

The concept of unintentional error

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Abstract:

There are many definitions of unintentional error and no unified definition has been agreed upon. Therefore, in this research paper, we present the various legislative, jurisprudential and judicial trends that have addressed this topic. Our study has reached several results, perhaps the most important of which is that there is confusion between the definition of unintentional crime and unintentional error

Keyowrds; error–unintentional–legislation–jurisprudence–judiciary–crime.

ملخص

تعددت تعريفات الخطأ غير العمدى ولم يتفق على تعرف موحد، وفي هذه الورقة البحثية نعرض مختلف الاتجاهات التشريعية والفقهية والقضائية، التي تناولت هذا الموضوع، وقد توصلنا لعدة نتائج لعل أهمها هو أن هناك خلط بين تعريف الجريمة غير العمدية والخطأ غير العمدى.

الكلمات المفتاحية: الخطأ- غير العمدى- تشريعات -فقه- قضاء- جريمة.

Introduction:

A crime is defined as not being a material entity based on criminal activity and its effects (Mahmoud Najib Hosni, Unintentional Error in the Penal Code, 1964), as it is not enough to merely attribute the act or omission that violates the law to a specific person to be criminally responsible, rather, there must be a psychological relationship between the material activity and the criminal result, and these psychological elements come together in another corner that is specific to them, which is the moral corner, therefore, the moral corner is based on the connection between mental and material activity.

Directing the will to commit the behavior is not enough for the moral element to be established, but this will must be criminal, and it is so when it is sinful and links the act to the criminal incident, since sin is the basis of the moral element, and therefore it is the basis of criminal liability.

It is agreed upon in criminal law that the moral element of the crime takes one of two forms: criminal intent and unintentional error.

From the above, it becomes clear to us that unintentional error is one of the elements of the unintentional crime, with its occurrence the unintentional crime is established and with its absence the crime is absent, however, we have noticed that legislations differ in defining intentional error, some of which did not define it and were satisfied with mentioning its forms, and some of which defined it in the general section of the Penal Code, which is the subject of our discussion in this research.

Research objectives:

This research aims to present legislative and jurisprudential trends in defining unintentional error by presenting a set of laws and jurisprudential opinions on the subject.

Due to the importance of this subject and the conflict of opinions on it, we divided this research into three axes using the comparative approach in presenting these trends and opinions, trying to show the opinion closest to the truth.

First axis: Legislative trends in defining unintentional error

First trend: Legislations that did not define unintentional error

The legislations that adopted this trend went to not include a definition of unintentional error in their laws, leaving the task as usual to jurisprudence and the judiciary, and were satisfied with defining its forms, and as examples of that we find:

- 1- The French Penal Code issued in 1992 (amended in 2000), which was satisfied with defining its forms in Article (121-3).
- 2- The Egyptian Penal Code issued in 1973, which neglected to provide a definition of intentional error, explaining its nature and elements, but was satisfied with mentioning its forms in the special section, then presenting its statement of unintentional crimes, especially murder and accidental injury crimes, as it mentioned in Article (238) negligence, recklessness, lack of caution, and failure to observe laws, regulations and systems.
- 3- As for the Algerian Penal Code, it followed the same approach, as it also neglected to provide a definition of unintentional error, and was limited to mentioning its forms in the special section in Article (288).

From the above, we note that most legislations do not define unintentional error, perhaps because of the difficulty that the criminal legislator finds in encompassing all existing and future cases when setting a general definition for it, and thus the definition will be a restriction on the judge's freedom to deal with the changing and complex facts presented to him.

The second trend: Legislations that defined unintentional error

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The proponents of this trend went to include a text in its general section, defining the meaning of unintentional error, its nature and stating its elements. We find as an example of this:

- 1- The Swiss Penal Code issued in 1973 in Article (18/3) which states ((A felony or misdemeanor is committed through negligence, every act without foresight is sinful without being aware of or taking into consideration the consequences of his action. Lack of foresight is sinful if the perpetrator did not take the precautions required by the circumstances and his personal situation)).
- 2- The Italian Penal Code issued in 1930 defined it in Article (43/P3) as: ((The crime is unintentional or contrary to intent when the perpetrator does not want the criminal result - even if it was expected - that will occur due to negligence, lack of care, recklessness or failure to respect laws, regulations, systems and orders)).
- 3- The Bahraini Penal Code issued in 1976, which defined error in Article (26), which states that: ((The crime is unintentional if the criminal result occurs due to the perpetrator's error, and the error is considered available whether the perpetrator expected the result of his action or abstention, and was able to avoid it or did not expect it and it was within his ability and duty)).
- 4- The Syrian Penal Code issued in 1949 also defined error in Article (190) by saying: ((The crime is unintentional whether the perpetrator did not expect the result of his wrongful action or inaction and was able or duty to expect it and whether he expected it and thought he could avoid it)).
- 5- Yemeni Law No. 12 of 1994 defined error in Article (10) thereof, stating: ((Unintentional error is present if the perpetrator, when committing the act, behaves in a manner that an ordinary person would not do if he were in his circumstances, such that his act is characterized by recklessness, negligence, carelessness, or failure to observe laws, regulations, and decisions. The perpetrator is considered to have acted in this manner if, when committing the act, he expected the result that an ordinary person could have expected, or expected it and thought it possible to avoid it))

Through the previous definitions, we find that the definition of unintentional error in Yemeni law is the best that has been said in the scope of Arab legislation, as it is characterized by comprehensiveness, accuracy and integration, and it came to include everything related to error in terms of stating the forms in which unintentional error is committed, and the standard by which it is measured, as it defined it by the standard of the average person who is moderately cautious and careful, and also defined the elements that must be present in it, and it also combined the two forms of conscious (informed) and unconscious (uninformed) error, but what is taken from it is the length of this definition, as if it were brief, it would have appeared as a more complete definition than it is now.

After reviewing the position of comparative criminal legislation on the issue of defining unintentional error, we go to support the legislative trend that adopted the inclusion of a definition of unintentional error in the core of the law and within the general principles of criminal law, because the presence of the definition within the general section of the law, and the inclusion of texts for its application in private law helps in clarifying the cases of error that occur in practical life, while the absence of a specific definition with clear features in the law opens the way for jurisprudential interpretations in the field of error, which leads to their differences and variations according to these opinions.

If some of them believe that defining unintentional error is not the task of the legislator, but rather the task of jurisprudence and the judiciary, this is rejected, because the matter requires at least that criminal legislation include a text in which it clarifies the elements of unintentional error, its forms and characteristics, to help unify the legal opinion and achieve judicial stability (Adel Youssef Al-Shukri, *Criminal Liability Arising from Negligence*, 2005, p. 147).

The second axis: Jurisprudential trends in defining unintentional error

First requirement: Definition of error in Islamic legislation

Error in Islamic jurisprudence is the occurrence of something against the will of the perpetrator, because the perpetrator in crimes of error does not do the act intentionally or want it, but rather the act is done against his will and contrary to his intention, and sometimes the perpetrator intends an act that is not a crime in itself, so that a crime is generated from this permissible act without the perpetrator intending what was generated from his act. The crime generated from his permissible act is considered an unintentional crime, even if the perpetrator intended the permissible act, because he intended an act that is not forbidden, and it is not included among the crimes (Abdulkader Awda, *The Modern Encyclopedia of Criminal Jurisprudence*, 2001, p. 65).

We point out that the sin in unintended aggression (unintentional error) is the sin of negligence in caution, because the perpetrator is responsible for his negligence in cautioning against the action that led to the harmful result, and Error is a type of sin that a person commits, and it is what he intends to do and does not intend to disobey the legislator, but the act occurs due to his negligence and lack of verification and caution.

The second requirement: Defining error in the jurisprudence of civil law

An opinion in civil jurisprudence defines error as: ((A harmful act that violates the law)), and this definition is criticized for not specifying the meaning of error, and while it is necessary to specify harmful acts that violate the law, we find that the law only provides for a few of those acts (Abdulmajid Alhakim, *Summary of explanation of civil law*, 1977, p. 487).

Another opinion defines error as: ((A shortcoming in human behavior that does not occur from a person who is judging and who was in the same external circumstances

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in which the perpetrator was found)). Others defined it as: ((Breach of a previous duty that could have been known and observed)) (Abd Assalam Al-Tunji, *Civil Liability of the Doctor in Islamic Law and in Syrian, Egyptian and French Law 1966*, p. 257).

A mistake is a defect in human behavior that cannot be committed by a rational, discerning man who is surrounded by the same external circumstances that surrounded the person responsible for the mistake. Therefore, it can be said that a mistake is a breach of a previous obligation, as this obligation is the duty imposed by law on every individual not to harm others, as the obligation that breaching it leads to establishing tort liability is an obligation to always exercise care, and the care required here is the obligation to take the necessary precautions to avoid harming others, therefore, the obligation that breaching it leads to establishing tort liability differs from the obligation that breaching it leads to establishing contractual liability, as the latter may be an obligation to achieve a goal or an obligation to exercise care (Abdulmajid Al-Hakim, 1977, p. 489).

Third requirement: Definition of error in criminal law jurisprudence

First: Definition of error in French criminal jurisprudence

Jurisprudential opinions differed in France on the issue of defining unintentional error. Some define it as ((an error that does not conform to the caution required by social life and imposed by the law)) (Adel Youssef Essakri, 2005, p. 175).

While the scholar Garo defines error as ((not anticipating a result that the perpetrator should or could have expected, which is the commission of the act or voluntary abstention that resulted in this result, and if the crime of error was not due to a voluntary act, the perpetrator is not punished)), and in other definition, he defines unintentional error as ((an action that does not conform to the caution required by social life)) (Chams Eddine Ibrahim Ahmed, *Means of Confronting Assaults on Personal Life*, 2005, p. 104).

An opinion in French jurisprudence holds that unintentional error is a voluntary act that produced or could have produced results that the perpetrator did not intend, either directly or indirectly, but was able to prevent and should have done so. (Mohamed Abdullah Abu Bakr Salama, *Encyclopedia of Information Technology Crimes*, 2006, p. 97)

Second: Definition of Error in German Criminal Jurisprudence

An opinion in German jurisprudence defines intentional error as ((the perpetrator's negligence of the duty to take precautions and exercise the care that he is personally obligated to take, and therefore he did not avoid the act or the consequences resulting from it, which deserves blame)), while another side of German jurisprudence defined it as ((the perpetrator's fulfillment of the pillars of a penal text unintentionally, but rather because of his violation of the duty obligated to him, and he did not realize that he is violating a legal text and that he is committing a legal violation)) (Dhiaa

Eddine Mahdi Hussein Al-Salihi, *The Concept of Criminal Liability in Criminal Law*, 1986, p. 23)

Third: Definition of Error in Arab Criminal Law

The opinion of Arab criminal jurisprudence regarding the definition of error was divided into two main trends:

The first trend:

This is the general trend that represents the majority of Arab criminal jurisprudence, and depicts unintentional error as failure to take sufficient precautions to prevent the occurrence of the harmful result. In this trend, a group of jurists define unintentional error as ((a breach of a general obligation imposed by the legislator on individuals to exercise caution in what they undertake, in order to protect the rights and interests protected by the law)) (Fayez Al-Khouri, *Criminal Rights*, 1931, p. 82).

In the same sense, others define it as ((the offender's departure from a legal duty imposed on him, by being cautious and careful in his conduct, which leads to the occurrence of the criminal result stipulated by law, or exposes it to danger, while he could have avoided it or exposed it to danger if he had exercised due diligence)) (Ali Hussein Al-Khalaf and Sultan Abdulkader Al-Chawi, *General Principles of the Penal Code*, 1982, p. 30), while others define it as ((the behavior that is inconsistent with the caution required by social life)), or it is ((a positive or negative voluntary activity that is inconsistent with the duty of caution and care)) (Fakhri Abd-Arazzaq Salbi Al-Hadith, *Explanation of the Penal Code*, 1992, p. 37).

It is noted that these definitions were unable to comprehend and define the concept of unintentional error, as they did not fully encompass the elements of error, because they limited the wrong mental behavior of the offender to his behavior alone, represented by not taking the duty of caution and care without linking this mental behavior to the result, as the law does not punish error by merely breaching the duty of caution and care, but rather requires the occurrence of the criminal result, and therefore, there must be a psychological connection or relationship between the sinful will and the result, as without this connection the offender cannot be held accountable for the occurrence of the result.

There are those who define unintentional error as ((a behavior or omission that violates the duties of caution and care and creates criminal liability for its perpetrator in certain cases due to the resulting harm, and is represented in a voluntary activity that leads to a result that was not intended by the perpetrator, whether due to his complete lack of knowledge of the suitability of his activity to cause this result, while it is necessary to expect it, or due to his knowledge of the possibility of his activity causing this result)) (Sulayman Abd Almonaim, *General Theory of Penal Law*, 2000, p. 177), it was also said that ((every voluntary act or omission that results in consequences that the perpetrator did not intend directly or indirectly, but he could have avoided)).

It can be noted that this definition is characterized by accuracy and comprehensiveness, as it encompasses the two elements of unintentional error and

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focuses on determining the position of the perpetrator in terms of knowledge of the suitability of his behavior to cause the legally prohibited result in one of its three forms, represented in: the complete absence of knowledge of the suitability of the activity to cause the result, or the absence of knowledge of the suitability of his behavior to cause the result at its lowest level, which is the level of possibility.

A part of jurisprudence believes that the best definition of unintentional error is the one based on looking at its position in the crime, because error is a moral element in it, as it is the psychological aspect that reflects illegal materialities issued by the perpetrator and together constitutes the unintentional crime, therefore, the proponents of this opinion focus on the dual role of will in unintentional error, which is positive for the behavior and negative for the result, that is why some say that unintentional error is ((the tendency of the will towards dangerous behaviour without accepting it, achieving the criminal result that results from this behaviour while taking precautions and caution to avoid its occurrence)) (Mohamed Sobhi Najm, Penal Code, 1966, p. 177).

Others believe that unintentional error is ((the will to behave in a way that results in unlawful consequences that the perpetrator did not expect if they were expected, or expected and thought they could be avoided)) (Nidham Tawfiq Al-Majali, Explanation of the Penal Code, 1998, p. 455). It has also been said that it is ((the tendency of a person's will to engage in dangerous behavior without doing what is required of him in terms of deliberation and caution)) (Awadh Mohamed, Penal Code, 1998, p. 177).

This definition is criticized for making the source of the duties of caution and care the law alone, while it is not the only source, but rather general human experience is the general source of those duties, therefore, some jurists have drawn attention to this aspect, and said in the context of his definition of unintentional error that it is ((a voluntary behavior that involves a breach of the duties of caution, care and attention imposed by the law or human, scientific or technical experience, and which results in a criminal result that could have been prevented)) (Mahmoud Najib Hosni, Explanation of the Penal Code, 1989, p. 348).

The second trend:

It is a special trend represented by Arab jurisprudence and is based on depicting unintentional error as a mistake in the facts, as error is defined as ((not observing the general or special rules of behavior, the observance of which would avoid the occurrence of unlawful results that are harmful to the interests and rights of others, and are criminally protected, or avoiding falling into a mistake in the facts that leads to achieving the result as long as the latter can be expected and avoided at the same time)) (Mahmoud Najib Hosni, Lessons in International Criminal Law, 1960, p. 59).

It can be noted that this trend in defining error makes the mistake a case of error, as it goes to depict the error as an error in the facts, and this error may be directed at any element of the criminal act, as it may relate to the causal relationship and may be

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an error in the reality of the criminal behavior, or in the location of the crime or in one of its elements (Adel Youssef Al-Shukri, op cit p., p. 179).

The third requirement: Judicial trends in defining error

The criminal judiciary, when dealing with the cases and situations presented to it, contributed to setting multiple and diverse definitions of unintentional error, which differ according to the cases and situations presented, which led to the emergence of several definitions that can be attributed to it.

The German Supreme Court set a definition of intentional error in one of its rulings, saying ((Unintentional error assumes that the perpetrator neglected the care that was within his ability, and his duty in view of his circumstances, information and personal capabilities, so he did not expect the criminal result that he was able to expect or exercise the care imposed on him or expect its occurrence but estimated that it would not happen)) (Ahmed Abu Al-Makarem, *Forms of Error in the Egyptian Penal Code*, 1996, p. 11).

It is noted that this definition is characterized by brevity, comprehensiveness and accuracy, and it addresses the elements of error in terms of the perpetrator's behavior not conforming to the level of caution and care, and it includes determining the nature of the psychological relationship between the perpetrator's will and the criminal result represented in the image of the perpetrator not anticipating the criminal result and not directing his will towards it in the case of conscious error, or in the image of the perpetrator anticipating the criminal result and not directing his will towards it and his desire not to occur in the case of conscious error (Adel and Youssef Al-Chukri, previous reference, p. 182). It can also be noted that the German judiciary has set a personal standard for error in which it refers to the personal makeup of the perpetrator and his special circumstances, whether external or personal, such as his degree of intelligence, level of education and personal experiences, taking into account the circumstances surrounding him.

The American judiciary distinguishes between recklessness and negligence, but it is not easy to define reckless or rash behavior to make it distinct from negligence in a clear manner. This judiciary believes that the law does not consider behavior or conduct criminal unless it exceeds the limits of negligence, or even gross negligence, and falls within the scope of reckless or rash behavior, we find that the American judiciary believes that negligence is not subject to legal accountability unless the behavior exceeds it to fall within the scope of reckless or rash behavior. (Maher Abdel Chweich, *The General Theory of Error in Criminal Law*, 1981, p. 82).

In the context of Arab criminal law, we find that the Egyptian Court of Cassation has set two different definitions of unintentional error, as it distinguished between the error that occurs from individuals in general and the error that occurs from an employee while performing his job (Ahmed Abu Al-Makarem, previous reference, p. 11), as it says in its definition of error in one of its rulings: ((The error that occurs from individuals in general in intentional crimes occurs when the person acts in a manner

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that does not conform to the caution required by the circumstances of normal life, and thus it is a defect that taints human behavior, which the ordinary, discerning man does not commit, who is surrounded by external circumstances similar to the circumstances that surrounded the person responsible for the crime)) (Egyptian Criminal Cassation No. 54, 03/10/1974, p. 146).

The Egyptian Court of Cassation defines the unintentional error committed by an employee while performing his job by saying: (Gross negligence in the scope of public funds is a form of gross error, based on the perpetrator's deviation from the usual and reasonable behavior of an ordinary employee in his circumstances, consisting of a voluntary, wrongful act that leads to a harmful result that the perpetrator expected or should have expected, but he did not intend to cause it and did not accept its occurrence (Egyptian Criminal Cassation No. 94, 04/26/1966, p. 1157).

By reviewing the decisions of the Egyptian Court of Cassation, it has set a standard or criterion to judge the actions of the perpetrator and whether he has breached the duty of caution and care or not, and this standard is an objective and abstract standard based on the average person or employee, or the person who takes an average degree of caution and care in his actions, and if the perpetrator adheres in his behavior to the degree of caution and care that this person adheres to, then there is no breach on his part of those duties and no error is attributed to him, but if he falls below the level of what the average person adheres to, then there is a breach on his part and the error is attributed to him even if he adheres to what he is accustomed to in his actions.

We also find that this court has set a clear and decisive dividing line between the case of error with expectation and potential criminal intent, and this is clear from its statement: ((..., but he did not intend to cause it and did not accept its occurrence...)), and if the perpetrator had anticipated the result and accepted it, his case would have moved from the realm of error to the realm of criminal intent, however, the perpetrator's failure to accept the result keeps him in the realm of unintentional error.

The Libyan criminal judiciary defines unintentional error in one of its rulings as: ((It is the failure to take the duty of caution and care, in which the perpetrator does not expect the result to occur, but he is held accountable for it because he is supposed to expect it and take the necessary precautions to prevent it from occurring)) (Decision of the South Benghazi Criminal Court No. 576, 05/10/1986, referred to by Adel Youssef Al-Chukri, previous reference, p. 38)

Conclusion

The aim of this research is to monitor the different trends in defining unintentional error, and our study has reached a set of results that we summarize as follows:

- 1- We noticed confusion between the definition of unintentional error and the definition of unintentional crime, as unintentional error does not equal or mean unintentional crime, and therefore it is established in jurisprudence, law and

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judiciary that unintentional crime includes, in addition to its moral element (unintentional error), a material element that includes (criminal behavior and the result that results from that behavior and the causal relationship that brings them together).

- 2- We found through the research that there is no need to mention criteria for unintentional error, because there is a basic criterion by which the legislator measures people's actions and the extent of their deviation from the required behavior, which is a mixed criterion (personal and objective) represented by the moderate (normal) person.
- 3- We also found through the research that there is no need to enumerate the forms of unintentional error in differentiation, because these forms are merely synonyms intertwined with each other and it is not easy to set clear and precise boundaries between them, as they are sometimes insufficient to clarify the meaning of error, and sometimes deviate from it, which ultimately leads to ambiguity of the definition.
- 4- We finally arrived at adopting two definitions of unintentional error, the first is broad and defines unintentional error as: ((The offender's failure, when acting – positively or negatively – to fulfill the duties of caution and care imposed by the rules of law or general human experience, and his failure, accordingly, to prevent his action from leading to the occurrence of the criminal result, whether he expected it or should have expected it, but did not accept it and could have prevented it from occurring)). As for the second, it defines unintentional error as: ((Negligence or spontaneous failure to verify and take precautions against a duty imposed by the rules of law or general human experience)).

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