

THE CRIME OF BREACH OF TRUST AND THE CRIMINAL LIABILITY OF THE LAWYER FOR IT, WITH RESPECT TO THE FILES, IN IRAQI AND ALGERIAN LAW

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Abstract:

Breach of trust is a serious crime that strikes at the heart of trust relationships in society. Its gravity is compounded when committed by individuals entrusted with protecting rights and practicing a profession of a highly ethical and professional nature, such as lawyers. By virtue of their work, lawyers receive files, cases, and data pertaining to their clients, which are entrusted to them. This places them under criminal liability should they breach this trust. The researcher aims to explore the criminal dimensions of a lawyer's liability regarding the files they handle, employing a descriptive, analytical, and comparative approach, as well as examining the material, moral, and legal components of the crime.

This research studies the crime of breach of trust in Iraqi and Algerian law. It clarifies the concept of the crime and distinguishes it from related crimes such as fraud and theft. It also identifies the penalties prescribed for a lawyer who commits this crime in the course of their professional duties. Furthermore, the research highlights the preventative measures adopted by the laws under comparison to ensure that this crime is not committed by members of the legal profession.

Keywords: Breach of trust, lawyer, criminal liability, Iraqi law and Algerian law

Introduction

The legal profession is an honorable profession based on trust and a commitment to protecting the rights of individuals and defending the legal interests of clients. Both Arab and foreign legislations have given great importance to regulating this profession due to its crucial role in establishing justice and ensuring the proper functioning of the judiciary. However, this trust can be betrayed when a lawyer fails to fulfill their duties or misappropriates files and documents entrusted to them by their client, which constitutes the crime of breach of trust.

Research Methodology:

This research will employ a comparative analytical approach, through the following:

1. Analysis of relevant legal texts in both Algerian and Iraqi law, particularly the Penal Code and the Law Regulating the Legal Profession.
2. Comparison between the two legal systems to highlight similarities and differences in addressing the crime of breach of trust and the lawyer's liability thereof.
3. A descriptive approach to present the historical development of the crime and the concept of trust within the legal profession.
4. An inductive approach to derive conclusions and recommendations from relevant legal texts, scholarly opinions, and judicial rulings.

Original Research Question:

To what extent is a lawyer criminally liable for breach of trust when handling their clients' files, in light of the provisions of Iraqi and Algerian law?

The crime of breach of trust is not limited to ordinary individuals, but also includes those holding professional or legal positions. Lawyers are among the most prominent of these, especially since the handover of files and documents to them occurs within a legal and professional relationship governed by trust and commitment. If a lawyer mishandles their client's file, refuses to hand it over, or conceals it with the intent to cause harm, this entails their criminal liability according to the provisions of the law.

This research aims to shed light on this legal liability by studying the crime of breach of trust as a basis for the criminal accountability of a lawyer in the event of a breach of their professional duties. It focuses on a comparative analysis of the legal texts in Iraqi and Algerian legislation, examining the elements of the crime and the associated penalties and measures.

Section One

The Conceptual Framework and Historical Development of the Crime of Breach of Trust

First Requirement: Concepts

Section One: The Concept of the Crime of Breach of Trust

In Arabic:

Definition of the crime of breach of trust

The word "trust" in Arabic is derived from the verb "to be trustworthy," and it is said: "The man was trustworthy," meaning he was honest and worthy of trust..⁽ⁱ⁾

Honesty means preserving something entrusted to a person and returning it to its owner upon request; it is the opposite of betrayal..⁽ⁱⁱ⁾

God Almighty said in His Holy Book:

“ Indeed, God commands you to render trusts to their rightful owners.” (Surat An-Nisa, verse 58)⁽ⁱⁱⁱ⁾

In its linguistic sense, trustworthiness signifies honesty, loyalty, and the preservation of rights, while betrayal is the breach of commitment and the loss of trust.

Therefore, "betrayal of trust" in the language means acting in a manner contrary to honesty and integrity when one has acted in a way that violates trustworthiness and Breach of trust is a crime against property, based on a legal or contractual relationship whereby money, a file, or a document is entrusted to one person for safekeeping, and the latter then refuses to return it or misappropriates it as if it were their own.

- In Iraq: The crime of breach of trust has existed in Iraqi law since the Baghdad Penal Code of 1919. It was further developed in Law No. 111 of 1969, which broadened the concept of "trust" to include legal papers and documents, including court files received by a lawyer from their client.

In Algeria, the crime evolved from French law and was explicitly included in Article 376, focusing on the professional classification of the offender. This makes a lawyer liable to double punishment if they exploit their profession to mishandle files.

The Iraqi legislator addressed the crime of breach of trust in Article (453) of the Iraqi Penal Code No. 111 of 1969, as amended, which states: “Anyone who embezzles, uses, or misappropriates movable property belonging to another, or a file, document, or signed paper entrusted to them or deposited with them, shall be punished by imprisonment, provided that their act results in harm to another.”

The Algerian legislator addressed the crime in Article (376) of the Algerian Penal Code, which states: “Anyone who misappropriates, embezzles, or maliciously uses items, papers, or securities

entrusted to them as a trust, lease, mortgage, loan for use, or deposit shall be punished by imprisonment for one to five years and a fine.”^(iv)”

Breach of trust is distinguished from other crimes by the lawful transfer of money or files that precedes the unlawful act, unlike theft or fraud. The perpetrator is presumed to be trustworthy, and the crime is committed when this trust is abused.

In the case of a lawyer, the transfer of clients' files is a matter of professional duty and constitutes a lawful transfer. If the lawyer conceals, destroys, or refuses to return the file, this action falls under the definition of breach of trust.

The crime of breach of trust is unique among financial crimes in that it is based on a legitimate legal or contractual relationship that precedes the criminal act. When a lawyer receives their client's files, it is based on an implicit or explicit power of attorney that obligates the lawyer to safeguard all matters related to the case file and not to dispose of them except as required by the client's legal interests^(v).

“The Iraqi Federal Court of Cassation, in its decision No. 218/Criminal Panel/2021 dated May 10, 2021, ruled that:

(A lawyer's retention of a client's file after the termination of their power of attorney and their refusal to return it, despite repeated warnings, constitutes an act of intent to possess and falls under the crime of breach of trust).

“In Algeria, the Supreme Court, in its decision No. 128560 issued on November 23, 2017, ruled that:

)A lawyer's repeated and unjustified refusal to return a client's documents constitutes a professional violation that establishes criminal liability, as it is considered the malicious appropriation of another's documents)

The second branch: Criminal liability

Several crimes are similar in their elements and consequences to the crime of breach of trust, the most important of which are:

1. Theft: This differs from breach of trust in that the money is taken from the victim's possession without their consent or prior delivery, whereas in breach of trust, the money has been entrusted under a legitimate relationship.
2. Fraud: This involves using deceptive means to obtain another's money, whereas in breach of trust, such means are not used; rather, the money is misappropriated after being legally entrusted.
3. Administrative embezzlement: This is the misappropriation by an employee of state or public funds entrusted to them. This differs from breach of trust in terms of the perpetrator's status and the type of money involved.

Thus, breach of trust is a crime with its own distinct elements, and its gravity increases when committed by a lawyer, who is supposed to safeguard case files as part of their professional duty.^(vi)

Section Two: Elements of the Crime of Breach of Trust and its Legal Consequences

For the crime of breach of trust to be legally established, three essential elements must be present: the material element, the moral element, and the legal element. In the context of the legal profession, the importance of these elements is evident in cases where a lawyer handles their clients' files unlawfully.

First requirement: Elements of the crime of breach of trust

Section One

The legal element

The legal element of the crime of breach of trust is the existence of a legal text that criminalizes the act committed. This is stipulated in:

In Iraqi law: Article (453) of the Penal Code.

In Algerian law: Article (376) of the Penal Code.

Both articles require that the money or file entrusted to the client be misappropriated and that it be handled in bad faith, thus rendering the conduct punishable by law.

The elements of the crime are thus complete when a lawyer commits any act that constitutes a breach of the legal trust presumed in the relationship between them and their client, especially when it concerns case files and related documents.

The legal element of the crime of breach of trust is the existence of a legal text that criminalizes the act and specifies the prescribed punishment, based on the principle of legality in criminal law, which is considered a firmly established constitutional principle, expressed in the rule: “No crime or punishment except by law.” First: The Legal Text in Iraqi Legislation

The crime of breach of trust is regulated in Iraqi law by Article (453) of the Penal Code No. 111 of 1969, as amended, which stipulates the following:

“Whoever embezzles, uses, or misappropriates funds or other movable property to the detriment of its owners, which had been entrusted to him as a trust, deposit, lease, pledge, agency, or for the performance of a specific task, shall be punished by imprisonment for a period not exceeding seven years or by detention.”

This text clearly defines the crime as the embezzlement, use, or misappropriation of money that was lawfully entrusted to the perpetrator for specific purposes, and that this occurs to the detriment of the owner of the money.

Second: The legal text in Algerian legislation

The Algerian legislator regulates the crime of breach of trust in Article 376 of the Algerian Penal Code, which stipulates that^(vii)

“Anyone who embezzles or misappropriates, in bad faith, commercial papers, money, goods, merchandise, tickets, documents, negotiable instruments, or any other movable property entrusted to him by way of lease, deposit, agency, pledge, loan for use, or in trust, is considered to have committed the crime of breach of trust.”

This crime is punishable by imprisonment for one to five years, and the penalty may be doubled if the crime is committed by a public official or person in a public capacity.

Third: The Position of Jurisprudence and the Judiciary

Criminal law scholars consider the legal element to be the fundamental guarantee for protecting individual freedoms. No act may be criminalized unless it is stipulated in the law, and no punishment may be imposed except within the limits of the legislative text.

Iraqi and Algerian courts have emphasized in their rulings the necessity for the act attributed to the accused to conform to a legal text that defines the elements of the crime and the punishment. Any deficiency in this constitutes grounds for acquittal.

Practical examples from Iraqi courts:

In a 2018 ruling by the Karkh Criminal Court, a lawyer was convicted for handling his client's documents related to a real estate sale contract without written consent and for refusing to return the file despite the client's request.

The crime was deemed complete due to the presence of a legitimate handover and subsequent bad faith action.

In Algeria:

A 2020 ruling by the Supreme Court, Misdemeanor Chamber, convicted a lawyer who retained a civil file concerning an inheritance dispute and refused to hand it over except after receiving an "additional reward." The court found that this action constituted a breach of trust because there was no legal basis for the refusal.

The second branch:

The physical element

The material element of the crime of breach of trust consists of three main components:

1. The existence of money, a file, or a signed document belonging to another party:

This includes documents or papers that the lawyer receives from their clients for litigation purposes, which are considered entrusted to their possession.

2. The delivery of the money or document under a legal or contractual relationship:

This is the element that distinguishes breach of trust from theft; the file is delivered to the lawyer with the consent of the parties and within the framework of a legal power of attorney.

3. The lawyer's bad faith handling of the entrusted item:

Such as destroying the file, refusing to return it, using it for personal purposes, or deliberately concealing it with the intent to harm the client^(viii).

The First Requirement: The Material Element of the Crime of Breach of Trust

The material element of the crime of breach of trust represents the external criminal conduct that constitutes the criminal act. It is embodied in the fulfillment of three main elements: the delivery of the money, the nature of the possession, and the act of unlawful disposal.

First: Lawful Delivery of Money

The crime of breach of trust is not established unless the money was delivered to the perpetrator with the consent of the owner or the legal possessor, and in a lawful manner, such as if the money was deposited, pledged, or secured by an agency, lease, or loan agreement.

The condition of lawful delivery is what distinguishes breach of trust from the crime of theft, which is committed without the victim's consent, and from the crime of fraud, in which possession is obtained through deception.

The Iraqi Court of Cassation affirmed this, stating:

“The crime is not established unless it is proven that the money was lawfully delivered to the accused for safekeeping or use for a specific purpose, and then he refused to return it or disposed of it with the intent to possess it.”

Cassation Decision No. 458/2015

Second: The Nature of Possession

In the crime of breach of trust, possession must be temporary or incomplete, meaning the perpetrator possesses the money on behalf of another, not as the owner.

Here, possession differs from ownership. The perpetrator acts as if he owns the money, even though he actually possesses it temporarily and for a specific purpose.

Third: The Act of Unlawful Disposal or Use

The criminal act occurs when the perpetrator deliberately uses or transfers the money for his personal benefit, denies receiving it, or refuses to return it, thus violating the purpose for which it was entrusted.

The mere refusal to return the money, coupled with the intent to possess it, is sufficient to establish the crime.

The Iraqi Court of Cassation has affirmed that a lawyer's handling of court files without the client's permission, if criminal intent is proven, constitutes breach of trust.

In Algerian law, the Supreme Court has affirmed in numerous rulings that a lawyer who refuses to hand over a client's documents after the termination of the power of attorney, or who disposes of them, is subject to the penalty stipulated in Article 376 of the Penal Code.

Third branch

The moral pillar

The crime of breach of trust is an intentional crime, meaning it is only committed if the perpetrator possesses criminal intent. This intent includes:

1. The lawyer's knowledge that they do not have the right to dispose of the file.
2. The intention to possess it or to harm the client by concealing or failing to hand over the file.

If it is proven that the lawyer disposed of the file due to negligence or oversight without the intention of possessing it, then the act is not considered a crime, but may be subject to professional or civil liability.

The crime of breach of trust cannot be committed without criminal intent, which constitutes the mental element of the crime. This is represented by the perpetrator's knowledge that the money does not belong to them, that they possess it for a specific purpose, and yet they dispose of it with the intention of possessing it or depriving its owner of it.

First: Knowledge of the true nature of the money

The perpetrator must be aware that the money does not belong to them and that they possess it for a specific purpose. Therefore, their disregard for or denial of this knowledge does not absolve them of criminal responsibility as long as the evidence is available.

Second: Intent to Possess or Dispose of the Money in Violation of the Agreement

Here, the intent is represented by the perpetrator's will to dispose of the money in a manner indicating ownership, such as selling it, giving it away, or refusing to return it, with full awareness that this violates what was agreed upon at the time of delivery.

The Algerian Court of Cassation affirms in one of its rulings that:

The commission of the crime does not require actual harm; rather, it suffices that the perpetrator intends to breach the trust and appropriate the money”.

Decision No. 226144/2018

Third: Absence of Error or Negligence

If the disposal of the money results from negligence or unintentional error, the crime is not established, as breach of trust is a purely intentional crime, which is only committed with the presence of criminal intent.

In Iraqi law, the presence of intentional criminal intent is required. However, Algerian legislation stipulates “bad faith” as a condition for the commission of the crime, which is consistent with comparative criminal jurisprudence.

For a lawyer to be guilty of breach of trust, he must know that his possession of the file does not authorize him to dispose of it, and yet he still misappropriates it or refuses to hand it over with the intent to harm the client.

Mere negligence or simple professional error is insufficient to prove the crime; rather, there must be an explicit or implicit criminal intent aimed at causing harm or misappropriating the file.

The Central Criminal Court in Baghdad, in its ruling No. 325/J/2020, affirmed that:

A lawyer's failure to hand over his client's file, despite the termination of the power of attorney and the absence of any financial dispute between the parties, constitutes sufficient evidence of an intent to misappropriate the file and entails criminal liability according to the provisions of Article 453 of the Penal Code.(

The second requirement: Penalties and precautionary measures for the crime of breach of trust

Section One: Penalties

The penalties prescribed for the crime of breach of trust vary between Iraqi and Algerian law, but they share an emphasis on protecting the rights of the affected party, especially when the perpetrator is a lawyer who adheres to the ethics of his profession.

In Iraqi law:

Article (453) of the Penal Code No. 111 of 1969 stipulates that whoever commits the crime of breach of trust shall be punished by imprisonment, and the penalty may reach a specified number of years depending on the harm caused. The court may also award compensation to the victim for the material and moral damages suffered as a result of the breach.

Any movable property, document, or anything entrusted to a person, such as a deposit, lease, mortgage, power of attorney, etc., falls under this category.

For a lawyer, the files and documents entrusted to them by their client are considered a trust, and therefore any unlawful action concerning them falls under the scope of this article.

1. Offender's conduct:

Embezzlement: Taking money or documents for oneself without right.

Misuse: Using money or documents in a manner contrary to their intended purpose.

Distortion or harm: Disposing of money in a way that harms the owner or anyone with a right to it.

2. The material element:

The unlawful disposal of money or documents entrusted to them.

3. The Moral Element:

Criminal Intent: The intent is to harm the owner or seize the money, i.e., malicious intent.

4. The Criminal Liability of the Lawyer:

If a lawyer takes possession of any file or document entrusted to him or uses it for his own benefit, he is criminally liable according to this article and can be punished with imprisonment and a fine, as stipulated by law.

In Algerian Law:

Article (376) of the Algerian Penal Code imposes a prison sentence of one to five years and a fine, with the possibility of harsher penalties in cases of professional exploitation, such as when the crime is committed by a lawyer or other person holding a legal position^(ix).

1. Subject of the crime:

Money, documents, or any movable property entrusted to a person by way of agency, lease, or deposit. The lawyer to whom a client's files or funds are entrusted is considered responsible for them as a trust.

2. Offender's conduct:

Embezzlement or misappropriation in bad faith: i.e., using money or files in a manner contrary to the purpose for which they were entrusted.

3. Material element:

Disposing of money or documents entrusted to him/her in trust.

4. **Moral element:**

The presence of bad faith on the part of the perpetrator, i.e., the intent to cause harm or seize for himself/herself.

5. **Criminal liability of the lawyer:**

Any exploitation or misappropriation of files entrusted to him by his client is a crime and is subject to the penal sanctions stipulated in Algerian law.

Jurisprudence and the judiciary in both Iraqi and Algerian legislation have called for the necessity of increasing penalties for offending lawyers, given their essential role in preserving rights and ensuring justice, and that any breach of their trust constitutes a serious violation of the professional relationship.

Section Two: Precautionary Measures

In Iraq:

There are no specific laws pertaining to lawyers, but the judiciary imposes harsher penalties when abuse of professional relationships is proven.

The Bar Association can take parallel disciplinary measures (such as warnings, suspensions, and disbarment).

In Algeria:

Article 116 of the Algerian Bar Association's bylaws stipulates that any lawyer who commits an act that violates honor or trust shall be immediately referred to the disciplinary council.

Criminal penalties (imprisonment) and disciplinary penalties (suspension of practice) may be combined.

In Iraq, despite the absence of a specific law penalizing lawyers in their official capacity, the courts rely on articles of the general penal code and sometimes invoke Bar Association regulations (such as Article 37 of the Lawyers' Law) to take parallel professional measures such as suspension or disbarment. "In Algeria, combining criminal and disciplinary penalties is common practice, as the Public Prosecutor's Office can refer the lawyer to the judiciary, while he is referred to the Bar Association's Disciplinary Council by virtue of the profession, as stated in Decision No. 3129/2019 issued by the Algiers Court of Justice, which stipulated the suspension of the lawyer for one year with a criminal conviction with a suspended one-year prison sentence.

Conclusion

A - Results

First: Results

1. Confirmation of the Lawyer's Criminal Liability:

Both Iraqi (Article 453) and Algerian (Article 376) laws clearly stipulate that a lawyer is criminally liable if they breach the trust placed in them regarding files or funds entrusted to them, thus placing them within the scope of legal accountability.

2. Embodying the Material and Moral Elements of the Crime:

The material element is fulfilled when the lawyer handles files or funds in a manner contrary to the purpose for which they were entrusted.

The moral element is fulfilled by bad faith, intent to harm, or personal appropriation, and it is a fundamental factor in proving the crime.

3. Consistency of Legislation with Principles of Integrity:

The legal provisions in both countries emphasize the protection of the client's funds and property, reflecting the legislation's commitment to maintaining trust in the lawyer-client relationship.

4. Minor Differences in the Texts:

Iraq includes broader forms of legal transactions that negate trust, such as deposits, leases, mortgages, and powers of attorney. Algeria focuses on bad faith in embezzlement or misappropriation, emphasizing illegal acts within the scope of trust.

5. The importance of strengthening professional oversight: The application of legal texts requires robust oversight mechanisms, including monitoring lawyers' conduct and reviewing their files, to ensure adherence to the duty of trust.

Second: Recommendations

1. Enhancing Legal Awareness among Lawyers:

Organizing regular courses and workshops on the legal and ethical duties of lawyers towards their clients, thereby strengthening adherence to professional integrity.

2. Activating Legal and Professional Oversight:

Establishing follow-up committees or strengthening the role of professional bodies to monitor files and actions, ensuring compliance with the principles of integrity.

3. Developing Penalties to Ensure Deterrence:

Reviewing and updating penal and disciplinary penalties to effectively deter any lawyer who breaches their obligations towards their client.

4. Establishing Clear Procedures for Recovering Rights:

Defining clear legal mechanisms for recovering funds or misappropriated files, while protecting clients' rights, thus ensuring the swift resolution of disputes.

5. Strengthening the Consistency between Criminal and Disciplinary Liability:

Emphasizing that any breach of professional duties does not exempt a lawyer from disciplinary or criminal liability, while linking criminal penalties to professional penalties when necessary. 6- Raising awareness in the legal community: Spreading awareness among clients about their rights and the legal duties of lawyers, which contributes to reducing legal violations and achieving transparency.

footnotes

(i) Ibn Manzur, *Lisan al-Arab*, Dar Sader, Beirut, Third Edition, 2001, p. 45.

(ii) -The Concise Dictionary – Iraqi Language Academy, Cairo, 1993, entry: trustworthiness

(iii) -The Holy Quran, Surah An-Nisa, Verse 58

(iv) -Algerian Penal Code No. 49 of 1966

(v) -Dr. Ahmed Abdel Salam, **Criminal Jurisprudence**, Dar Al Nahda Al Arabiya, Cairo, Second Edition, 2005, p. 112

(vi) -Dr. Nasser Abdullah, **Ethics of the Legal Profession**, Dar Al-Fikr, Amman, First Edition, 2016, p. 89

(vii) Algerian Penal Code No. 49 of 1966, p. 198.

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