, Article 416 deals with the unintentional harm. If the crime is committed unintentionally, that is, through negligence, lack of attention, recklessness, lack of precaution, or failure to observe laws, regulations and orders, thus, the penalty in such case shall be imprisonment for a period not exceeding six months and a fine or by one of these two penalties.

### **2.2.1.2 Crime of refusing to provide relief**

The criminal law in a country may be affected by moral levels to a large extent, and since it is the duty of the legislator, and even its reliable legislative policy, to balance the manifestations of thought and the reality of the situation in society. Thus, it is necessary for the legislator to balance and link as much as possible between the conditions of this society and its established moral values in its depths.

Therefore, what is considered a duty in the eyes of morals may become a legal duty and this becomes clear when the legislator resorts to criminalizing refraining from performing a moral duty (Al-Hiti, 2011). The crime of refusal is defined as the refusal of a person to do a certain positive act that the legislator expected from him in certain circumstances, provided that there is a legal duty that obliges him to do this act, and that the abstainer is able to do it (Ahmed, 2010).

Since the health security of citizens has become a legal and national duty for all peoples. So, health security was legalized in national constitutions and international covenants. Children with disabilities are the most segments of society who need health security. Therefore, the refusal to provide medical assistance by the doctors falls under the penalties of the crimes of refusing to provide relief to the afflicted, stipulated in the Penal Code.

The Iraqi Penal Code identified the crime of refusal in Article (370/2). Article (370/2) stated that one shall be punished by imprisonment for a period not more than six months and a fine for anyone who refrains or neglects without excuse to provide relief to a distressed person in a disaster or a victim of a crime). Likely, Article (371) stipulates: "Whoever is charged by law or by agreement with the care of a disabled person because of his young age or old age or because of his health or mental condition, and abstains without excuse from carrying out his duty, shall be punished by imprisonment for a period not more than one year and a fine or any one of these two penalties."

The aforementioned provisions include physicians and others. Physicians therefore, must provide health care for disabled children. But in the event the doctor refuses to provide disabled children with assistance, physicians will be punished according to the Articles (371, 372) mentioned above. Since the rules of medical behavior and medical ethics have imposed on the doctor to respect all laws and to be subject to the provisions of all laws as a citizen, except for what is officially exempted from some provisions. These rules also stipulated that effort should be made to care for the patient.

Accordingly, it becomes clear that the doctor bears criminal responsibility in the event of his refusal to provide medical and treatment assistance to the disabled child. This is considered a violation of the disabled child right to health security, especially if this doctor is mandated by law or agreement to provide assistance and was able to provide it, whether the assistance was provided the doctor or by asking for help from others if he was unable. This responsibility rests with the doctors or anyone who works in the health professions. If one meets the necessary conditions for treating the patient and providing treatment to them. The Egyptian constitutional legislator did a good job when it criminalized refraining from providing treatment in its various forms to every person in cases of emergency or danger to life in Article (18/4) of the Egyptian Constitution of 2014.

### **2.2.2 Criminal protection of the right of disabled children to health security in special laws**

The legislator did not only provide the criminal protection for the RCDHS, as stipulated in the punitive provisions contained in the Penal Code, which are directed to all groups without discrimination, but rather it resorted to provide the criminal protection in laws relating to the protection of children or the protection of the disabled.

Regarding to Iraqi laws, no penalties were mentioned in the sponsoring of LWPSN No. 38 of 2013 related to the protection of the RCDHS. Unlike the Egyptian law, which succeeded in this direction; it stated explicitly about punishing people who endanger the health and lives of disabled children or in the event of refusal to provide treatment. The Egyptian Law on the Protection of Persons with Disabilities of 2018 stated in Article (47) that "Anyone who exposes a disabled person to one of the danger situations stipulated in Article 46 of this law shall be punished by imprisonment for a period of no less than six months and a fine of no less than five thousand pounds and not more than fifty thousand pounds or one of these two penalties).

Referring to the text of Article (46) of this law, it is clear that article 46 considers a child with disabilities to be at risk in a situation that threatens respect for his personal dignity, self-exploitation and discrimination against him because of disability if his health or life is at risk, as well as refraining from providing health



care or using therapeutic means or medical experiments that harm the disabled child, or the failure to provide the necessary treatment for children with disabilities.

Therefore, we suggest to the Iraqi legislator to follow the example of the Egyptian legislator regarding the criminal protection of children with disabilities stipulated in the LWPSN No. 38 of 2013.

As for CPL, the Egyptian legislator stipulated in the CPL in Article 96 the same terms that we mentioned and which were stipulated in Articles 46 and 47 of the Egyptian Law for the Protection of Persons with Disabilities of 2018. The cases which we mentioned are considered dangerous to the health and life of the child.

With regard to Iraq, so far, the CPL has not been legislated, but it is still just a project awaiting its enactment by the House of Representatives. This project stipulates in its texts the criminal protection of the RCDHS. It stipulates in Article (65) the punishment of anyone who assaults a child, whether by beating, wounding, giving a harmful substance, violence, or any act that violates the law and leads to permanent disability with imprisonment for a period of not less than five years and not more than ten years. But if the mischievous act leads to the child's illness, or broken bone, the penalty shall be imprisonment for a period not exceeding seven years and a fine of no less than one million and five hundred thousand dinars and not more than ten million dinars. Article (69/2) of the draft law also criminalizes anyone who endangers the health of the child, whether or not they intended to do so.

As for Article (70), considered the harm to a child's health resulting from negligence as an aggravating circumstance, and in relation to Article (86/2), it punished with life imprisonment anyone who tempts a child to take drugs and this leads to the child becoming addicted to it, or afflicting him with illness, injury, or ill health. Furthermore, other articles mentioned in this project, bearing in mind that all of what was mentioned regarding the protection of the child's health also applies to the disabled child in the light of Article (8) of this project, which stipulates that "Children with special needs, in addition to the recognized rights of the child, have the right to get the necessary care." In all fields of treatment and health ....).

To sum up, the Iraqi Child Protection Project is a valid law with regard to criminal protection of the RCDHS, because it provides adequate protection for this right and punishes every person who violates this right and harms the health of the disabled child. Therefore, the legislative authority must expedite the enactment of this law because of the protection it provides for the rights of children in general and children with disabilities in particular.

## **CONCLUSION**

The researchers mention the most important findings and scientific recommendations that can be relied upon in protecting the RCDHS.

## **RESULTS**

- 1- The main source or basis for the RCDHS at the national level is the constitution, which is the supreme law in the state.
- 2- The mandatory constitutional texts that affirm the RCDHS.
- 3- Some national constitutions do not explicitly mention the RCDHS, including the Russian, American and French constitutions. Likely, most constitutions that were issued before the conclusion of the Convention on the Rights of Persons with Disabilities of 2006, did not explicitly mention disabled children, but they were included in the texts that treated them as citizens without discrimination.
- 4- The Egyptian constitution is considered the best Arab constitution in terms of its stipulation of the RCDHS.
- 5- The Iraqi constitution of 2005 did not explicitly address the RCDHS, but rather included articles that dealt with the right of children in general to health security without discrimination.
- 6- The RCDHS is criminal protection based on the criminal provisions contained in the Penal Code and the laws relating to the protection of children or the protection of the disabled, which criminalize every act that leads to harm to the health of children with disabilities.
- 7- Refraining to helping children with disabilities without an excuse, especially with regard to providing medical or treatment assistance, is a crime for which the law is held punishment against.

## RECOMMENDATIONS

- 1- Issuing an article in the Iraqi constitution that stipulates the RCDHS, considering that the constitution is the best guarantor of the rights of people with disabilities, especially children, with an emphasis on providing the necessary guarantees to implement this right.
- 2- Amending the Iraqi LWPSN No. 38 of 2013 by issuing texts that explicitly punish anyone who endangers the health of a disabled child.
- 3- Legislating the Iraqi CPL because of the deterrent and severe penalties contained in this law for anyone who violates the RCDHS and puts their health and lives at risk.
- 4- Considering the disabled child as an aggravating circumstance in the harm crime stipulated in the effective Iraqi Penal Code.

## REFERENCES

1. Abdel Khaleq, E. Z. B. (2021). *Constitutional protection for people with special needs*. Dar Al-Fikr Al-Jamii
  2. Abdul Karim, M. (2019). The right of the disabled person to health care in Algerian law. *Journal of Studies on the Effectiveness of the Legal Rule*, 3(2)
  3. Abdul-Karim, H. A. (2005). *Crimes of assault on the human right to physical integrity: A comparative study*, (Unpublished PhD thesis). University of Baghdad
  4. Ahmed, A. A.Q. (2010). *The crimes of refusal*. New University House.
  5. Ahmed, K. M. M. (2015). *Criminal protection for people with special needs*. Dar Al-Fikr Al Jamia.
  6. Al-Asadi, D. A. A. (2002). *The right to body integrity is a guarantee of the accused*, (Unpublished Master thesis), University of Baghdad.
  7. Al-Haidari, J. I. (2012). *Al-Wafi in the penal code (special section)*. Al-Sanhoury Library
  8. Al-Haidari, J. I. (2017). *Al-Wafi in the general section of the penal code*. Dar Al-Sanhouri.
  9. Al-Hammad, H. H. H. & Naour, A. J. (2018). Criminal protection for people with special needs at the level of punishment. *Basra Studies Journal*, 13 (28), 257–243. <https://doi.org/10.31185/lark.Vol4.Iss35.1328>
  10. Al-Hiti, M. N. (2011). *The general theory of social crimes*, (1 st ed.) Al-Sanhoury Library
  11. Al-Hiti, M. N. (2016). *Explanation of the Penal Code (General Section): Part One (General Theory of Crime)*, (1 st ed), Dar Al-Sanhoury
  12. Allison Folmar- Constitution Rights: Medical Treatment for children with special needs- [www.Allisonfolmarlaw.com](http://www.Allisonfolmarlaw.com).
  13. Al-Qassas, A. A. T. (2020). *Constitutional criminalization*. New University House.
  14. Al-Sammak, A. (n.d). The criminal encyclopedia of criminal justice (Vol. 4, 1 st ed.) Al-Irshad Press.
  15. Ateeq, A. (2010). *Legal protection for people with special needs*. Dar Alnahdat Alarabia
  16. Family Voices of California, (2015). *6 Child Disability Rights Laws You Should Know*. <https://www.lpfch.org/publication/6-child-disability-rights-laws-you-should-know>
  17. Katkov, D. B., & Korchigo, E. V. (1999). *Constitutional law of Russia: Jurisprudence textbook*. Moscow
  18. Lakhdari, A., & Ben Jeddou, F. (2018). Legal protection of children with disabilities in Algerian legislation. *Journal of Law and Political Science*, 5(2), 414-427.
  19. Metwally, M. (1997). *The principle of equality before public utilities as applied to the distribution of health services in Egypt*, (1 st edition). Arab Renaissance House
- Constitutions and Ordinary Laws:**
- 1- Constitutions:**
20. The Constitution of the Arab Republic of Egypt of 2014.
  21. The Constitution of the Federal Republic of Russia for the year 1993.
  22. The Constitution of the People's Democratic Republic of Algeria for the year 1996.
  23. The Constitution of the Republic of Iraq for the year 2005.
  24. The Constitution of the United States of America of 1787.
  25. The French Constitution of 1958.
- 2- Ordinary laws:**
26. Algerian Child Protection Law No. 15-12 of 2015.
  27. Egyptian Child Protection Law No. 126 of 2008.
  28. French Social and Medical Procedures Law No. 2 of 2002.
  29. Iraqi Law No. 38 of 2013 for the Care of People with Disabilities and Special Needs.
  30. Iraqi Penal Code No. 111 of 1969.

31. Protection of Persons with Special Needs Law (02-09) for the year 2009.
32. The American Social Security Act of 1935.
33. The Americans with Disabilities Act of 1990.
34. The Citizens' Health Protection Law for the year 1993.
35. The Law on Fundamental Guarantees of the Rights of the Child in the Russian Federation of 1998.
36. The Social Protection Law for the Disabled of 1995.