

# The crime of doing medical work without a license (A comparative study)

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## **Summary**

*Medical work is considered one of the most important works that can undermine the human right to the safety of his body, so legislations, including the legislation in question, have sought to regulate the practice of this work, and to establish the rules and legal frameworks that govern it, in a way that removes the criminal character and gives it the character of legitimacy, And it shall exempt the person responsible from any criminal liability. In view of the seriousness involved in the practice of medical work on the right to body safety, the legislation subject to comparison stipulated that the medical practitioner must possess the scientific qualifications that would enable him to do this work, and that he possesses the necessary legal license, otherwise it will cease to be medical work Legitimate and becomes an illegal activity, the person in charge is asked about a crime, we called it the crime of practicing medical work without a license, and it is one of the serious crimes that has its implications, and its punishment is in accordance with the principle of legality.*

**Keywords:** *crime of doing medical work, without a license, A comparative study*

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## **Introduction**

### **First: the research topic**

The issue of preserving the integrity of the human body is one of the topics that has received the attention of the domestic legislation of various countries. Therefore, I have criminalized actions that would violate the sanctity of this body, such as wound and injury. But to preserve the integrity of the sick person's body sometimes requires that a person commit the previous actions with the intention of healing the patient, without being asked about the commission of a crime, but this person must have a certain quality, which is the attribute of the doctor or medical practitioner, and the work that is called He does medical work. The latter requires that the person in charge be exposed to the human body and cause him to be injured and injured, but his actions here are legitimate works, and the person responsible for them is not asked about them, except that their legitimacy is related to the availability of a basic condition, which is that the medical practitioner possesses the necessary legal license. In addition to other conditions such as the patient's consent and the intention of treatment, and in the absence of this license, the medical practitioner asks for a crime, we have termed it the crime of conducting medical work without a license, which we chose to be the subject of our research.

### **Second: The importance of research**

Since preserving human health and body integrity is an interest that legislation seeks to protect, its license to prejudice this interest by those involved in medical work, with actions that are like wounding and victimizing crimes if they are carried out by other people, was because of its appreciation that doing these work in them preserved the integrity of the body And for his health. But this work is not for anyone to do it, rather it must possess the required academic qualifications and legally authorized it to perform it. However, in practice, it may happen that some people do these tasks without possessing the qualifications or legal licenses, in a way that leads to prejudice the interest that the legislator decided to protect.

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### **Third: The research problem**

The problem of the study is limited to a set of questions that we will try to answer through this study, the most important of which are:

- 1- What is meant by medical work, and what are its conditions? Is there an agreement between jurisprudence, the judiciary, and the domestic legislation of comparative countries on this?
- 2- What is the crime of doing medical work without a license? What are its pillars and penalties?

### **Fourth: Research Methodology**

The comparative analytical approach is the approach that is consistent with the subject of our research, so we will adopt it through an analysis of texts and legal rules in the relevant laws, as well as a study and analysis of what have been said in internal jurisprudence and justice in the comparative countries, in order to identify the similarities and differences between them regarding the crime subject of our research.

### **Fifth: The research plan**

We will divide the topic of our research into an introduction, two studies and a conclusion. The first topic has been devoted to clarifying the concept of medical work, and we will address in the second topic the pillars of the crime of practicing medical work without a license. As for the conclusion, it included the most important conclusions and recommendations that we reached.

## **The first topic**

### **The concept of medical work**

It has been a result of the great scientific progress in the practice of the medical profession, that the development of medical work has witnessed a tremendous development, accompanied by an increase in the need for public health requirements. After it was limited to treating diseases, it expanded its scope and extended to include cases of diagnosis, and then prevention of diseases. Medical work is extremely important, in the sense that doing it often requires compromising the safety of the human body. Therefore, it is considered at the present time one of the most dangerous actions, as a result of the damages it may cause to the public interest. Therefore, it was considered the basis for the responsibility of the person responsible from the criminal side, and for this work to be legitimate and in order that the person responsible for it does not ask about a crime, it must be done according to the conditions required by law. For the purpose of informing the concept of medical work, we will divide this topic into two requirements. The first is devoted to the definition of medical work, and the second is devoted to the conditions related to its practice.

### **The first requirement**

#### **Definition of medical work**

The definitions that have been said about medical work have varied and varied, and this was, as we mentioned, because of the evolution in medicine science and art through different stages. There are definitions that viewed medical work as a humanitarian work, some of which relied on the moral or social aspect, and some focused on the legal aspect of medical work. Whatever the view adopted in the definition, it is possible to divide these definitions into two different directions: the first is the narrow direction in the definition of medical work, and the second direction has taken a wide path in this regard. In this demand, we will try to clarify the most important definitions that supporters of both directions have said, provided that this is in two branches: the first is devoted to the narrow direction in the definition of medical work, and the second to the broad direction in its definition.

#### **First branch**

##### **The narrow trend in the definition of medical work**

This trend focused on the idea of treating or healing the patient when he defined medical work, as one of the proponents of this trend knew him by saying, "That work carried out by a specialized person to heal others, which is based on the established medical principles and rules in the science of medicine, and that resorting to science from The healing order of the patient is what distinguishes medicine from magic and sorcery "(1). Another researcher defined him by saying that "every intervention from a specialized person allows him to practice this work with the intention of healing the patient, by doing enough care to achieve this recovery even if the desired result is not achieved, and this intervention may be as soon as the disease is detected and treated, whether with the available drugs or with the intervention Surgical "(2). It was also known as "that work done by a specialized person in order to heal the patient, in accordance with the established medical principles and knowledge in the science of medicine, and the origin of medical work is to be therapeutic, meaning to eliminate the disease or reduce its severity or pain" (3). Among those who support this trend are those who define medical work as "an activity that conforms to the manner and conditions of its directness with the established rules in the science of medicine, and in itself, according to the normal course of things, tends to heal the patient" (4). And some of them went on to say "that medical work, whatever it is practiced, is not more than necessary for the art of treatment and that it relates to the freedom to work on the patient's body" (5). Or, "It is the work that a specialized person does in order to help others recover, and that work must be based on the principles and rules established in medical science" (6).

Some internal legislation has been adopted in this direction, including the ones that are subject to comparison. Although the relevant French legislation does not contain an explicit definition of medical work, Law No. 35 issued on November 30, 1892 limited medical work to the idea of treatment only, and continued This matter until the French legislator adopted the Public Health Law on December 24, 1945 amending the law issued in 1953. The French legislator expanded the concept of medical work and began to include diagnosis in addition to treatment, which is implicitly utilized from the text of the aforementioned law by saying (it is committed ... .. everyone who performs diagnoses or treatment as a matter of mind Congenital ..... ) (7). The Iraqi legislator has followed the same trend in Law No. (503) of 1925 amending this law, even if it does not refer explicitly to the intended medical work, but it is

implied that he restricted medical work to treatment only. And that is about dealing with the definition of medicine by saying (the science and profession of preventing the seizure of diseases and human ills and the treatment of these diseases and ills and their mitigation) (8). The situation continued until the instructions were issued in 1962 and issued according to the aforementioned law.

As for the comparative internal judiciary, it was also supportive of this trend in some of its rulings at first, including the French judiciary, as it was influenced by the position of both internal jurisprudence and legislation in France. This is confirmed by the position of the Court of Cassation in one of its rulings in 1929 when it indicated that receiving the patient and practicing methods of treatment without a license is an unlawful practice of medicine (9). This trend has been criticized several of the most important of which are the following (10):

1- It restricted medical work in the field of treatment and recovery, ignoring prevention and diagnosis.

2- The goal of treating and recovering the patient was considered the origin of the medical work, and this saying has become unacceptable at the present time, especially after the medical work and the art of medicine have evolved greatly, so that some medical work is not aimed at treatment or the patient's recovery only, as is the case with work that includes plastic surgery, as these actions are aimed at improving the appearance and appearance of the person, not treating or curing it, and those who are subject to it may not be sick at all. Also, providing consultations, reports, and prescription medications are all considered medical works, even though the goal is not to cure or treat the patient.

3- This trend was not subject to the conditions of practicing medical work until it is considered legitimate, according to what is proven in jurisprudence and the judiciary.

## **The second branch**

### **Wide direction**

Given the criticisms leveled at the previous trend, a new trend has emerged that broadened the definition of medical work, so that it did not make it limited to the idea of healing and treating the patient. In addition, it includes other issues such as diagnosis, examination and prevention. Therefore, one of the owners of this trend knew him by saying, "It is that aspect of knowledge that relates to the issue of healing, relieving disease and protecting people from diseases." (11) It was also defined as "every activity that responds to the human body or itself, and in its nature and manner consistent with the scientific principles and the norms recognized theoretically and scientifically in the medical profession, with the permission of the law with the aim of detecting, diagnosing and treating the disease, to achieve recovery or reduce the patient's pain and reduce it." (12). In another definition, it is "an activity that conforms to its method and conditions of directness with the established rules in medical science, and in itself, i.e. according to the normal course of things, is directed to the patient's recovery, and the original medical work is to be therapeutic, i.e. it aims to get rid of the disease or reduce its severity or just relieve its pain. However, it is also considered a medical action that aims to reveal the causes of poor health, or just to prevent disease. (13) One of the comparative legislations that adopted this trend, including the French legislation that expanded the definition of medical work in a limited way in the Public Health Law in 1945 as mentioned earlier, then with the issuance of the Ministerial Decree on January 6, 1962, the French legislation adopted the broad concept of medical work explicitly, As this decision included a range of medical work that only doctors or qualified medical assistants under the direct responsibility and control of a doctor perform, as well as work carried out by medical assistants with a qualitative and quantitative prescription from the doctor (14). As for the Egyptian legislation, it adopted this trend as well, when it prohibited the provision of medical advice or a patient's clinic, or surgery or direct birth, or prescribing medications or treatment of a patient or taking samples ..... etc, except by a person authorized to practice the medical profession ( 15th). As for the Iraqi legislator, the French and Egyptian legislators followed the example of adopting this trend implicitly, according to instructions issued in 1962, which can be inferred from separate texts from these instructions (16). As for the comparative internal judiciary, the French judiciary has adopted the broad definition of medical work, especially after the Public Health Law was passed in 1945. According to one of the decisions of the State Council in 1959, the statement states that medical work is not limited to treatment only, but rather includes other actions such as diagnosis. Providing advice, performing surgeries, prescribing medication, presenting reports, etc. (17). In Egypt, the Court of Cassation went to the adoption of a broad definition of medical work, when it indicated in one of its rulings in 1988. That it is not permissible for a person to initiate the actions mentioned in Article (1) of the Law Regulating Practicing the Medical Profession in Egypt No. (415) of 1954, Unless he is an Egyptian licensed to practice medicine (18). This trend, on the other hand, has not escaped from the arrows of criticism, given that medical work has become today covering all cases

of medical intervention, such as cosmetic medicine, complex analyzes, giving injections and using radiation, and even possession of narcotic substances for the purpose of treatment, and any other actions necessary to improve the patient's health condition or to pursue a profession Medicine. There are even those who call for extending the scope of medical work to veterinary medicine because of its link to human health (19). The most important criticisms leveled at this trend can be limited to the following (20):

1- The scientific development and progress in the field of medicine has made medical work include things imposed by the conditions of family and professional life for a person other than treatment, diagnosis and prevention, the most important of which is the direction and organization of his life, just as diseases are no longer confined to organic diseases, but rather include even psychological and mental disabilities. In addition, medical work now includes prescriptions such as vitamins, hormones and food.

2- The great scientific progress and development in the various fields of life, especially the industrial ones and the resulting risks to human life, led to the emergence of the so-called healthy art that goes beyond the preventive scope of medical work.

3- The aforementioned trend neglected the conditions that must be met in the medical work in order for it to be legitimate, not requiring the responsibility of the person responsible and the most important of them, the patient's consent and that a person authorized by law performs it. In view of these criticisms, some have tried, and we agree with it, to define a medical work that exceeds the shortcomings that marred the previous two directions, as medical work was defined as "every action that responds to the human body or itself, and in its nature conforms to the fixed principles and rules generally accepted in theory and scientifically in Medical science, carried out by a doctor who is legally authorized to practice that work with a view to detecting, diagnosing and treating diseases to achieve recovery, or to relieve patients 'pain or reduce or prevent diseases, and aims to preserve the health of individuals or achieve social interest, provided that there is satisfaction This medical work. "(21)

## **The second requirement**

### **Conditions for medical work**

It is well established that every person has the right to the integrity of his body from acts that constitute a violation of his sanctity, and are legally punishable crimes, which are described in different descriptions, such as the crime of wound or abuse .... etc. And when doctors perform their professional work, they commit acts that constitute crimes if committed by others, such as performing surgical operations or giving medication, etc. This medical action may entail the recovery of the patient, or it may lead to his death, permanent disability events, wounding, or injury, without the criminal being asked by the doctor. However, this matter is not absolute, but rather is restricted by certain conditions, including those that relate to patient satisfaction and the intent of treatment, including those related to licensing and following the established scientific principles in medicine, and we will address the examination of these conditions in two branches.

### **First branch**

#### **Practicing medical work for the purpose of treatment by following established medical principles**

This condition requires that the goal of the doctor or the medical practitioner is to heal the patient or rid him of his illness, by taking the necessary care when performing what is required by his medical work, such as performing surgery, using radiology, or performing the necessary analyzes ..... etc. . In order to verify the intent of this work, it must have been done in good and its content here is (with the intention of treating the patient to help him recover from his illness) (22). Any medical work that deviates from the Department of Goodwill (with the intention of treatment) loses its legitimate medical character, and exposes the person in charge of it to criminal responsibility as violating the human right to the integrity of his body, even if this work was done with the patient's consent and consent. As if the doctor performed a surgical operation with the intention of conducting a scientific experiment, or with the aim of ridding the patient of the duty of military service, or with the aim of harming the patient or performing an abortion in order to get rid of shame (23). In addition to the foregoing, the practice of medical work must have been carried out by following the scientific principles of medicine and it means "fixed principles and the norms accepted in theory and practice among doctors that each doctor must be familiar with at the time of carrying out the medical work." Or it is "the set of stable theoretical and scientific rules among the people of medicine, and is no longer a matter of discussion

among them, as it is the minimum that must be observed in medical work, except as an exception as necessary" (24). These scientific principles and rules in medicine include fixed and newly developed sciences, and they are of a binding nature for medical personnel who must adhere to and comply with them. This is stable and consistent in internal jurisprudence and the judiciary and among the doctors themselves, as it is of a customary nature and is flexible and in continuous development so that it cannot be limited to specific legal texts (25). That is why the medical practitioner must respect them as an important condition for the legitimacy of his work, with some exceptions in which non-compliance with established scientific principles is permitted, such as cases of urgency, speed and necessity, and violating the responsibility of the person in charge of the work in criminal terms. It is known that for the purpose of treating any patient there are rules and principles that must be observed, so whoever suffers from a fracture in his foot and turns to the orthopedic doctor, the latter must adhere to the rules followed medically when treating this patient in order to improve his condition and recovery, for example, it is not permissible for him to put plaster on the broken bone, before taking a x-ray to confirm the position and condition of the fracture, as well as the case with the dentist and eyes ..... etc. The criminal laws that have been compared unanimously agreed that the medical practitioner must adhere to the recognized scientific principles when treating the patient and that his intention behind this is his treatment, which was confirmed by the Egyptian legislator in the Code of Ethics issued by a decision of the Minister of Health No. 238 of 2003 (26). Likewise, the Iraqi legislator said: "There is no crime if the act occurred in the use of a right established by law ..... 2- Surgery and treatment operations on the principles of art ...." (27).

### **The second branch**

Practicing medical work based on patient satisfaction and authorization to treat it

The medical practitioner shall, before commencing any medical work related to the patient, obtain his consent and consent, or the consent of the person acting as his guardian. The patient's consent is intended to express the will of a reasonable, aware person without defects, such as coercion or fraud, provided that such consent is explicit and legitimate in its place, and it may be tacit as someone who goes to the doctor's office for the purpose of conducting the examination and examining it from a disease or illness that suffers from it, and this Satisfaction is an essential condition for legalizing medical work with an adult patient after seeing the medical intervention and its effects, otherwise it is not permissible to do any action that would prejudice his rights to the integrity of his body, even if the motivation for this work is in his interest, and if the work is done in such a case, he arranges Criminal responsibility of the perpetrator (28). The patient's satisfaction with performing surgery and medical treatment includes several elements: (29):

1- That the patient's satisfaction comes from a distinct and conscious will, that is, he is a reasonable adult who is willing to conduct medical work on him and the effects that result from it. If the patient is deficient or lacking the will due to dementia, insanity, and others, then consent is issued by his guardian, such as the father, the mother, or the trustee Ali Saghira, otherwise medical work is forbidden.

2- If the consent is issued by the patient when he is a fully qualified adult, the consent issued by the private or inquisitive agent does not allow the conduct of the work, regardless of his relationship, or the degree of his closeness to the patient, such as the father, mother or husband.

3- To be satisfied with the patient after he has been perceived by the medical practitioner, with the direct or potential results of this work and the effects of this work, and this obligation falls on the medical worker, and if he breaches it for any reason whatsoever, the medical work is stripped of the nature of legality He asks criminal responsibility (30).

As for licensing treatment, it is intended that the person in charge of the medical work who is authorized by law to practice this work, because the laws related to the medical work require that the person who performs medical activities such as diagnosis, treatment and prevention, to be the holder of a license or license before practicing these actions, since The medical work is a prejudice to the life of the person and the safety of his body, so it requires that those who do this work have the scientific and technical competence in order to achieve the public interest that the legislation aims (31). Therefore, the latter stipulated obtaining the legal license to practice medical work, which is a prerequisite for legalizing this work. Otherwise, the person responsible bears the responsibility of criminal liability even if the other conditions are met, and this license may be general that includes all medical work, and may be partially limited On some of these works (32). Comparative penal legislation has established this requirement, both in its general criminal laws and in its legislation related to medical work. This is what the Egyptian legislator affirmed in

the Code of Professional Ethics issued by a decision of the Minister of Health No. (238) for the year 2003 saying that (the doctor may not conduct the medical examination or treatment of the patient without approval (based on knowledge) from the patient or his representative legally if the patient is not Welcome to this, and the patient's going to the doctor in his workplace is considered tacit approval of that .....) (33) Article (41) of the Iraqi Penal Code stipulates: "No crime if the act occurred in use of a right prescribed under the law ..... 2- Surgery and treatment ... Whenever it was performed with the consent of the patient or his legal representative or was performed without consent, either of them in urgent cases ).

### **The second topic**

The elements of the crime of doing medical work without a license

Human behavior is not a crime unless the law stipulates that it is criminalized as acts of the principle of legitimacy, and this matter applies to medical work as a professional human activity, it should be carried out in accordance with the conditions required by the law and the foregoing, and one of the most important is that the medical practitioner obtain a legal license giving him this capacity, He is allowed to practice this medical activity or work, otherwise the practice of work is considered illegal, and he has committed the crime of doing medical work without a license in accordance with the legal model required by the legislator. In this topic, we will study the pillars of this crime and its punishment, with two requirements: the first is devoted to the material pillar, and the second will address its moral pillar and its punishment.

### **The first requirement**

#### **The materialistic pillar of crime**

The materialistic pillar of the crime in general is the activity or behavior that the law stipulates to criminalize, as there is no crime without a physical corner, and comparative legislation has been agreed on that. That it is not permissible for anyone to show ..... and in general practicing the medical profession in any capacity except if it is Egyptian .... and his name was registered in the register of doctors in the Ministry of Public Health and in the schedule of the Medical Doctors Union ....) (34) . The same law also stipulated that the holder of a bachelor's degree in medicine and surgery from one of the existing medical colleges in Egypt shall be entered in the register of the competent ministry and spent compulsory training for one year for those who obtained a bachelor's degree after studying for a period of 6 years and for a period of two years for who obtained a bachelor's degree after studying for a period of 5 years ...) (35). As for the Iraqi legislator, it has been stipulated in the Law of Practicing Medicine in Iraq No. (503) of 1925 amending that (in this law ..... 2- (by physician) means the person who holds a degree or a medical certificate from a recognized authority that qualifies him to practice medicine with all His branches) (36). It also stated that (it is not permissible to practice medicine or any of its branches ..... except for persons authorized under this law) (37). It also stipulated in the Physicians Syndicate Law No. (81) of 1984 that the doctor may not practice the profession in Iraq only after he belongs to the syndicate and has obtained the certificate of registration and license to practice the profession (38). It also stipulated in the same law that (a member is required to have an Iraqi national who holds an Iraqi medical school certificate or its equivalent ..... ) (39). Among the aforementioned texts it becomes clear to us that the material pillar of the crime is that a person performs the medical work without possessing the required qualifications, and without having a license or permit to give him the right to practice medical work. Accordingly, the establishment of this pillar must achieve two elements: the first is the lack of legal capacity of the medical practitioner, and the second is the lack of legal authorization by the medical practitioner, and we will undertake their research in the following two branches:

#### **First branch**

##### **Lack of legal capacity of the medical personnel**

The law limited the task of performing medical work to specific persons, and whoever violates that falls under the legal question, so the comparative laws in question stipulated that no actions that would prejudice the lives of people and the safety of their body be carried out except by persons carrying a certain capacity, and one of these actions is work Medical. Therefore, whoever engages in this work must be competent in that he possesses special knowledge,

merit and scientific competence in the field of medical work practice. This was confirmed by the Egyptian legislator, as he prohibited the practice of the medical profession in any capacity except for those who had a bachelor's degree in medicine and surgery from one of the existing medical colleges inside Egypt, and the compulsory training went on for one year for those who obtained a bachelor's degree after studying for a period of 6 years, and for two years for those who obtained a bachelor's degree After studying for 5 years (40). Likewise, the Iraqi legislator did when he prohibited the practice of medicine, except for persons who obtained a degree or a medical certificate from a recognized authority that qualifies them to practice medicine in all its branches (41). From these legal provisions it is clear that the medical practitioner must be a person holding a scientific degree in medicine in one of his branches, and this degree is issued by a recognized authority that qualifies its owner to practice medicine and this authority is a recognized university or college of medicine within the state or Outside, as it is also required that the doctor has spent the period of compulsory training after obtaining a bachelor's degree, and this period may be a year or more or less according to the text of the law (42). Based on the foregoing, the lack of the trait of the person in charge of the medical work, as if he was not a doctor or was so and then pulled the trait from him for any reason, then he is asking about his action according to the result resulting from it, and his action here may constitute an independent crime in itself according to the legal text Who may give her a description of the crime of wound, intentional injury or wrongful killing (43). Because there are some actions by people who do not have the required qualifications, and they are described as medical activities such as (circumcision, needle glaucoma, minor operations). The person in charge of the work may hold the required capacity, but he does not possess the necessary license, as if he holds a bachelor's degree in human medicine and from a recognized university, but he was not registered with the competent authority and did not obtain a license to practice his profession, for such a person is asked about He did according to his intent and in light of the legal adaptation of his act, as he might be asked about a disciplinary crime, which is practicing work without a license stipulated by laws related to the medical profession (44). The latter will be the subject of our study in the second branch.

## **The second branch**

### **Lack of legal authorization for the medical practitioner**

The establishment of the first component is not sufficient to achieve the material pillar of the crime, but its second component, the lack of legal authorization, must be achieved, otherwise the crime in question does not exist. This is what was agreed upon by the laws that are the subject of comparison. The French Public Health Act clearly stated that the practice of medical work must be from a person who possesses a legal license, in Article 356 of the law. Likewise, the Egyptian legislator did in Article (1) of the Law of Practicing the Medical Profession of 1954, when it was stipulated that the name of the medical practitioner be recorded in the record of doctors in the Ministry of Public Health and in the schedule of the Physicians Syndicate, and this was the course of the Iraqi legislator also, whether in the law of the practice of medicine In the amended 1925, or in the Physicians Syndicate Law in 1984. Legal licensing means allowing medical work to be carried out in accordance with the relevant legal rules, and this license is a prerequisite for medical work to become lawful. Note that there are those who see otherwise, and justify his view by saying that the basis of the legitimacy of medical work is the possession of the holder of the scientific qualifications that enable him to practice this work, and on the basis of these qualifications the person is granted the legal license to practice the work (45). In fact, this opinion is considered and cannot be accepted in the field of criminal law, because if a person does not obtain the required academic degree, he cannot request legal permission to practice medical work. This means that a qualification is a prerequisite for obtaining a license, and without it the license cannot be granted at all. The comparative laws in question have been explicit in this regard. By the same approach, the comparative judiciary followed, as the French Court of Cassation ruled in one of its rulings in 1929 that (receiving patients and practicing suggestive methods of treatment for them without a permit is an unlawful practice of medicine) (46) In another ruling, she indicated that the mere act of describing a specific diet followed by the patient is a component of the crime of practicing medicine without a license (47). In the same context, the Egyptian Court of Cassation indicated in a ruling in 1975 that (the unlicensed doctor to practice the medical profession treating the patient by applying different ointments and powders to the places of burns is considered a crime in accordance with the provisions of Article 1 of the Law of Practicing the Medical Profession of 1945) ( 48). In another ruling in 1988, the court indicated that (no one can practice the medical profession and practice the actions mentioned in Article (1) of Law No. (415) of 1954 in any capacity, unless a doctor is registered in the doctors 'record in the Ministry of Health) (49) . In the Iraqi judiciary, the Iraqi Court of Cassation has affirmed that an unauthorized person with blue stitches is punished according to the general criminalization rules, as it is not authorized to conduct this medical activity (50). Based on the foregoing, the medical work loses the legitimate status if the person in charge does not carry the required legal

license, and this license is granted only based on the availability of academic qualifications, and therefore a person may not perform any medical work, if he does not possess this license even if He was scientifically qualified. Likewise, if this person was in possession of the educational qualification, but he did not obtain a license, then if he did so, he would be considered a perpetrator of the crime of doing medical work without a license, even if Other conditions were available to start medical work, such as the intention of treatment or patient satisfaction, because the basis for criminalization is the practice of medical work without a license.

### **The second requirement**

#### **The moral element of the crime and its punishment**

We will address in this demand the second pillar of the crime of practicing medical work without a license, which is the moral pillar, then we will address the effect of committing this crime by the medical practitioner and we mean the punishment, provided that this is in two branches: the first is devoted to clarifying the moral pillar of the crime, The second is for her punishment.

#### **First branch**

##### **The moral pillar of crime**

It is well established that the moral element is the second pillar of the crime, and its absence means that it does not exist, or that the perpetrator of the act is totally or partially responsible. It refers to the psychological bond that links the material of the crime to the will of its perpetrator, and this psychological bond is called the criminal intent. It means the will to act and the will of the criminal consequence of the act (51). Consequently, the criminal intent has two elements, which are knowledge and will, and it is meant by knowledge, i.e. knowledge of the elements of crime (52). As for the will, it is the will to achieve these elements and their criminal consequences (53). With regard to the crime in question, the moral element means the knowledge of the offender or the medical practitioner, that the work that he undertakes to perform is one of the works that he may not perform except upon a legal license, as well as the departure of his will to do this work and its consequences. Accordingly, knowledge as an element in the criminal intent of this crime is a state of mind, or awareness of the elements of the criminal incident of exercising medical work without a license, and it is already represented by the operator. These elements that need to be known are what the legislative text requires to give the incident, or the act and its legal description that applies to it, or in other words, the knowledge of the medical practitioner should include all the facts of legal significance for the establishment and verification of his crime. . For example, the person in charge of the medical work must be aware of the issue of the right that is violated, as well as the seriousness of his work or his action on the interest that the law requires protection, as well as expecting the result that will result from his action. As for the will as an element of the criminal intent in the crime in question, it is the psychological activity that controls the conduct of the medical work for the purpose of investigating the criminal incident of awareness and discrimination even if no criminal result is achieved, because the crime in question is a crime of risk or behavior, which is the availability of an element The will is sufficient for the purpose. Consequently, the crime is achieved as if a person used pamphlets, paintings, or other media and publishing, and he possessed the required academic qualification for the purpose of bringing in the public, believing that he has the right to practice medical work before he obtains the legal license to practice the work, or that A person impersonates a circulating title in the field of medical work, to compel people to believe that he is licensed to practice medical treatment and diagnostics, and he does not possess the necessary legal license.

#### **The second branch**

##### **Crime penalty**

Punishment is the penalty that the criminal law imposes on those who prove that he committed the crime in implementation of a judicial ruling, and in the interest of society in order to prevent the criminal from committing the crime again in the future, and to notify all people of the pain that might be inflicted upon them if they committed the crime. The crime of conducting medical work without a license is like any other crime. The criminal legislator decides a penalty for its perpetrator if its elements are fulfilled in the previous manner. Comparative criminal legislation has unanimously agreed on this matter. The Egyptian legislator decided, for those who engage in medical work, contrary to the law, two original penalties: imprisonment that does not exceed two years and a fine that does not exceed two hundred pounds. The first time, but in the case of an oud, it is necessary to judge with both penalties, given that the

oud is an aggravating circumstance (54). In addition to the original penalties, there are complementary and obligatory penalties that the judge orders when deciding the original punishment, which is to close the clinic, remove signs and banners, confiscate things related to the profession, and publish the judgment in two newspapers at the expense of the convict (55). Anyone who engages in work without a license and uses pamphlets or plates and other means of publication shall be punished with previous penalties, if he aims behind this to compel others to believe that he has the right to practice this work, and likewise the case for someone who impersonates himself as a doctor or who has machines or a number Medical, who wants to use it for medical work contrary to law (56). As for the Iraqi legislator, he is the other. He has imposed an original penalty on everyone who practices medical work without a license or license under the provisions of the law, and this penalty is imprisonment for a period not exceeding three years, or a fine not exceeding five thousand dinars, or a ruling on both penalties (57). Also, this punishment is imposed on anyone who impersonated an adjective, title, or mark, indicating that he possesses a legal license to practice medical work contrary to reality (58). It is also noted that the Iraqi legislator, unlike the Egyptian legislator, punishes even those who legalize the practice of medical work without a license, and make the punishment of the perpetrator the same as the full penalty of crime (59). And he decided to impose a dependency penalty in addition to the original ones, and this punishment is to deny the owner of the profession the practice of his medical work for the duration of his sentence that limits freedom (60). It is also noted that the Iraqi legislator has stipulated disciplinary penalties as well, which are governed by the Discipline Committee of the Medical Syndicate, the most important of which are alert, warning, and prevention from practicing the profession and the fine (61). Therefore, we call on the Iraqi legislator to follow the example of the Egyptian legislator in imposing complementary and obligatory penalties, in addition to the original ones in order to protect the practice of medical work, and to achieve the public interest in preserving the safety and health of the human body.

## **Conclusion**

After we have finished studying the topic of our research related to the crime of practicing medical work without a license, and that is through examining the concept of medical work in internal jurisprudence and legislation, with reference to the position of the internal judiciary whenever the scientific need arises. We also discussed the conditions for the legitimacy of medical work, and then the pillars of the crime of practicing medical work without a license and the penalty that it entails, we have reached the following conclusions and recommendations:

### **First: the conclusions**

- 1 - There is no agreement between comparative internal jurisprudence on the definition of medical work, and the reason behind this is the various stages in which this work has developed, following the tremendous scientific developments in the field of medicine.
- 2- The comparative internal legislation did not address the definition of medical work with explicit texts, but rather referred to activities that fall within the scope of this work, such as treatment, diagnosis, and conducting surgical operations .... etc.
- 3- There is an agreement between jurisprudence, legislation, and a comparative judiciary regarding the conditions for the legality of medical work, such as the patient's consent and the intention of treatment ... etc.
- 4- The failure of the legal license necessary to practice medical work leads to the establishment of a crime approved by the comparative legislation, which is the crime of practicing medical work without a license and I have counted it as a risk crime.
- 5- The crime above consists of two main pillars, the material pillar and includes two elements: the lack of legal capacity for the medical practitioner and the lack of legal licensing, and the moral corner with the elements of knowledge and will.
- 6- The comparative legislation considered the crime of misdemeanor, and it decided on it original, consequential or complementary penalties, and some of them took disciplinary penalties.

### **Second: Recommendations**

- 1- We recommend the comparative criminal legislator to define accurately the content of the medical work in a manner that closes the door to jurisprudence and judicial jurisprudence and by express texts.
- 2- We recommend the comparative criminal legislator to adopt texts that include an accurate identification of the acts that constitute criminal behavior, or the physical element of the crime of conducting medical work without a license.
- 3- We recommend the comparative criminal legislator to strictly control the procedures and conditions for granting a legal license to practice medical work, so that this license is only available to those with high skills and academic qualifications, and to pave the way for those trying to do this work by using fraud and deception methods.
- 4- We recommend the comparative criminal legislator to increase the crime penalty and make it a prison instead of incarceration, due to the seriousness of the work he is doing and the possible serious harm to the safety and health of the human body, as well as increasing the penalty of the fine, in addition to approving dependency and complementary penalties, the most important of which is deprivation of Profession and confiscation.

## References

- (1) Referred to by: Ghadban Nabilah, The Doctor's Criminal Responsibility, Master Thesis, Faculty of Law, Mouloud Mamari University - Tizi Ouzou, 2009, p. 14.
- (2) Dr. Amin Mustafa Muhammad, Penal Code - General Section - Crime Theory, First Edition, Beirut, Lebanon, 2010, p. 137.
- (3) Dr. Hussam al-Din al-Ahwani, Legal Problems Aroused by Transplants of Human Organs, Journal of Legal and Economic Sciences, No. 1, 1975, p. 235.
- (4) Dr. Mahmoud al-Qiblawi, Doctor's Criminal Responsibility, Dar Al-Fakr Al-Jami'a, Egypt, 2004, p.
- (5) Bin Fateh Abdul Rahim, The Physician's Criminal Responsibility, Master Thesis, College of Law and Political Science, University of Muhammad Khidir- Biskra, 2014-2015, p. 18.
- (6) Dr. Mansour Omar Al-Maayta, Civil and Criminal Liability in Medical Errors, First Edition, Riyadh, 2004, p. 15.
- (7) Article (372) of the law.
- (8) Paragraph (1) Article (2) of the Law.
- (9) Referred to by: Dr. Fahd Dukhin Al-Adwani, Medical Work in Comparative Law and Judicial Provisions, No. (32), Part (2), No Publication Date, p. 531.
- (10) Mahmoud Musa Dudin, Civil Physician Responsibility for His Professional Work, Master Thesis, College of Graduate Studies, Birzeit University, 2006, p. 20.
- (11) Bin Fateh Abdul Rahim, previous source, p. 19.
- (12) Ould Omar Elissa, Khaddache Rawaah, The Criminal Responsibility of the Doctor in Algerian Legislation, Master Thesis, Faculty of Law and Political Science, Mouloud Mamari University - Tizi Ouzou, 2016, p. 9.
- (13) Dr. Mahmoud Naguib Hosni, Explanation of the Penal Code - General Section, Arab Renaissance House, Cairo, 1977, p. 182.
- (14) Referred to by: Dr. Fahd Dukhan Adwani, previous source, p. 525.
- (15) See Article (1) of the Law Regulating Practicing the Medical Profession No. (415) of 1954 as amended.
- (16) For example, see paragraphs (1, 2, 5) of the instructions issued in accordance with the Law of the Practice of Medicine in Iraq for the year 1925 published in the Iraqi facts in the number (752) on 12/12/1962.
- (17) Referred to by: Dr. Fahd Dukhan Adwani, previous source, pp. 531-532.

(18) Ibid, pp. 533-534.

(19) For more detail on the medical intervention, see: Dr. Abdel-Wahab Omar Al-Batrawi, Criminal Responsibility for Doctors, The Arab Journal for Security Studies and Training, Volume (16), No. (31), No Publication Date, Pp. 7 and beyond.

(20) Ghadban Nabilah, previous source, pp. 15-16.

(21) Referred to by: Dr. Mansour Omar Al-Maayta, previous source, p. 15.

(22) Dr. Abboud al-Sarraj, General Penal Code 2, Syrian Arab Republic, 2018, pp. 104-106.

(23) Dr. Ahmed Awad Bilal, the Egyptian Penal Code - General Section, Book One, The General Theory of Crime, No Place Printed, 2007, pp. 161-169.

(24) Dr. Mansour Omar Al-Maayta, previous source, p. 30.

(25) Dr. Abdul-Wahab Omar Al-Batrawi, previous source, pp. 39-40.

(26) Article (9) of the Code of Professional Ethics issued by decision of the Minister of Health No. (238) for the year 2003.

(27) Paragraph (2) of Article (41) of the Iraqi Penal Code No. 111 of 1969, as amended.

(28) Dr. Hassan Shamsi Pasha, d. Muhammad Ali al-Barr, Doctor's Responsibility Between Jurisprudence and Law, No Place of Publication, No Date of Publication, pp. 28 ff

(29) Dr. Ashraf Tawfiq Shams El-Din, Explanation of the Penal Code - General Department, The General Theory of Crime and Punishment, Faculty of Law, Banha University, 2012, pp. 262-263.

(30) Dr. Adnan Al-Khatib, General Principles in the Penal Code, Book One, Damascus University Press, 1963, pp. 186-187.

(31) Dr. Isaac Ibrahim Mansour, Explanation of the Algerian Penal Code - On Crimes Against Persons, Ethics, Money and State Security, Second Edition, University Press Office, Algeria, 1988, p. 67.

(32) Bin Fateh Abdul Rahim, previous source, p. 28.

(33) Article (28) of the Code of Professional Ethics issued by decision of the Minister of Health No. (238) for the year 2003.

(34) Article (1) of the law.

(35) Article (2) of the law.

(36) Paragraph (2) of Article (2) of the Law.

(37) Article (3) of the law.

(38) Article (3) of the law.

(39) Article (4) of the law.

(40) Article (1) of the Amended Medicine Practice Law of 1954 is amended.

(41) See Article (3) of the Medicine Practice Law of 1925.

(42) Article (2) of Amending the Medical Profession Law of 1954 is amended.

(43) See, for example, articles (240-244) of the Egyptian Penal Code No. 58 of 1937 as amended, as well as articles (411-416) of the Iraqi Penal Code No. 111 of 1969 as amended.

(44) Consider, for example, Article (11) of the Law of Practicing Medicine in Iraq for the amended 1925, as well as Article (25) of the Iraqi Medical Union Law for the year 1984, as well as Articles (10, 11) of the Law of Practicing the profession of Egyptian Medicine of 1954 amending .

(45) Mahmoud Musa Dudin, previous source, p. 27.

(46) Referred to by: Dr. Fahd Dukhin Adwani, previous source, p. 531.

(47) Referred to by: Bin Fateh Abdul Rahim, previous source, p. 87.

(48) Ibid., P. 87.

(49) Referred to by: Dr. Fahd Dukhin Adwani, previous source, pp. 533-534.

(50) Referred to by: Mahmoud Musa Dudin, previous source, p. 27.

(51) Dr. Abbas Al-Hassani, Explanation of the New Iraqi Penal Code - General Section, Baghdad, 1970, p. 86.

(52) Dr. Amin Mustafa Muhammad, previous source, p. 399.

(53) Dr. Abdullah Suleiman, Explanation of the Penal Code - Public Section - Crime, Part One, University Press Office, Algeria, 1995, pp. 250 and beyond.

(54) Article (10) of the Medical Practice Law of 1954 as amended.

(55) Ibid.

(56) Paragraphs (First, Second) of Article (11) of the Practicing Medical Profession Law of 1954, as amended.

(57) Article (33) of the Physicians Syndicate Law of 1984. It is worth noting that the amounts of fines mentioned in the special laws, including the aforementioned law, were amended according to Law No. (4) of 2019 amending the Law to amend the fines mentioned in the Penal Code No. 111 of 1969 The rate and other special laws No. (6) for the year 2008, and the amounts of the fine in the violation are no less than (50,000) thousand dinars and not more than (200,000) two hundred thousand dinars, and in misdemeanors not less than (2000001) thousand dinars and not more than (1000000) million dinars In felonies, not less than (10,000,000) dinars and not more than (10,000,000) ten million dinars. The law was published in the Iraqi facts, number (4546) on 7/8/2019.

(58) Ibid.

(59) Ibid.

(60) Paragraph (First) of Article (27) of the Physicians Syndicate Law of 1984.

(61) Article (25) of the Physicians Syndicate Law of 1984.

#### Sources

##### First: books

1- Dr. Ahmed Awad Bilal, The Egyptian Penal Code - General Section, Book One, The General Theory of Crime, No Place Printed, 2007.

2- Dr. Ishaq Ibrahim Mansour, Explanation of the Algerian Penal Code - On Crimes Against Persons, Ethics, Money and State Security, Second Edition, University Press Office, Algeria, 1988.

3- Dr. Ashraf Tawfiq Shams El-Din, Explanation of the Penal Code - General Department, The General Theory of Crime and Punishment, Faculty of Law, Banha University, 2012.

4- Dr. Amin Mostafa Mohamed, Penal Code - General Section - Crime Theory, First Edition, Beirut, Lebanon, 2010.

5- Dr. Hassan Shamsi Pasha, d. Muhammad Ali al-Barr, the doctor's responsibility between jurisprudence and law, no place of publication, no date of publication.

6- Dr. Abbas Al-Hassani, Explanation of the New Iraqi Penal Code - General Section, Baghdad, 1970.

7- Dr. Abdullah Suleiman, Explanation of the Penal Code - Public Section - Crime, Part One, University Press Office, Algeria, 1995.

8- Dr. Abboud al-Sarraj, General Penal Code 2, Syrian Arab Republic, 2018.

9- Dr. Adnan Al-Khatib, General Principles in the Penal Code, Book One, Damascus University Press, 1963.

10- Dr. Mahmoud al-Qiblawi, Doctor's Criminal Responsibility, Dar Al-Fakr Al-Jami'a, Egypt, 2004.

11- Dr. Mahmoud Naguib Hosni, Explanation of the Penal Code - General Section, Arab Renaissance House, Cairo, 1977.

12- Dr. Mansour Omar Al-Maayta, Civil and Criminal Liability in Medical Errors, First Edition, Riyadh, 2004.

#### Second: Research

1- Dr. Hussam al-Din al-Ahwani, Legal Problems Raised by Transplants of Human Organs, Journal of Legal and Economic Sciences, No. 1, 1975.

2- Dr. Abdel-Wahab Omar Al-Batrawi, Criminal Responsibility of Doctors, The Arab Journal for Security Studies and Training, Volume (16), No. (31), no publication date.

3- Dr. Fahd Dukhin Al-Adwani, Medical Work in Comparative Law and Judicial Provisions, No. (32), Part (2), no publication date.

#### Third: The dissertations and the thesis

1- Bin Fateh Abdul Rahim, Doctor's Criminal Responsibility, Master Thesis, College of Law and Political Science, University of Muhammad Khader - Biskra, 2014-2015.

2- Ghadban Nabilah, Doctor's Criminal Responsibility, Master Thesis, Faculty of Law, Mouloud Mamari University - Tizi Ouzou, 2009.

3- Mahmoud Musa Dudin, Civil Physician Responsibility for His Professional Work, Master Thesis, College of Graduate Studies, Birzeit University, 2006.

4- Ould Omar Elissa, Khaddache Rawaah, The Criminal Responsibility of the Doctor in Algerian Legislation, Master Thesis, Faculty of Law and Political Science, Mouloud Mamari University - Tizi Ouzou, 2016.

#### Fourth: Laws and regulations

1- Medicine Practice Law in Iraq No. 503 of 1925 as amended.

2- The Egyptian Penal Code No. 58 of 1937 as amended.

3- Law No. 415 of 1954 regulating the practice of the medical profession, as amended.

4- The instructions issued in accordance with the Law of Practicing Medicine in Iraq for the year 1925 published in the Iraqi facts, number (752) on 12/15/1962.

5- Iraqi Penal Code No. 111 of 1969, as amended.

6- The Code of Professional Ethics issued by decision of the Minister of Health, No. (238) for the year 2003.

7- Law No. (4) of 2019 amending the Law amending the fines mentioned in the Penal Code No. 111 of 1969 amending and other special laws No. (6) of 2008.