



PENALTY FOR THE CRIME OF TRADING WITH A HOSTILE COUNTRY DURING WAR TIME (COMPARATIVE STUDY)

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Article history:	Abstract:
Received: 6 th September 2022 Accepted: 6 th October 2022 Published: 11 th November 2022	<p>Economic support for a hostile country significantly contributes to the dominance of its economy through increasing of its material potentials. Without these capabilities, war cannot take place and continue and any increase in country's potentials implies that this country can continue fighting. Therefore, the Iraqi comparative and penal law have sought to criminalize trading with a hostile country in time of war because the interest affected by this criminal attack is not concerned with a specific individual or individuals, but the entire state.</p> <p>The problem of the study lies in the fact that the Iraqi legislator treats with the issue of trading within the scope of the penal law although there are shortcomings in this treatment. The legislator failed when he expanded the circle of people with whom it is criminal to trade, especially the country's nationals if they reside outside their country or residing in the country if they left it for a certain period, during the period of residence. As a result, the punishment must be imposed by the people in execution of a judicial decision against those who are proven guilty for the crime in accordance with a decision issued by a competent authority. This means that the punishment is imposed only against a culprit or accomplice; this is called the principle of personal punishment.</p>

Keywords: Crime of trading, war time, original sentence, secondary punishment, legal conditions and excuses

1. INTRODUCTION:

Offence of trade with a hostile country in the wartime was classified as one of the Offences harmful to the public interest; the latter amounted to a direct Assault on the right of the State as a whole not only on a particular person. Therefore, the crime of trade must be studied because it is a matter related to security and stability of the State since the trade with its multiple images , whether it's import, export or any other business, benefits the country a lot, so how can it be used as a tool against it?.

2- WHAT IS MEANT BY OF TRADE WITH A HOSTILE COUNTRY IN THE WARTIME :

The trade with a hostile country is as a serious act affecting the external security of the State, so we're going to divide this paragraph into definition of trafficking, the wartime and the hostile country.

2-1 - definition of the trafficking:

It is the act or the work was done by its owner aiming at the speculation (profit-making), the work is often done in the form of a project by someone who deals with this project as an ongoing craft (Mohamed El Fadhel, 1965). It is understood from this definition that the profit is the basis on which it was based to clarify what's a business, but this business had to be in a form of an ongoing project, i.e., a permanent work. Trade was also defined as dealing or doing business for the purpose of obtaining profit from the price difference (Mubarak bin Suleiman bin Muhammad Al Suleiman, 2006). It is observed that this definition corresponds to the first one in terms of the obtaining of the profit, but they are different in the way of obtaining it.

2-2- The Hostile Country:

The hostile country is defined as every State between itself and another State a state of war which does not end with a truce . It is also defined as a country which in war with another country (Dr. Abdul Ilah Muhammad Al-Nawaisah, 2005).

2-3 The Definition Of The Time Of War:

There are those who knew the wartime as status of actual fighting or the case of stop fighting (truce) without acting of reconciliation, whether it is the result of a permanent or temporary truce (Wajdi Shafeeq Farag, 2010). This definition is somewhat in line with the definition of a state of war to which it was referred by the Iraqi Penal Law in the second paragraph of Article 189. It was defined also as the status of the actual combat between the State or who is in the rule of it as the groups hostile to this State, i.e., non-State political groups as long as these groups are treated as combatants ((Dr. Khaled Mohamed Kadfour Al Muhairi, 2013). This definition is to be criticized being narrower in wartime clarification in comparing with the first definition; it did not refer to the truce in which the combat will cease.

3- PENALTY FOR THE OFFENCE OF TRADE WITH A HOSTILE COUNTRY IN WARTIME :

The penalty is defined as a sanction imposed in the name of the people pursuant to a judicial ruling against those found responsible for that crime under a decision issued by the competent authority (Dr. Maher Abed Shawish Al-Durra, 1990). So, we will divide this paragraph into original penalty and secondary penalty.

3-1 Original Penalty:

The original penalty is the essential sanction of the committed offense, so it includes the judgment independently and no other penalty shall be imposed, and the article 85 provides for this penalty. For the Egyptian Penal Code, the original penalties were contained in article 13 from the Egyptian Penal Code as well as they were contained in the article 17 of the Italian penal code.

The original penalties for the offence of trade with a hostile country in wartime are imprisonment and a fine .

3-1-1: Imprisonment:

The penal laws (Iraqi, Egyptian and Italian) punished the perpetrator of the offence of tradewith a hostile country in wartime with a prison sentence, but they disagreed, however, in determining the length of imprisonment. For the Iraq's penal code, it punished the perpetrator of this offense with a sentence of temporary imprisonment; the article 172 provided that "...shall be punishable by imprisonment for a term not exceeding ten years...". So, the penalty of the prison shall be imposed for a term not exceeding ten years on anyone who conducts business regardless of type. As for the Egyptian Penal Code, it provided for the penalty of the rigorous imprisonment for everyone who imported or exported goods and products; it provided that "...Anyone who, in time of war, by himself or through someone directly or by another country, exports goods, products or other materials from Egypt to a hostile country or imports any such item from Egypt shall be punished by rigorous imprisonment..." Article 79 of the Egyptian Penal Code. For the rigorous imprisonment penalty is "...That the sentenced person be placed in a legally designated prison and the employment of this person in prison for the term he is sentenced to... The penalty/sentence of the rigorous imprisonment must be not less than ten years , not exceeding fifteen years (Article 14/1 of the Egyptian Penal Code), also the Egyptian Penal Code provided for the penalty of imprisonment against everyone who conducts any business (Except for import and export) with a hostile country; it provided for "...shall be sentenced to imprisonment... everyone who conducted, in the wartime, other businesses by himself or by someone else with nationals of a hostile country or with agents, delegates or representatives of the country whatever their residence or with an individual or body residing in this country (79A, Egyptian Penal Code). As for the Italian penal code, it provided that"... shall be sentenced to imprisonment for a term between two and ten years against everyone who undertakes business..."

this means that the Italian penal code determined the penalty of the imprisonment against everyone who undertakes any business regardless its type.

3-1-2 The Fine:

The fine is considered as an original penalty in the offense of the trade which is imposed besides prison penalty or may be imposed as an original penalty alone without the imprisonment by virtue of the text of the Iraqi Penal Code in the article (172). But for the Egyptian Penal Code, in the articles (79, 79a), made the fine as an original penalty may be imposed alone without the imprisonment, also it did not provide for one fine penalty for the trade with a hostile country in the wartime, but it made a difference in the amount of the fine between import, export and other businesses. For the fine of the import or export equals to five times the value of things while the fine of the other businesses not less than 1.000 pounds and not exceed 10.000 pounds. But for the Italian penal code, it made the fine penalty besides the imprisonment penalty for a term from two years to ten years; it provided for" A fine equals to five times the value and any way, the fine shall not be less than 1.032 euros.". this means that the Italian Penal Code agreed with the Egyptian Penal Code in respect of the imposed fine on the convicted person in the offense of the trade in the sense that the Italian Penal Code determined a fine equals to five times the value and the Egyptian Penal Code determined a fine , for the import and export, equals five times the value of things. Moreover, The Italian Penal Code is unique in providing for the penalty of arrest as an original penalty for the fine penalty.

Moreover, the researcher believes that the Iraqi legislator in the Penal Code failed when it left the discretion to the court by imposing the penalty of imprisonment for a term of ten years or a fine . so, we call on the legislator to amend the legal provision and delete the phrase (or these two penalties), and the penalty of fine must be imposed beside the penalty of imprisonment for a term not exceed ten years, and so the legal provision will become "shall be punished with imprisonment for a term not exceed ten years and a fine not less than 500 dinars and not exceed 10.000 dinars " , this is to achieve deterrence and the painful on the perpetrator, especially it is an offense of trade and the perpetrator may be with a financial ability, so he will not be affected by the penalty of the fine.

3-2 The accessory penalty:

The Iraqi Penal Code defined the accessory penalty as "Sentence/penalty imposed on a person sentenced by law without the need to be provided for in the provision (article 95 of the Iraqi Penal code). Since this penalty is executed without the judge pronounce it, and the Convicted person shall not Refrain from or object to the execution of the penalty because this penalty is legally prescribed , also the judge shall not be exempt the Convicted person from its execution since it follows the original penalty directly. (Dr.. Hassoun Obaid Hajeej, Hassan Khanjar, 2014).

The Iraqi, Egyptian and Italian penal codes did not provide for an accessory penalty for the offense of the trafficking, so reference must be made to general rules. The accessory penalty is divided to two types:

3-2- Deprivation Of Certain Rights And Privileges:

the Convicted person in the offense of the trade will be deprived from some rights and privileges based on the provision of the article (96) of the Iraqi Penal Code " Life imprisonment or temporary imprisonment is followed by de jure from the day of sentencing to the release of the perpetrator his deprivation of the following rights and privileges:1- Functions and services held by him, 2- To be an elector or elected to representative councils, 3- To be a member of the administrative councils, the municipality, or one of the companies, or he was a director of them , 4- To be a guardian, a trustee or an agent, 5- to be an owner, publisher or editor-in-chief of a newspaper. Also, according to Article 97 of the Iraqi Penal Code, he will be deprived of management or disposal of his funds/money non the endowment or the testamentary. For the Egyptian Penal Code, it provided for " every judgment as a criminal sentence entails inevitably the deprivation of the convicted person of the rights and privileges : first, Admission to any service in government directly or as a contractor. Second, have a rank or honor. Third, evidence before courts. Fourth, the management of his tasks or works related to his property and his money within the period of his arrest and shall appoint a trustee of this department to be approved by the Court. Fifth, his continuation from the day of final sentencing as a member of a council, council of directorates, municipal or local councils or any public committee. Sixth, his validity to be a member of a designated body (article 25 of the Egyptian Penal Code). For the Italian penal code, it provided that: 1- will be deprived of holding public office , 2- holding a particular profession , 3- Closure of management offices for legal persons and companies, 4- it is prohibited to contract with the public administration, 5- termination of the employment relationship, 6- confiscation. But for the prescribed accessory penalties of the fine are: 1- Suspension of practicing the profession, 2- Suspension of the Office of Management or Legal Companies.

It will be understood that the penalty of the confiscation is from the accessory penalty in the Italian penal code not from the complementary punishment as in the Iraqi and Egyptian penal codes (we will point out that later). Moreover, there is an accessory penalty of the fine, this is what's not mentioned in the Iraqi and Egyptian penal codes. For the accessory penalty of the fine in the Italian penal code, the researcher believes that the accessory penalty of the fine is general and it was understood from it that the trade will stop anyway, therefore it is as a cruel punishment because the trade poses a danger to the interest of the country if it was with a hostile country and in the wartime not always, also the suspension of the office or the company for a term determined by the law is a penalty which commensurate with this offense.

3-2-2- Police Surveillance:

The Iraqi penal code in the article (108) defined the Police Surveillance as " the surveillance of the convicted person's behavior following his release from prison to make sure of the integrity and the good behavior" , i.e. put him under surveillance of the police for a period of time to make sure of his integrity and the good behavior requiring some matters as restricting his residence to a specific place (Talal Abu Afifa, 2012), so the penalty of the police surveillance is one of the freedom-restricting penalties, but its execution outside the prison as the convicted person will be under the surveillance of the police in the offense of the trade based on the article (99) of the Iraqi Penal Code in which was stated that" who has been sentenced to imprisonment for a serious crime against the external security of the State will be de Jure, after his release from prison, under the surveillance of the police" . but for the Egyptian penal code , under the article 28" .. every one who has been sentenced to hard labour or imprisonment for a felony against government security ... shall be, after the expiration of his sentence, under the surveillance of the police for a term equals to the term of his penalty without a period exceeding five years..".

For the Italian penal code did not state the penalty of the police surveillance.

It's clear from what's said that the penalty of the police surveillance is applied on the convicted person in the offense of the trade by force of law without it is provided for in the judgment when the offender sentenced to imprisonment because this offense is one of the offenses which affects the external security of the State (as in the Iraqi legislation) or as the Felonies against government security ((as in the Egyptian legislation). Nonetheless, the Court may commute the period of surveillance or it may order the exemption of the offender from the surveillance or the easing of restrictions , but if the convicted person violated the provisions of the surveillance, he shall be punished with imprisonment for a term not more than one year and a fine not more than 100 dinars, or he shall be punished with imprisonment only in accordance with the article (28-29) of the Egyptian penal code if the court considered that the personality, circumstances and social status of the unsub do not warrant putting him under the surveillance. But, if he violated the provisions of the surveillance such as the non-compliance with residence at a particular place , he shall be punished. So, the legislator's intervention in this regard is inevitable because the surveillance is a penalty must be executed by the convicted person outside the prison, i.e. when he is a free one, and then this implementation can only be guaranteed by a sanction for violation of its provisions (Dr. Ali Hussein Khalaf, Dr. Sultan Khalaf Al Shawi, 2015).

3-3- The Complementary Penalty:

The complementary penalty is a type of sanctions which is imposed when the judgment provides for it because it is not imposed on the convicted person by force of law, so it shall not be imposed alone (Dr. Muhammad Khalaf, 1978), this means that it shall not be imposed unless it is pronounced by the judge in addition to the original penalty (Dr. Ahmed Awad Bilal, 1995). The Iraqi, Italian and Egyptian legislators did not indicate, in the penalties codes, the complementary penalty for the offense of the trade with a hostile country in the wartime. Therefore, reference must be made to the general rules in which the following penalties were stated :

3-3-1 : Deprivation Of Some Rights And Privileges:

The Iraqi penal code provided for this penalty in the article (100) whereby it stated " in the case of sentence of life imprisonment or temporary imprisonment or the imprisonment for a term more than one year, the court may deprive the convicted person of one or more of the rights set out below for a term not more than two years starting from the completion date of the penalty execution or the time of its end, for whatever reason..... 1- Assuming certain functions and general services, 2- Holding national or foreign decorations, 3- take up arms. For the Italian penal code , it provided in the article (28) for the complementary penalties in chapter III of the first book, whereby it stated "1- Deprivation of the right to vote or to be elected at any electoral meeting and any other political right, 2- deprivation of holding one of the public posts, 3- deprivation of being a trustee or a guardian, 4- deprivation of the degrees or honours or decorations and other honorary marks The term of this penalty is from one to five years".

Based on the foregoing, the convicted person shall be deprived of some rights and privileges based on the discretion of the court since the court may deprive him or not of these rights, but this deprivation must be for a term not more than two years starting from the completion date of the penalty execution or the time of its end for any reason, and this unlike the deprivation of some rights as an accessory penalty since this must be during the execution of the sentence/penalty. For the Italian penal code, the term of the complementary penalty is from one year to five years.

3-3-2 Confiscation:

The confiscation is a penalty which is imposed for the purpose of State possession of materials and funds related to offense for free (Dr. Ahmed Shawky, 2007), i.e. transferred ownership of the funds of the unsub in the offense of the trafficking, then adding these funds to the state funds for free.

The legislator, in the Iraqi penal code in the article (100) has provided for "... the court may, in the guilty verdict in a felony or misdemeanor, rule on confiscation of items seized in the offense or the items which were used in committing it or were going to be used ...". For the Egyptian penal code, it stated in the article (30) "... the judge may , if he sentenced the penalty of the felony or misdemeanor, sentence the penalty of the confiscation of the seized items .."

In fact, the confiscation is a discretionary/ permissible penalty since the court has a discretion authority in imposing it whereby this penalty may be imposed as a complementary penalty for a person sentenced to an original penalty. However, this does not prevent it from being a mandatory penalty especially when the law provide for it explicitly (Ahmed Taher, 2019) as in the offense of the trade with a hostile country in the wartime ; whereby the Iraqi penal code in the article 172 provided for it "... It is sentenced of the confiscation of the items were found in the crime scene " , also the Egyptian penal code stated in the article 79a " ... It is sentenced of the confiscation of the items were found in the crime scene..". But for the Italian penal code, it did not provide for the penalty of confiscation in the criminalization provision of the trade offense, but by reference to general rules, we will find that this code provided for the penalty of the confiscation as one of the accessory penalties (As we explained earlier) which imposed on the convicted person by force of law without the need to provide for it in the judgment's decision. So, either way, the penalty of the confiscation shall be imposed whether the legislator provided for it in the provision of the offense(as in the Iraqi and Egyptian penal codes) or cited it among the accessory penalties (as in the Italy penal code). And the Italy, Egyptian and Iraqi legislators make the right when they provided for the penalty of the confiscation to achieve the public and private deterrence. In addition to what was mentioned, the Iraqi penal code is unique in providing for the penalty of the fine in the case of in case the items of the offense are not seized, whereby it stated" It shall be sentenced of the confiscation of the items were found in the crime scene, and in the case these items of the offense are not seized, the offender shall be sentence of an additional fine equals the price of the items in the crime scene. Also the researcher see that the Iraqi legislator made the right when he provided for that because the fine money will return to the State Treasury which leads to contribute to increasing the financial possibilities of the country, and so on the increasing of the military capabilities.

CONCLUSION:

At the end of this research, we have reached than the Iraqi legislator imposed the penalty of imprisonment and the fine or one of these penalties against who committed the offense of the trade with a hostile country in the wartime, i.e., he left the discretion to the court to choose the adequate penalty which is compatible with the circumstances of every unsub. But the Egyptian penal code, it made the distinction between the penalty of the import and export, and the other businesses. For the Italy penal code, its position was similar as which of the Iraqi penal code since it did not make a difference between the import and export, and the other businesses. For our part, we hope the Iraqi legislator will amend the penalty of the fine in the offense of the trade by imposing it along with the penalty of the imprisonment for a term not more than 6ten years, so the provision will be " ... shall be sentenced to imprisonment for a term not more than ten years, and a fine not less than 500 dinars and not more than 10.000 dinars ..." to

achieve the deterrence and the adequate painful on the unsub especially it is an offense of trade and the unsub may be with a financial potential will not be affected by the penalty of the fine alone.

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