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THE PREREQUISITE (THE PRESUMED ELEMENT) IN THE CRIME OF TORTURING THE DEFENDANT (COMPARATIVE STUDY)

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Abstract:

The precondition for the crime of torture (the presumed element) is the condition that the law requires in order for the crime to take place and although it is not one of the elements of the crime, it is necessary to meet it for the commission of a crime that requires a special condition, such as the defendant being a public official or charged with a public service, and as is the case in the crime of bribery or embezzlement that requires a special element for its establishment and this precondition (supposed) must be met at the time of the perpetrator's commencement of his constituent activity of the crime.

The jurisprudence regarding it was divided into several opinions, and there were those who considered it a special condition and independent of the other elements of the crime and based this on the basis of its independence on the criminal activity of the offender because it precedes the criminal behavior that constitutes the material element, while others believe that the special elements, including the supposed element, are considered in every crime as the elements that enter into the formation of the general elements. Most crimes meet with common and general basic elements (the material element and the moral element), But this case is not the same in all of them, as there is a type of crime that is not satisfied with these two elements, but rather its legal model requires, in addition, the availability of special elements that distinguish it from other crimes, as is the case in the crime of torturing the accused to extract his confession, and these elements are represented in the characteristics of the offender and the victim and that these characteristics are related to this type of crime, whether or not, so if the offender or the victim is excluded before committing it or acquired after that, then we will be facing other crimes that have been called by other names.

Keywords: (condition, presumed, torture, defendant)

INTRODUCTION

The defendant is innocent until proven guilty in a fair legal trial. Human freedom and dignity are preserved. All types of psychological and physical torture and inhumane treatment are prohibited. Any confession extracted under duress, threats or torture is prohibited. The state guarantees the protection of the individual from intellectual, political and religious coercion. The Constitution of the Republic of Iraq for 2005 valued the sanctity of individual freedom and its guarantees and considerations that transcend all other considerations, As it is not the goal of the criminal procedures to prove the guilt of the accused only. Rather, it is a fact-finding, and not in any way, and far from respecting the rights of the accused. There is no value for the truth that is being pursued at the expense of justice.

Torture is an abhorrent practice in that it represents a flagrant violation of human rights and a serious attack on human and human dignity. A person charged with a public service is that he tortures a person who has the right to life, liberty, and physical integrity that alters matters which were emphasized by various divine laws, religions and man-made laws, as God Almighty created man and honored him over other creatures in this universe and granted him rights that necessitated protection and non-violation of them. And the internal law, as stipulated by most of the laws, including the effective Iraqi Penal Code, where Article (333) deals with it but from a narrow perspective that does not exceed the limits of the crimes of assault by officials or those charged with a public service against the defendant, witnesses and experts for the purpose of forcing them to give information they do not want to give, which made us focus in this research on the

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concept of torture and knowing who is the perpetrator and who is the defendant in order to stand on the nature of the precondition (supposed) as a cornerstone of its existence, there is the crime of torturing the defendant to extract his confession after the availability of the general elements in it, by asking a number of questions, namely (what is meant by torture and the (supposed) precondition), What are the elements of the precondition that exist in the crime of torture? What is the time for the offender to have the capacity of an employee or a public servant? And to what extent does Article (333) Iraqi penalties and Article (126) Egyptian penalties apply to the actual employee? Is the person who commits the crime of torture considered an original perpetrator who does not have the capacity of a public official or a person in charge of a public service, but rather has committed it with another person who enjoys that capacity, or does this person have a legal status that differs from that of the original perpetrator and when does the accused person have the capacity of the victim to become worthy of protection?

Is it required that the victim be a natural, living person?) In order to answer these questions, we decided to address the subject of our study in two sections. The first will be devoted to knowing what is meant by the precondition for torture. The second topic we will dedicate to knowing the elements of the (supposed) precondition, and we will talk in the first requirement about the element of the offender and the second requirement we talk about the second element, which is the victim. We have followed the comparative analytical approach to the legal texts developed by the Iraqi legislator and the Egyptian legislator, which dealt with the subject of our study.

The first topic

The concept of the (assumed) precondition in the crime of torture

The precondition in the crime of torturing the defendant is a special condition or a special element required by law in order for us to be in front of a crime with a complete list of its elements after the completion of its general elements (physical element and moral element) and in order to determine what is meant by the condition, element or supposed element in the crime of torturing, we must First, define torture as the main element in the crime, and we will talk about it first, then we will address the definition of the precondition second.

Definition of torture

Torture is defined linguistically as a word derived from the root tormented. She tormented him, just as the word torment denotes torment and punishment, and that is why it is said that he tormented him as torture or torment.(1)

As for the idiomatic meaning of torture, there are many definitions of torture provided by international charters and treaties as it constitutes an international crime under these charters. Article 1 of the Convention Against Torture defines it as "any act that results in severe physical or psychological pain or suffering inflicted on a person, with the intent to obtain from this person or from a third person information or a confession, or to punish for an act he or she or any person has committed, or to intimidate or pressure him or a third person for any reason based on any kind of such pain or suffering is desired, approved, or tolerated by a public official or other person acting in an official capacity and does not include pain or suffering arising solely from, inherent in, or incidental to, legal sanctions(2). This definition is close to the definition provided by the United Nations Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment, which was adopted by the United Nations General Assembly on December 9 1975 with its resolution No. 3452/D-30.(3)

The Statute of the International Criminal Court defines in Article (7), paragraph (II) as "the intentional infliction of severe pain or suffering, whether physical or mental, on a person who is under the supervision or control of the accused, but torture does not include any pain or suffering that results only in legal sanctions or is part of it or as a result of it.(4)

Torture is also defined by the draft Arab Convention for the Prevention of Torture as "every act or omission that results in severe physical or mental suffering or pain, intentionally committed by a public official or official in order to compel a person to confess, obtain information from him, or punish him for an act." committed or suspected to have been committed by him or another person, or with the intent to intimidate him or other persons or force him or others to do something bad for any other reason."(5)

What should be noted is that the previous definitions attempted to be familiar with the broad definition of torture, to the extent that, in their definitions, they included examples of forms of contribution and the various aims sought from that, in an effort to include the most possible cases of torture that exists in countries with their various regimes.

As for legal scholars, they have also come up with many definitions of torture. The Italian jurist (Cesari Bakaria) defined torture as "the harm or cruelty inflicted on the accused or suspect in order to force him to confess to a crime, or to remove inconsistencies

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in his statements, or to reveal the names of his accomplices, or to extract evidence from a witness who refrained from tell the truth"

Others defined it as "inflicting severe pain by physical or psychological means on a person to extract information about a crime or as a means of punishment for an act or crime he committed."(6)

French jurisprudence defines it as "acts of extreme violence that attack the integrity of the victim's body. "(7) It is taken from these definitions that they did not expressly specify the characteristics of the offender and the victim, who is required to be an employee or entrusted with a public service.

Another aspect of jurisprudence defines it as "physical harm that includes the meaning of extracting or squeezing and extracting by force, and it is the most severe type of influence that falls on the accused and corrupts his confession and paralyzes his will with a physical force that he cannot resist. voluntary character.(8)

It is also defined as "the use of means of physical violence to influence the will of the accused."(9)

It was also defined as "a kind of physical coercion that takes the form of repeated beatings, as it may result from the defendant's weak resistance to food or sleep deprivation."(10)

It is noted that the definitions we have mentioned have limited the act of torture to physical harm without the moral harm inflicted on the person, which may be more severe than physical torture, and thus, you may have narrowed the scope of responsibility in this serious crime by limiting it to physical torture rather than moral torture. However, another aspect of jurisprudence went to define torture as "every assault or physical and moral harm, whether serious or not."(11) It was also defined as "every intentional assault that causes physical or mental pain to a person who is under the authority and supervision of the offender."(12) It is noted on these two definitions that they have expanded the scope of responsibility as it included serious harm and minor harm, as well as the second definition included material and moral harm. We also note on all the definitions mentioned that it did not show that every act of abuse or harm achieved for the meaning of torture, positive or negative, is represented by abstinence or not doing it.

As for the Iraqi legislator, torture was defined in the Law of the Iraqi Criminal Tribunal for Crimes against Humanity in 2003 as "the intentional infliction of severe pain and suffering, whether physical or mental, on a person in detention or under control, provided that torture does not include pain or suffering resulting from the penalties."(13) We find that the Iraqi legislator here in this definition has taken the approach of the statute of the International Criminal Court in the aforementioned definition of torture, and we find that the legislator here also when defining torture did not expand the scope of criminal responsibility for the act of torture. Rather, he added the scope of that criminal responsibility, as it stipulated that the victim be detained or under the control of the offender, and therefore if the victim was not detained and not under the control of the offender, this text cannot be applied, and this direction is not consistent with what the Iraqi legislator adopted in Article (333) of the Penal Code No. (111) for the year 1969, which states: "Any public official or agent who tortures or orders torture among them or a witness to force him to confess to a crime, give statements or information about it, conceal a matter or give a specific opinion about it, shall be punished with imprisonment or imprisonment." By virtue of torture by force or threat. We find that the Iraqi legislator, as he included the victim in the crime of torture with the accused, witness or expert, who are not usually detained and not under the control of anyone, and also taken on the definition that came in the law of the Iraqi criminal court that it was not required for the investigation of the crime to cause the criminal act severe pain and this does not agree With the most correct opinion in jurisprudence, who realizes the crime of torture, regardless of the gravity of the act or the result.

In addition, torture is one of the crimes of assault on persons, which occurs even if the victim is not harmed, due to the seriousness of the criminal act in the first place, and it is good for the Iraqi legislator in Article (333) when he did not mention a specific definition of torture, because any definition was not comprehensive and prevented the new acts of this crime and did not require a certain degree of gravity as he left the matter to the trial court to derive it from the circumstances of each case. These actions have an effect on the soul of the subject, so any torture to which the accused is subjected makes his confession doubtful, especially since the suspicion is explained in favor of the accused. (15) This is what the Federal Court of Cassation went to in its decision (If the fortified evidence from the accused in his confession was in the role of the investigation that he denied before the court, and the medical report proves the presence of bruises, wounds and burns all over his body, and because the suspicion is explained in the interest of the accused and the confession is not supported by other evidence, then the evidence is insufficient for conviction). And in another decision of the Federal Court of Cassation, it stated: (... the

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available evidence against the accused is his statements recorded by the investigator, which he denied before the investigating judge, and it was proven that he was subjected to torture. The evidence available against him is insufficient and does not give full conviction to his participation in the crime.(16)

It can be summarized from the above that torture in a broad sense is "every intentional behavior, whether positive or negative, by the offender, whether an employee or a person entrusted with a public service, to assault the victim, whether an accused, witness, or expert, causing him physical or psychological harm to make him confess to a crime, make statements, or Information about it, concealment of a matter, or to give a specific order about it, "and accordingly, the practice of torture actually" means that an official or a person entrusted with a public service commits a physical or moral assault on an accused, witness or expert in order to make a campaign to confess or give statements or information about a crime or to conceal an order of things or give a specific opinion on them.

The offender, a public official or a person entrusted with a public service, performs a positive or negative, material or moral behavior on the victim, an accused, a witness or an expert that would be the material element of the crime of torture, and his behavior leads to a consequence, which is physical or psychological harm to the victim to force him to confess." Or to make statements or information about it, to conceal an order or to give information about it.(17)

As for the Egyptian Criminal Court, it defined it as "the cruel and violent abuse that he does, and it weakens the resolve of the tormentor, which leads him to accept the affliction of confession in order to get rid of torture." (18) What is taken from this definition is that he focused more on the effects of the act than on the essence of the act itself, stipulating the occurrence of a certain result, which is to force the victim to confess, and this is not true, because torture is a crime whether it leads to confession or not, and this is what Article 110 stipulates.) of the previous Egyptian Penal Code under which the previous court issued the ruling, which is what Article (126) says of the Egyptian Penal Code, which considered this crime as one of the crimes of assault on persons originally and was mentioned by the legislator in the section of coercion and mistreatment of people by employees, i.e.

in the range of crimes harmful to the public interest, in appreciation of the legislator for the character of the offender and the character of the victim in this crime, which had weight in the Assessment of justice, this crime is originally one of the crimes of assault on persons, but the legislator, in appreciation of the specificity of the offender's situation and the authority he possesses, the situation of the victim and his incapacity, which form here two elements necessary for the commission of this crime, which prompted him to add to the act a description It is different and distinct from the rest of its images, which is compromising the integrity of the body.(19)

Definition of the precondition (supposed)

Most of the crimes converge among themselves with general and common basic elements, which are the material and the moral elements, but this case is not equal in all of them. For every crime has its own elements that distinguish it from other crimes, which are represented in the capacity of the perpetrator or the victim or in other elements, as well as the case in the crime subject of our research.

And that these characteristics are linked to this type of crime, by presence or knowledge, so that if the offender or the victim is excluded before committing it or acquired after that, then we will be facing other crimes. Crimes that should be committed by the availability of the presumed corner.(20)

And that the crime of torture, in order to complete its criminal model, requires the availability of the general elements of the crime, namely the material element and the moral element. The legislator also stipulated the availability of the supposed element in addition to it. Jurisprudence was divided in this regard into several opinions. The elements of each crime, including the presumed condition, are the elements that enter into the formation of the general elements.(21)

Prerequisite in the crime is not recent or emerging in general, but was initially talked about within the scope of private law, and the French jurist (Otolan) was the first to name it with the constituent circumstances that can be associated with basic elements in the crime such as his description of the offender or the victim, which They are necessary elements for the crime to occur. The perpetrator of the crime of female rape must be a male, and for the crime of embezzlement, the perpetrator must be a public servant, and this characteristic is a cornerstone of the crime.(22) And that this idea in the beginning did not develop and resonate in the penal law and did not garner enough attention, but it came back again to take a broader scope in the penal law in its public and private branches, as it was called by different names, including the initial or previous conditions, as the Egyptian jurisprudence called them different terms Such as presumed conditions, presumed elements, presumed elements, presumptions of the crime, or the presumed aspect of the crime.(23)

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The Italian criminal jurisprudence had a prominent role in paying attention to the idea of the supposed corner after it was neglected by the French jurisprudence as they crystallized and developed it after linking it to the pillars of crime, led by the jurist (Manzini), who explained the concept of the supposed pillar, as he called it the supposed conditions, and he divided it into two types: presumed conditions for the crime and they mean those legal elements that exist in advance and before the commission of the crime on which it depends. The existence of the crime or not, according to the description prescribed for it in the relevant legal text, but if it fails, then we are facing another crime and another description, and presumed conditions for the incident, and they mean the legal or material elements prior to the execution of the crime or contemporaneous with it that the law requires in order to apply to it, and by defaulting The latter results in the inadmissibility and clarification of the punishment for the incident for the act(24).

As for the French jurisprudence, which was not concerned with the idea of the supposed element of the crime at first, as we mentioned, it returned again through the views of the jurist (Robert Vaughn), who was of the opinion that there are elements that make up the crime, and these elements are not of the same degree of importance because some of them He has priority over others, and this in turn is reflected in determining the scope in which the crime can be committed, which is the judicial ruling with regard to the crime of abandoning the family, and not paying the family alimony.

As for the crime of family abandonment, or the existence of an obligation contract to refrain from paying alimony, and he concluded in his opinion that some crimes require that there be an element prior to their existence, and the French judiciary benefited from this opinion and duplicity, especially in the field of international jurisdiction, as it excluded the supposed element when exercising it, which was dealt with in Article (693) of the French Code of Criminal Procedure, which states that the French judiciary is not competent unless one of the constituent elements of the crime is committed only on the French territory.(25)

The Italian jurist (Manzini) defined the supposed element as a positive or negative circumstance that necessarily precedes the existence of the crime or incident.

The definition that the Italian jurisprudence has settled on for the presumed element or the special element is that it is an element that precedes the behavior and is necessary to exist in order for this behavior to prove the description of the crime. It is a crime of breach of trust.(26)

And one of the French jurists defined it as "the elements with which a crime can be committed."

As for the Egyptian jurisprudence, some have defined it as a legal or actual center or element, or a legal or material fact that must exist at the time of the commission of the crime, and its failure results in the absence of the crime.

Another defined it as "the elements that are supposed to exist at the time of the perpetrator's initiation of his criminal activity."(27)

A third defined it as a fabric of conditions, legal elements, positive or negative conditions related to the subject of the crime, the perpetrator or the victim.(28)

Through the foregoing definitions of the precondition or presumed condition, we see that what the Italian jurisprudence has settled on is the appropriate definition of the crime that is the subject of our research. The presumed element is an element that precedes the behavior and is necessary to exist in order for this behavior to prove the description of the crime, so that if it fails, another crime is realized.

Accordingly, we conclude that the supposed element is the same as the special or prior element required by law in connection with each crime described separately and added to its general elements, and distinguishes it from other crimes after giving it a legal name. Or the victim, or it may necessitate a specific means carried out by the crime or a special characteristic of the victim, as some crimes depend on criminalization and punishment on the availability of the supposed element, which the law supposes to exist at the time of the perpetrator's activity and without it this activity is not described as a crime.

The second topic

Elements of the (supposed) precondition in the crime of torture

It has become known that the law requires for the establishment of any crime a number of elements that are considered as common elements in all crimes. These elements are represented in two aspects, one material and the other moral. The material is the essence of the criminal activity of the perpetrator and the result, while the moral is represented by the criminal intent in intentional crimes or mistake in non-intentional crimes. The crime of torture, the subject of our research, differs from similar crimes as it requires an essential pillar, which is the presumed pillar or the so-called precondition, which is based on two elements, the first being the character of the offender (public employee) and the second the victim (the accused) and we will talk about them in two demands,

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the first requirement for the character of the offender The second is for the victim.

Offender feature

The principle is that the crime is committed by every person who does the act that the law forbids, but there are crimes that deviate from this principle, so it is not imagined that it would be committed except by someone who carries a certain capacity, and the crime of torture is one of these crimes, as the legislator stipulated that the capacity of its perpetrator be either an employee or a public servant. Accordingly, we find that most criminal legislations are in agreement on the description of the employee or the person charged with a public service in relation to the offender. We will address this capacity in two parts. The first part deals with the public employee and the second we will talk about about the person charged with a public service, as was referred to in the text of Article (333) of the Iraqi Penal Code by saying (... Every public servant or person assigned to a public service has been tortured or tortured ...) The Egyptian legislator shared this description in Article 126 of it, which stipulated (... Every public official or employee ...).(29)

First branch

Public employee

The laws of the public service did not care about establishing a general and comprehensive definition of the public employee, so it was left to the jurisprudence and the administrative judiciary to strive to develop a concept to define what is meant by the public employee, as the administrative jurisprudence defined it (every person who legally performs permanent work in the service of a public facility run by the state or a public moral person by way of direct exploitation).(30)

This concept of the public servant has developed in the element of permanent work in the job, here the capacity of the public servant is applied to everyone who is appointed in a temporary or permanent job in the service of the public facility run by the state or a person of public law by direct exploitation.(31)

According to the foregoing, the concept of the public employee is based on two elements. The first is that in order for the employee to acquire the status of an employee, his presence in the public facility must have a legal capacity, that is, through appointment. If this element is not available, the capacity of the public employee will not be achieved.(32)

As for the second element, in order for a person to acquire the status of a public employee, in addition to the appointment, this person must be a worker in the service of a public utility, whether this utility is administrative or economic, and it requires that this public utility be managed by direct exploitation, and the public utility is defined as every project undertaken by the administration. By itself or by individuals under its care and supervision to satisfy a specific need.(33)

The jurists of administrative law have also defined the public employee as (the person who works permanently in state facilities or the socialist sector), and it was also defined as (every person who was in charge of managing a public facility managed by the administrative and local authority, whether he performs this service temporarily or permanently).(34)

We also find that the Administrative Judiciary Court in Egypt has defined the public servant in many of its rulings, as it said in its ruling that ((the public servant is the person who is entrusted with a permanent job in the service of a public utility run by the state or a person of public law through the direct route)).(35)

Likewise, the Supreme Administrative Court came in its jurisdiction (in order for a person to be considered a public servant subject to the provisions of the public position, he must be appointed on a continuous basis, not opposed to contributing to a permanent job in the service of a public utility managed by the state through the direct route.(36)

And the Iraqi legislator defined the public employee in the Civil Service Law No. 24 of 1960 in Article (2) of it (that every person entrusted with a permanent job within the state's personnel cadre)

Based on the foregoing, we conclude that in order for a person to acquire the status of a public servant, his relationship with the government must be characterized by permanence and stability in the service of a public facility run by the state through direct or subjection to its supervision, and not a casual relationship. Some of them went on to say that the public servant is (everyone who works for the state, whether in state departments or in the socialist sector). Another defined it as (the one who is on the staff of the employees or on the owners of workers working in the state and its affiliated institutions, whether it is a permanent or temporary job).(38)

It is noted on these two definitions the expansion of the scope of the concept of the public employee in order to miss any opportunity for the occupants of a public position to escape punishment due to the different naming assigned to him, as it does not require in the concept of the public employee the availability of certain elements such as a permanent job and service in a public facility and a degree on the owner of the job, or even the issuance of Appointment order from the legally competent authority. The actual employee according to the criminal concept is considered a public employee as long as he exercises

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the powers of public utilities, even if an order for his appointment or assignment is not issued by the legally competent authority. It seems that this is what the criminal legislator wanted to achieve, so he did not provide a strict definition that may not accommodate all of these cases.

Well, the criminal legislator did in this regard. A number of comparative legislations have included a definition of the public servant as it is in Article (169) of the Jordanian Penal Code No. 18 of 1960 in force, where it indicated that "Every public employee in the administrative or judicial corps is considered an employee within the meaning of this chapter. An officer of the civil or military authority or one of its members and every worker or employee in the state or in a public administration) and this was confirmed by the Libyan Penal Code of 1953 within Article (16) of it and the Lebanese Penal Code No. 340 of 1943 in Article 350 and the Syrian Penal Code No. 184 of 1949 in Article (340) thereof.(39)

As for the Egyptian criminal legislator, the public official did not know a general and abstract definition that applies to all criminal matters, or rather to the crimes in which the legislator requires this characteristic. in those crimes.(40)

The Egyptian criminal legislator has embraced a broad concept of the public servant in the application of these crimes that differs from the less expansive administrative concept. And in view of the silence of the Egyptian criminal legislator about setting a general and abstract definition of the public servant in the Penal Code, this silence led to a dispute in criminal jurisprudence about defining what is meant by the public servant in the field of criminal law. The Penal Code, this only means referring to the definition applied in jurisprudence and administrative judiciary. As for the other trend of jurists, they went to say that the criminal law has an independent subjectivity that distinguishes it from other laws, and therefore the concept of the public servant in criminal law differs from it in administrative law .

The meaning of the public servant in the criminal law is every person appointed to work in the service of a public utility run by the state or a public moral person by direct exploitation, whether that is permanent or temporary, with or without pay. From other laws, including administrative law, despite the distinction and independence of each of the two laws from the other, this does not mean disharmony and lack of relationship between them, in fact, criminal law is closely related to other laws.(41)

As for the position of the Iraqi legislator regarding the character of the perpetrator in the crime of torture, he touched on it in Article (333) when he said (...every employee or entrusted with a public service...), as it is understood from this article that the crime of torture must be perpetrated by an employee or entrusted with a service. In general, the Iraqi legislator defined the public employee in successive civil service laws, and the legislator settled on the definition he provided in the Civil Service Law 24 of 1960 in force, where the public employee was defined (every person entrusted with a permanent job within the state's personnel cadre) As it becomes clear to us from this definition that the legislator, in order for the legislator to be considered a public servant, his relationship with the government must be characterized by permanence or stability in the service of a public facility managed by the state through the direct way or subject to its supervision and not a casual relationship. It agrees with the nature of this law, while we find that the Iraqi criminal law, although it does not include a definition of the public servant, goes to expand the scope of the concept of the public servant and the reason for that is that the legislator wanted not to leave an opportunity for impunity for the occupants of a public office because of the different designation assigned for him. And indeed, the Iraqi legislator in this case, which is worth mentioning, is not a condition for the employee to be proven. Rather, it is sufficient for him to be under probation as long as the appointment order has been issued by the authority in which he works.(42)

While we find that the Iraqi criminal legislator in the Penal Code provided a special definition for the public servant, while it did not include a definition for the public employee, as we explained previously. Or a worker entrusted with a public mission or serving the government and its official and semi-official departments and the interests affiliated with it or placed under its control. This includes the Prime Minister, his deputies, ministers, members of the representative, administrative and municipal councils. It also includes arbitrators, experts and creditors' agents (Sindiki) liquidators, space guards, members of boards of directors, managers and employees of institutions, companies, associations, organizations and establishments to which the government or one of its official or semi-official departments contributes a share in any capacity in any capacity, and in general anyone who performs a public service, paid or unpaid, and does not preclude the application of the provisions of this law against The person charged with a public service ends his job, service, or work whenever the criminal act occurs while one of the attributes mentioned in this paragraph is available in it.

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General with a temporary contract with it until the capacity of the person charged with a public service in it is fulfilled.

The question that can be raised here is what is the time that the offender must have the capacity of an employee or a public servant when committing the crime of torture? In order to answer this question, it can be said that the perpetrator of the crime of torture must have acquired the capacity of a public official or commissioned a public service at the time of the commission of the criminal conduct constituting the crime.)

Iraqi penalties, even if he acquired this capacity, i.e., the capacity of an employee or a person charged with a public service prior to his initiation of the criminal behavior, or he had acquired it after committing the crime. Or whoever is suspected of committing it or participating in it, but it is sufficient for the public servant to have the authority under a position that allows him to torture the accused with the intent of making him confess, and whatever motivates him to do so.(43)

The other question that may also be raised is about the extent to which the text of Article (333) applies.

Iraqi penalties and the text of Article (126) Egyptian penalties for the actual employee, which is intended to recognize the capacity of a public servant to a person who exercises a public position despite the fact that its conditions were not fulfilled in it, either because no decision was issued for his appointment or a void decision was issued for his appointment, or the procedures for his exercise of the job have not been fulfilled after .

The answer to this question requires a distinction between two cases:

The first case: It is the case of the person whose appointment decision has been marred by a non-material defect, that is, it is not relied upon, or the defect that marred the decision is substantial but unknown, so that the employee who did not lose any aspect of his job authority because of it, in this case the previous articles do not apply to him.

The second case: It is the case if the defect in the appointment of the employee prevented him from carrying out the duties of his job, in this case the above-mentioned articles shall not apply to him.(44)

The other question that should also be raised in this regard is, is the person considered an original perpetrator in the crime of torture who does not acquire the status of an employee just because he committed it with another who has that capacity, or does this person have another legal status that differs from that of the original perpetrator?

An opinion went on to say that it is sufficient for crimes that require a special capacity in the offender, such as the capacity of a public servant and in which there are multiple contributors, that one of the contributors possess this capacity in order for the special provision to be applied to all contributors to the crime, whether they enjoy the capacity of a public servant or not, even if the one who committed the crime Committing the material element is a person who does not have the special capacity as long as it is available to other shareholders.

While another opinion refused to accept the validity of this opinion, and went on to say that when the legislator stipulates in the crime a specific quality in the offender, it is obligatory for the completion of the crime with its various elements that the one who enjoys that special capacity is the one who committed the material act constituting it, and therefore the participation of others in that crime It is always an accessory contribution, even if this third party has committed with the original actor the material element constituting it.(45)

We support the view of the second opinion, and we see that when the legislator stipulates in one of the criminalization texts a specific quality in the offender, such as the capacity of a public official, for example, he is obligated to consider a person an original perpetrator in the crime to have this capacity.

While others do not enjoy it, the original perpetrator capacity is only applied to public officials among them and not others from whom this capacity is limited, as they are considered accomplices in the crime by means of assistance.

Victim's character

Neither the Iraqi legislator nor the Egyptian legislator has put a specific definition of the defendant in the Penal Code or the Code of Criminal Procedure, and for this reason, the definitions that the jurists have said of the meaning of the "defendant" have been varied. The litigant to whom the accusation is brought by initiating the criminal case(46). It was said that the accused is every natural or legal person who has been accused by the competent procedural authority of committing an act that is considered a crime in the law, whether he is a perpetrator or a partner in it. (47)

It was said that the accused is every person who is accused of committing or participating in a specific crime based on the availability of signs or evidence indicating that the crime is attributed to him.(48)

According to these definitions, it becomes clear that a person does not acquire the status of the accused

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except from the moment the criminal case is moved against him, but before that, the person has not acquired the status of the accused yet, even if he has committed the crime or the evidence is stifled, and then the person does not acquire the status of the accused by simply submitting A report against him or a complaint, or if the judicial officer conducted some investigations or inferences about him, but then he is suspected. However, linking the person's acquiring the status of the accused to the time when the criminal case is being filed against him is difficult to admit.

Because, although it is suitable for determining the meaning of the accused in one of the stages of the criminal case, it does not cover the rest of the other stages in which the authority can relate to an individual, during which its representatives may practice forms of violence against him, such as the person around whom it is suspected that he was involved in committing the crime While the judicial control officers are tasked with collecting inferences.(49)

The Court of Cassation ruled that the accused, in the ruling of the first paragraph of Article 126 of the Egyptian Penal Code, is "everyone who has been accused of committing a specific crime, even if that was while judicial officers were carrying out the task of searching for crimes and their perpetrators and collecting evidence in them that are necessary for investigation and lawsuits." According to the provisions of Articles 21 and 29 of the Code of Criminal Procedure, as long as there is a suspicion surrounding him that he was involved in the commission of the crime in which those commanded are collecting evidence, and there is no objection to one of them falling under the provisions of Article (126) of the Penal Code if he is told by himself that he is being tortured. the accused to force him to confess.(50)

It is clear to us from these definitions that the status of the accused applies to the person before initiating the criminal case, when the judicial police officers undertake the task of searching for crimes and their perpetrators and collecting evidence.

It is necessary to say that when a person acquires the status of an accused, he becomes worthy of the criminal protection stipulated in Article (126) Egyptian Penalties, and the status of the accused must be available in the victim at the moment the offender commits the criminal behavior constituting the crime of torture. (126) Penalties, even if this quality is present in the victim, and then the trait ceases to exist in him after that, for any of the reasons leading to that, It is also required that the victim be a natural person, because only a natural person can imagine that a public official would torture him to extract his confession, and it is also required that the victim of the crime of torture be alive to get him to confess regardless of his age, creed, social or health status It is equal for the victim to be unaware or insane, young or old, man or woman, juvenile or adult, or whether he is a known or unknown person, and it is also equal for the accused to be in the stage of inference, investigation or trial. (51)

As for the position of the Iraqi legislator regarding the status of the victim, it stipulated that for the investigation or for the perpetration of the crime of torture there should be a special corner for one of its elements, the victim must be an accused, a witness or an expert, otherwise the crime of torture will not be realized. Where the Iraqi legislator stipulated in the Penal Code, Article (333) of it, "… he tortured or ordered the torture of one of them, a witness or an expert." The Code of Criminal Procedure defines the accused as "the person against whom a crime or certain crimes have been charged, which preliminary and judicial investigations indicated that he had committed the crime, or that some evidence was available to that effect."(52)

The legislator in the Code of Criminal Procedure has given wide powers to members of the judicial police, especially in witnessed crimes as stated in Articles (43 and 44), where he permitted them to question the accused orally or hear the statements of those present, and bring every person from whom information can be obtained. In this regard, it is not excluded that a member of the judicial police will torture the accused and the witness at this stage of the criminal case, which is the stage of gathering evidence, In order to get him to confess or provide information about the crime, even verbally, from here the importance of giving the character of the accused to the person emerges, even if the matter was just a suspicion that occurred to him in the stage of investigation and collection of evidence, even if this investigation later proves the opposite, this does not remove The quality about him that he had already acquired and thus became a subject of protection under Article (333) of the Iraqi Penal Code.(53)

From what is clear to us that the mere fact that the authority collects evidence against a person to prove the accusation against him is sufficient to confer this character on him, even if the investigation proves the opposite, and if the court acquits him of that accusation, then the status of the accused is already established on him and if the authority fails to reach his confession despite the fact that torturing him.

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Thus, the crime of torture occurs when any authority is subjected to suspicion by any person, which expands the scope of responsibility in a manner that does not lead to the perpetrators escaping from the influence of justice, and therefore the accused is known in a manner consistent with what is stipulated in Article (333) that whoever directed He has the accusation from any party of committing a specific crime, so there is no objection to the person being considered accused while the judicial officers are carrying out the task of collecting evidence, as long as there is a suspicion surrounding him that he was involved in the commission of the crime in which these men collect the evidence.

As for the witness that the legislator wanted to protect from the crime of torture, because he, like the accused, may also be subjected to the influence that may be exercised on him in order to provide information about a crime or conceal a matter, threats and torture are all means that may push a person to lie in his testimony or to provide information other than that. It is necessary to know the person to whom the status of a witness is proven, as most criminal laws do not define the witness nor what is meant by testimony, but rather leave determining that to the jurists. A third party claims before the court to announce what he knows about facts related to the case.(54)

As for criminal law jurists, some of them went on to define it as "every person who has sworn a legal oath and has the ability to perceive and discern before the investigator or the judicial council what he witnessed about the work of others, or heard, or realized through one of his senses in order to prove the crime or deny it from the accused."(55)

The other section defined it as "every person who is assigned to appear before the judiciary or the investigative authority in order to provide information regarding an incident of importance in the criminal case." (56) Another of the jurists defined him as "the person who is able to transmit what he saw or heard of matters or perceived with his senses in order to prove or deny the fact."(57)

We conclude from the foregoing that the witness is the person who became aware of the criminal incident or any matter related to it through one of his senses, and this definition comes to clarify the purpose of the witness in general, as for what Article (333) of the Iraqi Penal Code meant that he added to him every person summoned by the public authority as a witness Although he did not realize the crime fact.

Thus, the crime of torture is realized if torture is committed by an employee or a person entrusted with a public service against a person who has been assigned to appear before the judiciary or the investigative authority to provide information about a specific incident in order to force him to provide or conceal certain information.(58)

As for the expert, and in order for him to be subject to the protection mentioned in Article (333), if any public servant or person assigned to a public service tortures him in order to force him to give or conceal information, as he can be defined in general as a person who possesses scientific and technical qualities and qualifications in the field of His technical and professional specialization, which enables him to give the correct opinion regarding the profession he is delegated to, provided that he performs it honestly and faithfully, with impartiality and impartiality, without apparent or hidden bias in relation to any of the parties to the lawsuit.

As for the criminal expert, he is the person charged with a public service and he is required to give his technical opinion regarding the body of the crime or the tools used in its commission and its criminal effects and others to clarify the truth and determine its meaning, for the purpose of using it in order to convict the accused or rule his innocence by the competent court. Therefore, he is not considered an expert unless his task requires two essential elements, which are perception and conclusion so that he can assist the judge in forming his belief in the case before him.(59)

And we go with the opinion that asks to expand the concept of the expert to include every person who is used by the judge to express an opinion on a matter that needs expertise, regardless of his knowledge and knowledge of the subject, his impartiality or sincerity. To reach an implied estimate, he does not have a technical certificate or technical advice.(60)

CONCLUSIONS

After we have finished studying the (supposed) precondition for the crime of torture in Iraqi legislation, we conclude our study with what we have reached and what we recommend.

1- The Iraqi legislator did not provide a specific definition of torture in the texts of the penal code in force. Rather, he preferred to leave the task of defining it to jurisprudence, the judiciary, and the judgment of the subject matter judge.

2- Torture in its broadest sense means that it is every intentional behavior, whether positive or negative, by the offender, whether an employee or a person entrusted with a public service, to assault the victim, whether an accused, a witness, or an expert, causing him physical or psychological harm to make him

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confess to the crime of giving statements or information about it or withholding it. An order of things or to give a specific command about it.
3- The crime of torture is one of the crimes that does not arise by just completing its general common elements with the rest of the crimes, such as the material element and the moral element. The type of crime, whether it is present or not
4- What Italian jurisprudence settled on from the definition of the precondition (assumed) is the appropriate definition of the crime of torture, the subject of our study, as it was defined as an element that precedes the behavior and is necessary to exist in order to prove this behavior describes the crime so that if it fails, another crime is achieved.
5- The perpetrator of the crime of torture must have acquired the capacity of a public official or a person charged with a public service at the time of the commission of the criminal behavior constituting the crime.
6- The victim must be a living natural person, not a legal person, because only a natural person can be tortured by a public official or a person entrusted with a public service to extract his confession.
7- The mere fact that the authority collects evidence against a person to prove the accusation against him is sufficient to confer this character on him even if the investigation proves the opposite or the court acquitted him of that accusation, then the status of the accused will be proven against him and if the authority fails to reach his confession despite his torture. The crime of torture takes place when any authority is exposed to suspicion by any person, which expands the scope of responsibility in a way that does not lead to the perpetrators evading the influence of justice, and therefore the accused is known and in a manner consistent with the provisions of Article (333) Iraqi Penalties
The most important things we recommend:
1- It would be nice if the Iraqi legislator provided a specific definition of torture, guided by the concepts presented by the comparative legislator, without leaving the matter to the jurisprudence of the jurists.
2- The need for the legislator to intervene to draft a text criminalizing the torture of the accused, and not to be satisfied with the text in Article (333), which defines the status of the victim as the accused, the witness and the expert, given the seriousness and recurrence of the crime of torture, the accused in particular, on the ground. Its penalties are according to the gravity of the result, leading to the imposition of an appropriate punishment in the event of the victim's death as a result of torture
3- We call on the penal legislator not to limit protection from coercion and thus torture to the accused, but rather to include the witness and the expert because both are subject to that.
4- It would be desirable if the legislator took into consideration what the Iraqi constitution adopted in Article (37) Paragraph (C) of the invalidity of the confession extracted by torture in order to achieve justice and an additional punishment for this crime that violates human rights, not just the rights of those who signed it.
5- We suggest that the legislator should move away from the requirement that the victim have a certain quality and a specific purpose of torture to achieve the crime of torture, as torture acts may involve persons who are not accused, witnesses or experts, and may be associated with the right of accused and experts for purposes and purposes other than what Article (333) stipulates penalties
6- The Iraqi legislator, when stipulating the offender's capacity for the occurrence of the crime, had to expand the scope of responsibility with regard to persons who may participate in the commission of the crime, other than officials or those charged with a public service, by singling out a special text and not relying on general principles that may bear the perpetrator of those who are not available It includes the capacity of the offender responsible for the crime of harm, for example, or participation in the crime, and thus escapes punishment if the original perpetrator from whom he derives his crime escapes.

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