

SPECIAL PROVISIONS FOR THE CRIME OF DISCLOSING DEFENSE SECRETS

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Abstract

Maintaining the secret of defending the state and refraining from divulging it is an important duty for everyone, as it is considered one of the most important secrets at the state level because it is linked to its existence and its continuation depends on the stability of security in it from many aspects, and some public functions in the state involve many aspects. These are important secrets that the employee becomes aware of by virtue of his continuous work, and that without his job status he would not have been given the possibility to view and know them, and the damage to the interests of the state that might result from these secrets being destroyed or their divulging them would be harmful to the interests of the state. Therefore, this matter is considered one of the most urgent matters to be addressed. The interests and security of the state. Therefore, many countries are keen in their laws to criminalize the disclosure of the country's defense secrets, and when we discuss this crime with special provisions, it shows the importance of confidentiality, who are the people committed not to disclose or destroy the country's defense secrets, the supposed pillar in the law for this crime, and knowledge of the general intent and purpose. This is especially true when we search for the moral pillar and the material pillar of behavior and result

INTRODUCTION

The obligation to preserve the country's defense secrets without divulging them is considered one of the most important duties imposed on the employee and anyone charged with public service, any citizen.

Every public government job must contain a lot of information and data, which in turn may contain many of these secrets. The importance of this research appears through knowing the special elements of this crime, whether the objective element, the moral element, and the legal element of the information and documents that fall within the ruling. Confidentiality

Individuals are considered obligated not to divulge state defense secrets. The problem of research lies in the fact that the material element requires a special form and behavior and is committed only by a perpetrator with a character determined by the law, in addition to the importance of the supposed element and whether its absence has an impact on the occurrence of the crime.

In this research, we followed the descriptive and analytical approach to legal texts and presented the opinions of jurists regarding some of the pillars and the position of the Iraqi legislator. Therefore, we divided this research into three sections.

The first topic

The legal pillar

The supposed element of the crime: All crimes generally share in the presence of the basic elements, which are the physical element and the moral element. However, on the other hand, there are certain crimes that require the availability of their own separate elements that distinguish them from other crimes, and this is stipulated in the legal model of the crime in addition to its general elements.

The first requirement

Provisions specific to the actor

This type of crime cannot be committed by any person. Rather, the characteristic assumed by the legal text is that the perpetrator is an employee, charged with a public service, or has a representative capacity, so that it is considered a formative element (a special element). If this

characteristic is not present in the perpetrator, then there is no room for the text to be applied to the act, which is Disclosing government secrets by a public employee or someone who is in their position, therefore, the status of the offender has a fundamental role to play in order for his behavior to be considered to constitute a crime.

This characteristic comes from the nature of the employee's work, i.e. his job and position, which necessitates the importance of having trust in whoever undertakes this job in order to protect job secrets and be entrusted with them. They look from the perspective of the trust placed in him as an employee and not by virtue of trusting his person.

The character of the offender is considered an essential element so that his action is considered fit to be a crime. It is not committed by any person, but rather by a person with a characteristic that stems from the type of work that he performs, that is, it is a functional characteristic, and when the legislator in the text criminalizing behavior requires that the material element of the crime be committed by a specific person. It has a special characteristic, as it takes into account the importance of criminal behavior itself, estimates the extent of its danger emanating from the character of the perpetrator of that behavior, and then decides the deterrent penalty for it⁽¹⁾.

The crime is not a physical entity that is formed from the act and its consequences, but it is also a personal (psychological) entity, as criminal responsibility is imposed on the offender and he bears the consequences of the act attributed to him if it was committed by mistake.

The latter represents the psychological will directed towards illegal material goods. Accordingly, the link between the perpetrator's psychology and the material elements of the crime represents the moral element of the crime and is also called the psychological or personal element.⁽²⁾

The perpetrator's mistake is of two types: there is the intentional mistake, which is called criminal intent, and it occurs in intentional crimes. There is the unintentional mistake (which is often called error), which occurs in unintentional crimes, in which the actor's will is directed toward the act without the result, and its basis is negligence and negligence, and within the scope of crimes. Affecting the external security of the state⁽³⁾

The second requirement

Special provisions indeed

To be aware of the occurrence of the crime. In order for the crime to be committed in accordance with the text of Article (186), the person must have knowledge of the occurrence of a crime affecting the external security of the state. Either there is sufficient knowledge and insufficient knowledge regarding the violation of defense secrets. In order for it to be considered a violation, there must be some degree of knowledge or know-how. Regardless of the source of this knowledge of the occurrence of the crime

Where it can be said that so-and-so's knowledge encompasses the incident and his knowledge is definitive and far from suspicion, it is the same as whether this knowledge agrees with reality or not. What matters is that it is based on a serious reason because the legislator does not force the informant to verify the validity of what he learned, but rather he is obligated to That person has access to some specific knowledge about the commission of the crime, for example knowledge of the time the crime occurred, its perpetrator, and other knowledge that could lead to fruitful reporting of it.

Insufficient knowledge can be said to be unverified, that there was a crime that occurred without them knowing its basic elements, so it is not considered sufficient and knowledge that is obligatory to report. This knowledge must be verified by looking at the people who did not contribute to the

⁽¹⁾ Samir Alia, Al-Wajeez in explaining crimes against state security, 1st edition, University Foundation for Studies, Publishing and Distribution, Beirut 1999, p. 54.

⁽²⁾ Samir Alia, Al-Wajeez in explaining crimes against state security, 1st edition, University Foundation for Studies, Publishing and Distribution, Beirut 1999, p. 54.

⁽³⁾ Samir Alia, Al-Wajeez in explaining crimes against state security, 1st edition, University Foundation for Studies, Publishing and Distribution, Beirut 1999, p. 54.

preparation of the crime or its implementation, otherwise the penalties prescribed for the crime that was committed will be applied against them. Or started committing it It is the responsibility of the court to establish knowledge in this way to extract it, given all the circumstances and conditions that indicate its existence.⁽¹⁾

Therefore, the object of knowledge is represented by every incident that takes the form of an attempt or a completed crime, and this is clear from the text of the article when it refers to (whoever knows of the commission of one of the crimes stipulated in this section.....) Therefore, it is not sufficient for the object of knowledge to be represented by preparation for the crime. Or intentionally, the subject of knowledge must be one of the acts constituting the crime

It does not matter whether this act falls within the predicate crimes themselves or within the crime of incitement or agreement to commit them⁽²⁾.

The second topic

The physical corner

The material element is merely a physical act that is criminalized in application of the legal principle of crime and punishment. Article (28) of the effective Iraqi Penal Code defines the material element as (criminal behavior by committing an act criminalized by the law or refraining from an act ordered by the law). The material element is important, so the law does not know it. Crimes without a material element and without a tangible physical appearance, so society does not suffer any defect ⁽³⁾

The first requirement

Behavior and outcome

Criminal behavior, as the first element of the material element, is an essential condition for it to be fulfilled. It is even one of the most important elements of the material element. It constitutes its external appearance and substance and a common denominator between all types of crimes, so it may be a formal or material crime. The Iraqi legislator has stipulated these crimes in Article (178), which states: Its text stipulates that (a penalty of imprisonment for a period not exceeding ten years shall be imposed on 1- Whoever obtains, by any illegal means, a secret of the country's defense, without the intention of handing it over or divulging it to a foreign country or to one of those working for its benefit. 2- Whoever announces or divulges a secret in any way. Of Defense Secrets 3 -), as it includes in Article (80A) what corresponds to Article (178) of the Iraqi Penal Code, while Article (80B) stipulates in the event that a secret is disclosed if this act results from an employee A general person or someone who has a public representative capacity or is assigned to serve. Behavior is divided into two types: positive behavior, which is: (every voluntary organic movement), or negative behavior, such as abstaining from doing an action prescribed by law. Some see negative behavior as nothing more than a person's reluctance to perform a specific positive action. The legislator forces it in specific circumstances, such that there is a legal duty that compels this act and that the one who abstains from it is able to perform it⁽⁴⁾

As for the criminal result, it is considered the second element of the material element of the crime, as it is known as the effect resulting from the criminal behavior, which the legislator looks at carefully for the legal composition of the crime, as it becomes clear that the result of the criminal behavior is considered one of the things that is not separate from this behavior.

Because the behavior of one last link has the result, but the result and the behavior are in reality two independent matters, and the Iraqi legislator expressed it with the term (attempt) in Article (30) of the Penal Code in force.

(1) Fathia Bin Nasser, Limiting Procedural Guarantees for Those Accused of Terrorist Crimes, New University House, Alexandria 2011, p. 31.

(2) Abdel Fattah Mustafa Al-Saifi, Penal Code - Crimes of Assault on State Security and Funds - Dar Al-Nahda Al-Arabi, Beirut 1972, p. 20.

(3) See the text of Article 28 of the law

(4) Dr. Mahmoud Mahmoud Mustafa, Explanation of the Penal Code - General Section - 10th Edition, Cairo University, Cairo 1983, p. 267 p. 270

Also, the result is considered an effect resulting from the criminal behavior, and we can distinguish between two types of crimes, crimes that are subject or existent, and crimes of mere conduct.

Regarding crimes of mere conduct, the specific legal model for their occurrence is to commit an act of criminal behavior, whether negative or positive.

Regardless of the occurrence of a result, there is no change caused by behavior in the outside world that is an element of this model

As for the subject crime, it is considered a crime whose legal model requires, in order for it to exist, to produce a specific result arising from the behavior of its perpetrator

On the other hand, we find that a physical crime also arises when a consequence occurs, being the behavior of the perpetrator, and this meaning applies to the crime of a juvenile. For this reason, it was said that any crime of a juvenile is considered a physical crime

But we cannot say that every crime of conduct is a formal crime, as a mere formal crime means that its legal model requires directing the will of the perpetrator to create a specific event, regardless of whether the result is actually achieved or not.

Regardless of the risk of its occurrence, whether or not it is present, the crime of insult, for example, is considered a formal crime, as it is committed as soon as he publicly utters words intended to insult prestige or honor.

At the same time, it is considered a crime of substance, not a crime of conduct, simply because these words must affect the hearing and psyche of the other, and Dr. Ramses Behnam says that if every material crime is a crime of an event (result), then not every formal crime is a crime of mere conduct.

Because the formal crime in some cases has a result, for example the crime of insult and defamation, and this is more correct because the crimes that affect the external security of the state are considered to be a category of formal crimes, and are also considered to be crimes of mere conduct according to the division of crimes in terms of the presence of the event, because the criminal law does not share that it is present. A specific criminal result that arises from the behavior of the perpetrator. Rather, the behavior is criminalized as soon as it is committed, so it may be incomplete or complete behavior, and it is treated as a complete crime because the interest being protected is important.⁽¹⁾

The second requirement

Causation

The importance of this element of the material pillar is evident through the connection between the two elements of the material pillar

Thus, it evaluates its entity and unity and considers it an idea and a legal phenomenon with a coherent structure and elements. It also shows the extent to which the causal relationship is important in that it plays a fundamental role in the scope of criminal policy, because by excluding every result that is not causally linked to the behavior, it leads to the scope of criminal responsibility being limited and delayed. Clearly, this is what the rules of justice require, as it is not reasonable for a person to be held accountable for a result that is not causally linked to the act he committed⁽²⁾

However, if this causal relationship exists between the act or behavior committed by the offender and the achieved result, then the condition of criminal responsibility is fulfilled, provided that the moral element is also fulfilled, then the crime is committed with all its elements.

Once this order is applied to the crime of divulging the country's defense secrets, it becomes clear, according to the approach taken by the Iraqi legislator, that there must be a causal relationship that brings together the criminal behavior in this matter. .

⁽¹⁾ See the text of Article 156 of the Iraqi Penal Code.

⁽²⁾ Haider Ghazi Faisal Al-Rubaie, Criminal Liability, Master's Thesis, College of Law, Al-Mustansiriya University, Baghdad 2006, pp. 7 et seq.

The crime and the result that arises, the matter is equal to its material or legal meaning and for the reason of completing the elements of the material element of this crime and allowing its perpetrator to be held accountable.

However, when this causal relationship fails for any reason, for example, the intervention of other factors that alone are sufficient to produce a result without the action and behavior of the actor, then the causal relationship is broken⁽¹⁾

It is represented in the connection between the materiality of the crime and the offender's psyche. It is known that the element that is based on this psychological connection between the offender and the material element of the crime.

Some see the importance of this element, as we cannot see a crime without a moral element, and therefore they consider the legislator's means of forming responsibility for the crime.

Even if the perpetrator has committed the material crimes, he may not be responsible for the actions he has committed, or he may not be aware or aware of the essence and nature of his actions, or he may be considered forced for some reason to do what he did.

The function of this pillar is only to ensure the availability and fulfillment of what is legally required to hold the perpetrator accountable for the criminal acts he commits in order to achieve justice⁽²⁾

The third topic

The moral pillar

Criminal intent: Two important elements must be present in order for criminal intent to exist, namely will and knowledge, as some explain the nature of knowledge by looking at it as a characteristic in which a thing becomes clear and appears in the way it is, and it is the most important element that the offender must be aware of, and it is considered essential for him to do so. His criminal intent is to make him aware of the act he committed and its seriousness

If the perpetrator does not know the seriousness of his act, then criminal intent does not exist because the element of knowledge is absent. Likewise, one of the important elements that the perpetrator must be aware of is the result in which the violation of the right protected by the law is committed. Likewise, the perpetrator must be aware of the causal relationship. Between the result and the action taking place.

The first requirement

General intent

That is, the offender must know that his behavior will lead to the result he seeks to achieve. As for will, it is the other important element of criminal intent, and it is a psychological activity that a person relies on to influence the people or things surrounding him, as it directs the nervous powers to prove actions that result in effects, whether material or legal.

However, in the event of the absence of the perpetrator's will, the criminal intent does not exist, and it does not matter the reason for the lack of this will. Perhaps, for example, the perpetrator committed the criminal act under threat or coercion to which he was subjected by another person. In this case, the perpetrator does not want the behavior nor the result, so he is not asked about the crime⁽³⁾.

In the event that the perpetrator carries out a physical activity, it is not sufficient to hold him accountable for an act that is considered a crime from a legal standpoint. Rather, the moral element must also be present that attributes the crime to him morally, and it is present if the mistake is made against him, that is, against the perpetrator, and this mistake can either be or be called in This is a case of criminal intent, or it may be unintentional.

(1) Dr.. Maamoun Muhammad Salama: Penal Code, Special Section, Crimes Harmful to the Public Interest, Without Cairo Publishing House, 1981-1982, p. 298.

(2) Dr.. Ashraf Tawfiq Shams El-Din, Principles of Criminal Law, Dar Al-Nahda Al-Arabiya, Cairo 1998, pp. 15 et seq.

(3) Dr.. Raouf Ubaid, Causation in Criminal Law, a comparative analytical study, 3rd edition, Dar Al-Fikr Al-Arabi, Beirut, 1974, p. 3.

The mistake is then called an unintentional mistake, and the general intention is defined as directing the offender's will towards achieving the event constituting the crime, with his knowledge of its elements, as defined by the law in intentional.

All acts stipulated in Article (181) of the Iraqi Penal Code are considered intentional crimes that require the presence of criminal intent, which is a general intent based on the necessity of having knowledge of all the facts that the law requires knowledge of and that the will is directed towards committing the forbidden act.

The offender must know that he is entering a prohibited place or area, flying over it, being present in it, or taking a drawing or photograph of it, contrary to the prohibition issued by the competent authority. However, the will is directed towards violating the law by committing the act, and therefore these types of crimes do not occur and do not occur. The perpetrator may be held accountable if he committed the act as a result of a mistake or lack of precaution

If the circumstances of the criminal incident indicate that the accused was ignorant of the nature of the place over which he flew, entered, or stayed, then he will not be convicted; Due to the lack of criminal intent on his part⁽¹⁾.

In terms of general criminal intent, the most dangerous and most crimes in general are intentional crimes, that is, they require intent (premeditation), as criminal intent is the moral element in intentional crimes, and the most dangerous form of the moral element in crime, and criminal intent means the will of the activity and the result in the crime on the part of the perpetrator, as His will is directed to the action he performs and to the criminal result

This meaning of criminal intent is what the theory of will - prevailing in criminal jurisprudence - holds, which is based on the fact that sinful will is the basis for the structure of criminal intent, whether it is in relation to the criminal behavior or the result resulting from it⁽²⁾.

The second requirement

Special intent

As for the specific criminal intent, if most of the premeditated crimes require a general criminal intent, there are crimes that are not few, and in order for them to occur or achieve the stipulated description, they must have a special intent, that is, a special intention and tend to achieve a specific goal or goal, and the reason for that is the pursuit of a foreign country to achieve With hostile acts against the country, Article (159) Iraqi Penalties

This occurs when the law indicates the requirement of a specific intent or if this appears from the nature of the crime and the context of the text. Rather, the interpretation of the word or phrase through which the legislator expresses the required intent may be considered. The absence of specific intent in the crime results in the act being removed from the criminal character or the act falling under the description Another or leads to strengthening the punishment, and that special intent is based on the elements of will and knowledge, in addition to the element of special intent, which is the direction of the offender's will for a purpose or goal, in addition to the general intent.

But what is meant by special intent is that it is considered an additional element in criminal intent, which distinguishes general intent from specific intent

Is it the motive or the purpose? To determine the meaning of this intention, we must define what is meant by these terms and their legal importance. The motive is a psychological activity related to the purpose and its perception.

In other words, it is the motive to satisfy a need, and we can define the motive as a psychological situation resulting from a sense of interest, which directs the will of the perpetrator to carry out the criminal act towards a similar end that is consistent with the interest.

Therefore, the motive is considered the psychological and emotional aspect, but it does not fall within the framework of the elements of the crime. Although some have distinguished between the motive and the motive in the crime, it is more likely that they are used as synonyms⁽¹⁾.

⁽¹⁾Hisham Yousfi, Criminal Protection of Professional Secrets, Dar Al-Walid for Publishing and Distribution, Cairo, first edition, 2015, p. 110.

⁽²⁾ Muhammad Mustafa Al-Qali, On Criminal Liability, Abdullah Library, Egypt, 1945, p. 79.

As for the legal importance of the motives, the matter has been settled in criminal legislation, which is that the motive is not considered an element of criminal intent.

However, the judge must reveal the extent of the perpetrator's seriousness through the honorable or vile motive, and within his authority to estimate the punishment, and this is what the Iraqi Court of Cassation said: "...it is not correct in any way to limit the application of Article (128) to punishments for some crimes, such as a crime." Intentional killing is a wash of shame, only because the legislator did not know the honorable motive and did not specify the extent of its application, but rather left that to the discretion of the court, which it deduces from the facts of the case, the circumstances surrounding the accused, social and moral incentives, etc⁽²⁾ ((...

Conclusion

Given the importance of this type of crime in the law and the special provisions required for this crime, we found a set of results and recommendations.

Results

- Disclosing the secret by an employee is necessary in order to form the material element of the crime
- In crimes of disclosing defense secrets, given the division of crimes into crimes of conduct and crimes of juvenile, we need a result for the latter
- Secret crimes are crimes of behavior on the one hand and consequence on the other hand. In addition, just as there are crimes, there is a private element and a general element, and in this crime, as a result of its importance, it requires the presence of a special element, given the elements of the material element, which are behavior, result, and causal relationship.
- The elements of the presumed element are a section related to the perpetrator and a section related to the act, as we have previously explained in the research

Recommendations

- We hope that the Iraqi legislator will not exclude from the scope of punishment someone who commits a crime by mistake, due to the importance of this crime, and grant it greater protection because it affects secrets and is a warning to those who tempt themselves to do so.
- We hope that the Iraqi legislator will take into consideration Iraqi citizens belonging to other countries and subject them to additional measures regarding this crime, for example, concluding agreements or treaties with the countries to which they belong.
- It would be better if the legislator enacted special laws to provide protection for defense secrets and expand surveillance and intelligence services, and not be satisfied with the general penal code.

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(¹) Judge Muhammad Ibrahim Al-Falahi, chosen from the Federal Court of Cassation, Criminal Division, Baghdad 2012, p. 54

(²)Court of Cassation Decision No. 531 / General Authority / 1978 on 12/30/1978, quoted by Judge Muhammad Ibrahim Al-Falahi, chosen from the Federal Court of Cassation, Criminal Division, Baghdad 2012, p. 51



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