

# The Crime of Capturing or Transmitting a Picture of a Person in A Private Place without His Consent (A Comparative Study)

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One of the most important rights that are related to a person is indivisible, and the consequent safeguarding of his dignity and freedom is the right in the picture. This is because he has authority over his body, and therefore his picture, and he has the right to allow others to take or transfer his picture and publish it, and to say otherwise is a violation of this right. Therefore, criminal legislation has sought to protect him from any aggression that may happen to him, by criminalizing acts that are the subject of capturing, or transmitting a picture of a person by any means, or a device of modern technological devices, or by traditional means, and without his consent if he is in a place that is used as a framework to practice his life Own. Including the legislation that is the subject of comparison, and the appropriate penalties decided for it to provide the elements and elements that it stipulated in the criminal texts, with the aim of protecting this right on the widest scale.

*Key words: Transmitting Picture , legal texts , modern technological*

## Introduction

The right of the person in the picture represents one of the elements of private life, and he is the person who has the right not to allow anyone to take his picture, and publish it by any means or apparatus and work, otherwise it is a violation of the human right to his private life or his right to his picture. Therefore, the internal legislation and judiciary recognized the human right in its form, including the comparative criminal legislation in question, which criminalized any act that constitutes an attack on this right, because that is a violation of the inviolability of the right to the picture. However, there is disagreement about the nature of this right for both jurisprudence and the internal judiciary, so what is the right in the picture?

What is its legal adaptation? What are the pillars of the crime of capturing or transmitting a picture of a person in a private place without his consent?

The comparative analytical approach is the approach that is consistent with the subject of the research, through which we will try to analyze the relevant legal texts in the comparative legislation, as well as an analysis of what he said criminal jurisprudence in this field. The subject of the research will be divided into an introduction, two topics, and a conclusion. The first topic is devoted to the concept of the right to a picture, and the second is devoted to researching the crime of capturing a picture, or transferring it to a person in a private place without his consent. As for the conclusion, it included the most important conclusions that we reached.

### **The First Topic**

#### ***Definition and Legal Adaptation of the Right to Picture***

We will address the topic in two requirements, the first is devoted to the definition of the right to the picture and the second to its legal adaptation.

### **The First Requirement**

#### ***Definition of the Right to the Picture***

We believe that the proper definition of the right to the picture should be divided into two parts, the first is to define the picture and the second is the right to the picture, which we will address in the following two sub-categories:

### **First Branch**

#### ***Definition of the Picture***

The picture in the language (I imagined the thing: his picture was imagined, envisioned to me, the pictures: the statues, and in the hadith he came to me tonight, my Lord in the best picture. Ibn Al-Atheer said: The picture appears in the words of the Arabs on its surface and on the meaning of the reality of the object and its form and the meaning of its characteristic, it is said the picture of the verb as well And such, i.e. its form and picture of the matter such and such, i.e. its characteristic (Ibn Manzoor, 2/492). As for the Latin origin of the word picture: (imago), it tends to every illustrated representation related to the proverbial theme through the conceptual similarity(Hisham, 2010). One of the researchers refers to the multiple indications of the picture such as reproduction and reproduction, and also indicates that the word picture “has its roots in the ancient Greek word (icon),” which refers to similarities and simulations, which were translated into (imago) in Latin, and (picture) In English. The French Litre dictionary defined it as representing an object by carving, carving, engraving or

drawing an picture (Dr. Abdel, 2005). The definition of an picture differs from one science to another. In optics, it is defined as a similarity or conformity to the object resulting from reflection or refraction of the light rays emitted from it on a lens or mirror. In the natural sciences is the drawing obtained by means of a mirror, or any optical instrument (Dr. Ahmad, 2001). As for the terminology, the French jurist (Jean-Paul Sartre) defined it as "that similarity and overlap between lines and colors only, but in reality it resembles a person with a similarity of his face" (Ibid.,406). There are those who see that the picture is a reflection of the human personality in its material and moral appearance, as what the person hides within him from the feelings, feelings and desires that the picture is the mirror that is expressed (Radhi , 2011). The picture may be called "one of the innovations that a person has reached, in order to obtain a similar form of a particular object, usually a physical body or a person, as it refers to dealing with two-dimensional objects" (Dr. Mamdouh ,2010). The picture throughout the research is based on two types of photographs (photovoltaic or solar), which is an picture obtained through the process of photography, by focusing the light sent from the body to the light sensor in the camera. They are pictures that are taken using films, such as old cameras, where the pictures are stored in these films, which are then placed in special chemicals and laboratories that are dimmed (Majdi , 2018). As for the digital picture, it is a file that can be opened on the screens of digital devices such as computers, smart phones, etc. It is intangible pictures that can be printed using different types of printers, and it can also be exchanged and transferred between electronic devices (Dr. Abd al-Latif ,2013).

### ***The Second Branch***

#### ***Definition of the Right to the Picture***

In general, the right is defined as “a privilege established by law for a person and protected by legal means, and this privilege entitles him to act with authority over money recognized for his exclusivity as an owner or due to him” (Ibid., 26). As for the right to a picture, it is intended that a person has the power to prevent a picture from being taken and published without his consent and consent (Dr. Hassan ,1974). Or it is the authority of a person to refuse to produce and publish his picture without his consent, whether by traditional artistic means such as drawing, sculpting or engraving, or by modern means by different imaging devices such as digital or traditional cameras (Muhammad, 2001). It was also known as "that exclusivity that allows a person to prevent others from drawing or capturing a picture of him without explicit or implicit permission" (Dr. Saeed ,1986). There are those who went to define the right to the picture, as the right of every person to refuse or accept seizure, or to reproduce his picture, use it and publish it, as well as refusing to distort its features and exploit or circulate it in any way (Ramzi, 2014). It is noted from the previous definitions that it confirms in one way or another the necessity of the approval of the owner of the picture when he wants to take any action, that would prejudice his right to his picture, whether this work is related to capturing or producing his picture by any means, old or modern, or

publishing his picture by any means, such as printing, Or display it on social networks or the Internet via mobile phones or computers and other devices. Therefore, it can be said that this right includes two aspects: The first is to prevent the production or capturing of the picture without the consent of its owner. The second is not to publish or transmit it without his knowledge and consent. In a related context, if the right in the picture is based on the inadmissibility of capturing it or transferring it and publishing it without the consent of its owner, then this right is characterized by two main characteristics: The first is that it is an inalienable right in it in any form of behavior such as selling or gift etc. And it is not permissible to concede it at all, and if any of these actions occurred, it will be void. The second is that it is a right not to be forfeited by statute of limitations or by expiry of the period, so that the person does not use his right in his picture.

### **The second requirement**

#### ***Legal Adaptation of the Right to the Picture***

The jurisprudence differed on the proper legal description of the right in the picture. There are those who went to be one of the elements of the right to private life. Some of them said that it is an independent right and it may be of a complex nature.

### **First Branch**

#### ***The Right to a Picture Is a Manifestation of the Right to a Private Life***

The main idea of the owners of this opinion, is that the right to the picture is an appearance or an element of the right to private life, although it was different about setting a comprehensive definition that prevents the right to private life. This led him to move towards clarifying things and things that relate to man and surround them with secrecy. These things are called the elements of the right to private life, and the most important of these elements is the right to the picture (Sama ,2017). However, some jurisprudence has defined private life as "a return to a person's self or the protection that prevents the eyes of others" (Jaghlal ,2019). Therefore, proponents of this trend see that the picture is one of the foundations of private life, and that any attack on it without the consent of its owner is an attack on the inviolability of his right to his private life. A person can live without a family or emotional life, for there can be no man without a face (Ali ,2004). One of the researchers expressed this by saying, "The right to the picture always aims to protect private life not only if the picture relates to this life, but also in the case in which the picture paints the person's features, given that these features are what reveal one's personality." (Dr. Hossam ,1978). The Paris Court confirmed this trend in one of its rulings in 1972 by saying (that a person has the power to file a lawsuit in which someone who publishes a photograph without his consent gets acquitted) (Dr. Muhammad, 2005). Based on the foregoing, if we consider that the right to the picture is one of the elements of private life, then any attack on the first represents a violation of the

sanctity of the second, and this weakened the strength of this opinion and subjected it to severe criticism, because saying that the right in the picture is one of the elements of private life means that they are One right, while they are two independent rights because the attack on a private life is only possible if it occurs secretly, while the attack on the right in the picture may happen in public.

## **The Second Branch**

### ***Independence of the Right in the Picture from the Right to Private Life***

Contrary to the first opinion, a second juristic opinion appeared, saying that the right to the picture is an independent and separate right from the right to private life and is not considered one of its elements, and the supporters of this opinion justified their view by saying that the picture of the person even if it was taken for him in the course of his private life, this is The action is a cause for accountability and the imposition of the penalty, and the basis for this is that this act constituted an attack on the right to the picture, while the right to private life did not cause any aggression or harm (Dr. Ahmed ,1986). and this trend reinforces his opinion by saying that if a photo was taken of a person during the exercise of his public life and then published, in a manner that would not offend or diminish this person, then this matter falls within The scope of admissibility, unlike publication that carries the character of abuse, constitutes an aggression against the right to picture and causes harm, while the right to private life is safe from this attack (Dr. Mostafa ,2001). that the latter protects the moral side of a person's personality, unlike the first in which the physical side is protected, that is, the human body (Dr. Muhammad al-Shahawi, 203). The French judiciary endorsed this trend in one of its rulings issued in 1971 by saying (that a person's right to a picture may be subject to aggression if a person exercises his public life without any prejudice to the right to private life) (Dr. Hussam al-Din, 78).

Despite the many arguments advanced by supporters of this trend and supporting their viewpoint, he was criticized by opposing jurisprudence and the most important of these criticisms is that the right to the picture and the right to private life are of one nature, and what confirms this is that the aggression that falls on the right to the picture It is an attack on the right to private life at the same time (Dr. Saeed ,1986). Just as saying the difference in the place protected by both rights as a justification for separating them is an unacceptable saying, because the right to the picture, just as it protects the material aspect of the human being, may protect the moral side of his personality. As if a picture of a person was published without his knowledge and consent (Abd al-Rahman ,2011). Looking at the criticisms leveled at this opinion, a group of them went on to say that the right to the picture is of a dual nature, which may arise as an independent right in itself at times, and may be an element or a manifestation of the right to private life at other times. If the picture relates to a person's private life, or if it reflects a part of his emotional life and is published without his consent and knowledge, then

the right to the picture is an element of the right to private life, but if the picture relates to the person's public life, as if it was taken for him in a place Historical, archaeological, or natural year and the person was visible in this picture, and this picture was published with the aim of referring to this prominent landmark in it, here the right to the picture rises as an independent and distinct right from the right to private life (Dr. Muhammad , 2011). We tend to support this last opinion, However, the comparative legislation did not determine a basis for protecting the right to a picture when it relates to a person's public life, that is, as an independent right, while it criminalized an attack on the right to a picture as one of the elements of the right to private life, when it stipulated that the photo be taken, transferred or published Connected to a person's private life (Dr. Ahmad, 2001).

## **The Second Topic**

### ***Elements of the Crime of Capturing or Transferring a Photo of a Person in a Private Place without His Consent***

We will divide the topic into two requirements, the first is devoted to the material pillar of the crime and the second to its moral pillar and punishment.

## **The First Requirement**

### ***The Material Pillar***

It is required for the material pillar of this crime to have two elements: the first is criminal behavior and the means of its commission, and the second is that the act falls on a picture of a person without his consent and if he is in a private place. We will discuss the two components in a separate section.

## **First Branch**

### ***Criminal Behavior and the Means to commit it***

Criminal behavior as an element of the material element of this crime consists of two acts: the first is capture or registration, and the second is transfer or publication. This is what the French legislator expressly expressed in the Article (226/2) of the new French Penal Code of 1992 by saying (... by capturing or recording or transferring an picture ...). Likewise, the Egyptian legislator In Article (309) bis of the Penal Code of 1937 said: (..... B- Take or transfer ... a photo ...). As for the Iraqi legislator in Article (438) of the Penal Code No. 111 of 1969 amending, he restricted criminal behavior to the act of publishing only by saying (.... whoever publishes in an overt manner ... pictures ...). The purpose of capturing or recording is to take a picture from a person who does not feel and install it on sensitive material such as negatives or others. We believe that the term capturing goes out to take a static picture, but recording is the transfer of the moving picture with sound, or without it over a specific period

of time, which is called video photography. Accordingly, this crime occurs in its entirety once the picture is taken or recorded, whether on the storage tape or the storage memory, even if the accused is not able to show it after that by performing a chemical reaction or electronic treatment, and then printing it on photocopy paper or in the form of a film. The crime also occurs even if the accused distorted the picture or movie after capturing it, or recorded it by adding effects or frills to make it contrary to the reality of the events and facts that were captured or recorded (Ibid, pp. 411-412). As for transfer or publication, it is the transfer, transmission, or sharing of the picture from the place where it was taken or recorded, and it is the place where the victim is located to another place, and this place may be public or private, so that an unlimited number of people or the public can view the content Still or moving picture . As for the method of committing the crime, it is noted that the comparative criminal legislator has expanded the scope of protection of the right to the picture or the right to private life, when it is not required that the photo be taken, recorded, transmitted or published using a specific device or medium. This was expressed by the French legislator in the Article (226/2) by saying (by whatever means). And the Egyptian legislator In Article (309) bis by saying (with one of the devices of any kind). As for the Iraqi legislator in Article (438), he used the phrase (in an overt way). These expressions include all the means and technical techniques currently available that may appear in the future. However, it is noticed on the Egyptian legislator that he is restricting the means of committing the crime (to the device), and this means that the machines that take pictures, transfer or record them electronically, such as digital cameras, or by using films like traditional cameras, are the ones covered by the penal text. As for the means and tools that are used, for example, to draw a picture of a person, or carve a statue of him or an inscription representing him, it is not covered by the text, because it does not apply to them the description of the devices mentioned in the text (the French Penal ,1998). According to the comparative legislation, failure to use a device or means to capture or transmit an picture does not achieve the crime as spying or embezzlement of a person with the naked eye, or through a telescope while in a private place or through a hole in the door of his house or through the window. However, these acts may constitute other crimes according to the provisions of the law, because these methods do not achieve criminal behavior. Also, it is of no importance to the location of the device or the means, whether the perpetrator carried it in his hand or was located in a specific location (Dr. Muhammad, 2005).

## **The Second Branch**

### **That the Act Falls on a Picture of a Person in a Private Place without His Consent**

This French lawmaker confirmed in the Article (226/2) by saying (..... a picture of a person in a private place without his consent). Likewise, the Egyptian legislator In Article (309) bis said (.... or without the consent of the victim ... a picture of a person in a private place). As for the Iraqi legislator in Article (438), he came up with a different formulation by saying (....

pictures .... related to the secrets of private or family life for individuals ....). It appears from the texts above that for this element to take place, the act of capturing, transmitting or recording must take place on the picture of a person, man or woman, whether alive or dead. However, there are those who believe that criminal behavior can be achieved even if the location of the picture is an animal belonging to a person, given that the picture in such a case may reveal certain things about the private life of its owner such as the isolation that he suffers from, and that he humanizes the existence of this animal. The same is true if a car or house is photographed of a person, which would disclose the material or living conditions of him in a way that is harmful to him (Dr. Ahmed ,1986). We do not agree with this opinion, because capturing pictures in such cases does not constitute an attack on the right to private life, because it is not secretive and it is easy for others to know and know it. In addition to the comparative legislation, it was stipulated that the subject of the photograph be a person and not something else.

In addition to the foregoing, it is required that the photo be taken of a person while he is in a private place, and means the place where the person is out of the eyes of the people of his own will and choice, whether or not his condition is shameful or not, and not allowed the others to enter it without the consent of its owner, and whether others can see what is inside with the naked eye or not. Accordingly, it is outside the scope of the criminalization to take a picture of a person sitting in a place available to the eyes of passing people, because by this public behavior he waives his right to the sanctity of his private life or his right to the photo, so the lesson if it is in the privacy of the place (Dr. Saeed ,1986). For example, the yacht is a private place as long as it is not allowed for others to enter or go to it without the knowledge and consent of its owner, and whoever takes a picture of this person without his consent He has assaulted his right to his own picture and to his private life. Even if this third party can see what is going on inside the yacht with the naked eye or through a binoculars. Finally, for this element to be conditional on the dissatisfaction of the victim who signed the criminal behavior while he was in the private place, and the condition of consent is a matter imposed by the nature of the right in the picture, which lifts the act of assaulting this right as an unlawful attribute. What can be published about matters of his private life, and if he is satisfied with that, he refuses to claim that he violated his right to his private life or his right to his picture. It is required in this consent that it is true free from defects such as fraud, mistake and coercion, and that it be contemporary to or prior to the criminal act, provided that it remains valid until it occurs, but if it is later, it does not execute the crime. Satisfaction is equivalent to being express or implied, which is inferred from the circumstances in which the act of capturing or transmitting the picture was taken. Satisfaction may be assumed (Ibid.,p. 49). As if it was taken during a public meeting on the audience's hearing and the viewers at that meeting, because the people who attend a meeting in which the recording and photocopying equipment rotates and did not object to this, this is a presumption of their supposed satisfaction, but it is not a conclusive presumption, as the picture may be taken in

mind Of those present or under the influence or influence of the accused (the Egyptian Penal ,1979).

## **The Second Requirement**

### ***The Moral Element of the Crime and Its Punishment***

We will explain the moral pillar of this crime in the first branch and its punishment in the second branch.

#### **First Branch**

##### ***The Moral Pillar***

In general, the moral element of the crime is intended to be committed (criminal intent), and without this intent, no crime can be attributed to a person, and therefore the crime does not exist. Among the aforementioned comparative texts, it becomes clear that the crime in question is an intentional crime. The phrases (whoever deliberately assaulted), (everyone who assaulted), and (who published) all indicate the need for a criminal intent for the perpetrator of this crime. The criminal intent is defined as the tendency of the will to investigate the criminal incident, knowing its elements, and to visualize it earlier, contemporary or later. This means that the criminal intent has two elements, which are knowledge and will, and knowledge means the knowledge of the perpetrator of the elements and facts that are necessary to give the criminal incident and its legal description, and these facts as we mentioned may be prior to the act or contemporary or subsequent to it, including for example A criminal offense, knowing its location, time, and outcome, the characteristic of the perpetrator, and the aggravating circumstances that facilitated the commission of the crime ... etc. (Kamal , 1995). In the crime in question so that the science is realized as an element of the criminal intent in it, that the perpetrator is aware that he is using a method, device or tool that would cause it, to take a picture and install it on sensitive material in terms of the owner does not feel, or that this medium works to transfer the picture or Sending or sharing it from the place it was taken or taken, which is the location of the victim's own presence to another place, public or private. But if the perpetrator is not aware of this, then there is no criminal intent for him, and therefore he is not asked about this crime. As if a person pressed the capture button, or registered with the device inadvertently while another person was in a private place, and the picture is installed in the device's memory without the perpetrator intending it, or if a person takes a picture, recording or transferring a picture of an archaeological scene or landmark in a park or An archaeological place, and a person or other persons appear in the picture without the perpetrator intending that this person or persons be the main subject of the picture, and without knowing that this place applies to him the description of the private place. As for will, it refers to the will of the criminal act and the resultant consequence of this act (Dr. Fakhry , 1992). In the crime in question, the will as an

element of the criminal intent means the will of the perpetrator, to commit the act of picking, transporting or recording a person in a private place without his consent, as well as the direction of the will to the result of this act, which is the prejudice or violation of the sanctity of the right to private life or the right in the picture. Accordingly, it is not considered a perpetrator of this crime, whoever hand or part of it falls, by mistake, on the button to operate the device, device or photocopy device while he is in a private place, so a picture is taken or recorded of a person in the same place. It is important here to refer to the lack of consideration for the motivation in the availability of the criminal intent of the perpetrator of this crime, whether this motive is to obtain a material or moral benefit, or harm the victim to the sole purpose of knowing the privacy of others (Ibid, pp. 287).

## **The Second Branch**

### ***Crime Penalty***

It is also known that the punishment is the penalty decided by law, and imposed by the competent court on those who prove responsibility for the crime. Comparative legislation has agreed that the crime of the crime in question is imprisonment for a period of no more than a year, but it differs in the imposition of the fine, as it was decided by French and Iraqi legislators without the Egyptian, as the French legislator set it in the Article (226/2) (300) three hundred thousand francs and the Iraqi legislator specified it in Article (438) no more than For (100) one hundred dinars (Amounts of fines , 1968). He also notes that the French legislator has decided both of these penalties as an original punishment for the crime, without giving the court the authority to rule on one of them, unlike the Iraqi legislator. Also, the Egyptian legislator In Article (309) bis was alone in imposing an aggravated punishment on the public official who commits this crime, which is imprisonment for a period not exceeding three years, and the reason for this tightening is to preserve the reputation of the public office and to enhance the confidence of individuals in the state. In addition to the fact that the nature of the public office gives its owner wide authority that expects fear and fear in the same victim, as it is noted that the Egyptian legislator has imposed a complementary and obligatory punishment, in addition to the original penalty (imprisonment). This penalty is the confiscation of the devices and others used in the commission of the crime, as well as the erasure or execution of the records obtained. This is in order to preserve the inviolability of the right to a picture or private life, and according to the general rules related to confiscation, it must not affect the rights of others in good faith (Dr. Ali ,2006). As if this third party had lost his camera or had been stolen from him, and he had no role in committing the crime.

## **Conclusion**

What is meant by the picture that is the object of the criminalization of assault in comparative legislation, is that which embodies the physical characteristics and shape of the human body



that is affirmed by light on a material pillar, and which expresses his feelings and emotions and can be known through it. The right to a photograph is the authority of a person to refuse to take, transmit, record or publish his picture without his knowledge and consent. The internal jurisprudence and jurisprudence differed on adapting the nature of the right to the picture, is it an element of the right to private life or is it an independent right or of a dual nature, while comparative legislation was confirmed as an element of the right to private life. The place of the crime is a person, so the crime does not take place if its object is depicting an object, document, place or animal, and this person must be in a special place. The material element of the crime is only realized by its elements, namely criminal behavior, the means of its commission, the private place, and the dissatisfaction of the victim. The moral element of the crime takes the form of criminal intent with its elements of knowledge and will. Comparative legislation considered this crime as a misdemeanor, and punished it with original penalties, namely imprisonment, some of which added the fine, and others imposed complementary and obligatory penalties, such as confiscation.

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less than 2001 thousand dinars and not more than (1000000) million dinars, according to Article (2) of the published law. In the Iraqi facts, number (4149) on 5/4/2010.

Dr. Ali Hussein al-Khalaf, and d. Sultan Abdul Qadir Al-Shawi, General Principles in the Penal Law, Legal Library, Baghdad, 2006, p. 440.