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### CRIMINALIZING INFRINGEMENT OF CONVERSATIONS A STUDY OF THE IRAQI, EGYPTIAN AND FRENCH LAWS

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#### **Abstract**

Iraqi and other comparable legislations, including Egyptian and French, have been keen to criminalize any act that can be considered an infringement of human rights with respect to conversations and communications. This criminalization is based on the need to provide security to individual's private life; it cannot be interfered with unless by the consent of the individual possessing this life. The two most significant aspects of this life which the legislator intended to protect are what goes on in a person's conversations and the conditions followed by such person depending on the fact that no one could have access to them. Public's perspective on such criminalization is that; modern technological advancement led to producing devices which can access someone's privacy without his knowledge or his ability to protect against such access. Such access infringes private life if not detaches it from its private characteristic, thereby ending up in the hands of those accessing it whose number is indefinite. Interfering in privacy though infringement of conversations threatens a fundamental aspect of society's values and customs. Therefore, an infringement of private life is an infringement of society's rights. Not to mention the moral and material loss suffered by the victim of such infringement.

#### **INTRODUCTION**

The secrecy of the conversation between a person and others is considered an integral part of the existence of this person, not to mention the particulars of such conversations. In such conversations, the speaker trusts the hearer without fear or disconcert that the somebody will eavesdrop. Therefore, it is a must that human right to preserve his secrets and conversations are respected and maintained, because they are the aspects mostly connected with this personality. It is considered an important guarantee to private life that the person feels safe upon conducting his communications. The Iraqi, Egyptian, and French

legislations supported this right. Iraqi Penal Code No. 111 for the year 1969 as amended, Article No. 438 stated that: "An offender of the following shall be penalized with no more than one year detention and a penalty no more than one hundred dinars: 1- Who publishes news, pictures, or comments in any means related to the secrets of individual's private or family life regardless of their authenticity, with the intention of offending them, 2- Who came upon a message, a correspondence, or a phone call from those mentioned in Article No. 323 and disclosed it to persons other than those intended for, with the aim of harming the person."

The first paragraph (A) of Article No. 12 of Telecommunications Code No. 159 for the year 1980 stated the following: "Without prejudice to any more severe penalty stipulated in the Penal Code or any other code; A- An offender of the provisions of paragraph (first) of Article Third of the said code shall be punished with imprisonment for no more than two years, and penalized with no more than one thousand dinars, or both."

Egyptian legislation, added the two duplicate Articles 309 (A) at the end of chapter seven of the third book of Penal Code No. 58 for the year 1937 in accordance with Code No. 37 for the year 1972. When Egyptian legislation passed Communications Regulation Code No. 10 for the year 2003, it included criminalizing infringement of communications privacy (conversations and texting). In this respect, Article No. 73 stated the following: "An offender of the following shall be punished with imprisonment for at least three months and penalized with no less than five thousand pounds, or with both; every individual who, during or due to his exercise of his job at communications; 1- published a recording of the content of a communication message or part of such without having justification to do so, 2- hiding, changing, preventing, or altering any communication message or part of it which might have reached him, 3- Abstaining on purpose from sending a communication message after instructing him to do so, 4- disclosing any private information related to users of communication networks or their received or outgoing phone calls without justification to do so."

### ***First: The Importance of the Research***

Due to the importance of private communications, including conversations, and what violations they entail, all countries were keen to maintaining this right in order for social life to continue and prosper. However, attention paid to private conversations differs between simple primitive communities and advanced modern ones. In the first one, the social bond between individuals is more effective which lessens the worry of individuals on their private life. As for the second, and due to the large population and increasing and closeness of residential units, we notice a decrease of moral values and the increase of individual's worry on private communications not to mention the complexity of social life. Therefore, the importance of this research stems from criminalizing infringement of conversations as stipulated in the Iraqi, Egyptian, and French laws, and to demonstrate the extent of protection provided by these legislations to human rights to private conversations.

### ***Second: The Aim of the Research***

The research aim at:

- 1- Studying the right to private phone calls and conversations.
- 2- Identifying the concept of conversations and the methods and types of eavesdropping.
- 3- Tackling the criminalization of conversations' monitoring and eavesdropping as stipulated in comparative penal laws.
- 4- The protection to be provided to the secrecy of conversations does not fall within the general principle of the right to private life. This is due to the fact that the content of such conversations does not necessarily relate to private life of the sender or receiver.

### ***Third: Research Problem***

The problem of the current research revolves around the fact that technological development of modern devices is in rapid increase. This consequentially poses a threat to individual's privacy which requires serious protection with legal guarantees. The problem is also represented in the absence of accurate organization of the justifications and right limits of privacy, existence of deficiencies and shortcomings in regulating provisions specific to the limits of this right, lack of organization of monitoring communications and leaving it in the hands of statemen, and the existence of serious violations of the right to privacy whether in residency or communications privacy.

### ***Fourth: Research Methodology***

- A- Comparative Methodology: by comparing the Iraqi, Egyptian, and French legislations to demonstrate similarities and differences between them, and between Arab and foreign legislations, if necessary.
- B- Analytical and Descriptive Methodology: by describing the scientific phenomena and problems, and trying to provide various solutions and answers to questions which falls within scientific research. Afterwards, the data collected shall be analyzed to reach significant results and recommendations.

### ***Fifth: Research Structure***

This research is divided into three requirements; the first tackles the concept of conversations and the means of their eavesdropping, the second tackles the types of conversations their extent of protection, and the third tackles the criminalization of eavesdropping.

#### ***First Requirement***

##### ***The Concept of Conversations and the Means of their Eavesdropping***

Recent studies proved that the enormous technological development in the production of private conversations and calls' eavesdropping devices and cameras made possible the infringement of individual's private life and the stripping of his secrets without being aware. This requirement is divided into

two parts, the first tackles the concept of conversations and the second the means of their eavesdropping.

### ***Part One***

#### ***The Concept of Conversations***

Conversations mean every sound which expresses a collection of interconnected meanings and ideas whether speaking is made in a foreign, national, or sign language (language of the deaf and mute), or by using codes. Therefore, any sound which does not express an idea such as murmur and sparse yells is not considered a conversation. This also includes music though it has a connotation (Dr. Mahmood Najeeb Husni, 2017).

The third chapter of the US Federal Law for the year 1986 stipulated the necessity to include human voice as communication content (conversation). Section No. 18 of Article No. 2510 identified aural hearing conversion as a conversion that contains human voice at any point between two points which are the source and target points. (Dr. Omar Mohammed Abu-Bakir Bin Younis, 2004).

Based on the foregoing, the US jurisdiction concluded that monitoring of mute CCTV footage does not lead to communications monitoring in accordance with the third chapter due to the absence of auditory sound. Some claimed that electronically-processed data cannot be considered a conversation if recorded while being transferred between communication and information devices (Dr. Hashim Mohammed Fareed Rustum, 1992).

#### ***First: Iraqi Legislator's Position***

Iraqi legislator used the expression (inviolability of personal conversations and prevention of mail and communications infringement). Article No. 438 of Iraqi Penal Code No. 111 for the year 1969 as amended stated: "An offender of the following shall be penalized with no more than one year detention and a penalty no more than one hundred dinars: 1- Who publishes news, pictures, or comments in any means related to the secrets of individual's private or family life regardless of their authenticity, with the intention of offending them, 2- Who came upon a message, a correspondence, or a phone call from those mentioned in Article No. 323 and disclosed it to persons other than those intended for, with the aim of harming the person." In attempting to punish offense of private life, it is clear that the Iraqi legislator adopted the theory of harm referred to, which contradicts what is adopted with respect to criminalizing and punishment of professional disclosure in Article No. 437 of the abovementioned law in adopting the theory of the entrusted individual's will (Dr. Ibrahim Ali Hamoodi, 2010).

#### ***Second: Egyptian Legislator's Position***

The Egyptian legislator on the other hand used the expression of "conversation" in Article No. 209 duplicate (1) of Penal Code No. 58 for the year 1937 as amended by stating: "An offender of a citizen's private life by committing one

of the following acts with legally illegal reasons or without the consent of the victim shall be punished with imprisonment for no more than one year: A-eavesdropped, recorded, or transferred through using a device of any type conversations that were made in private place or by phone."

Some Egyptian scholars state that Article No. 309 duplicate of Egyptian Penal Code No. 58 for the year 1937 as amended extend to include these situations in which a person's individual speech with himself is recorded (Dr. Fawzia Abulsattar Ali, 1990). On this controversy, some scholars called for the necessity of the Egyptian legislator's interference to amend Article No. (309) duplicate, of Penal Code, with respect to this expression. This is called for with the aim of changing the expression to verbal conversations or statements instead of conversations. This change is called for because they think that the Egyptian legislator intends by conversations as group conversations only, because it means, in language, an exchange of speech between two or more individuals (Dr. Adam Abdalbadea' Adam, 1990).

### ***Third: French Legislator's Position***

The French legislator used the expression "statements made", which indicates that the legislator includes the individual and group conversations (Bandintor, 1970). In response to the offenses made to private conversations, the French legislator criminalized the infringement of conversations in Articles (368 to 372) of French Old Penal Code for the year 1976. When the French legislator passed the new penal code in July 1992, not only did he stood by his earlier position on protecting conversations inviolability, he also amended the formulation of texts to extend the scope of such protection in Articles (1-226) (8-226 (2-226. Article No. 1-226 is concerned with criminalizing picturing, recording, or transferring speech made privately or secretly without the consent of the victim. Article No. 2-226 is concerned with criminalizing the keeping, popularizing, or using a record or a document obtained by means of the acts referred to in Article No. 1-226. As for Article No. 8-226, it is concerned with criminalizing the publication of voice or picture of a person without his content (Dr. Abdullah Ali Bin Sahwa, 2002).

(1) Check: Fawzia Abdulsatar Ali, PhD; Explanation of the Penal Code, Special Section, 3rd Edition, Al-Nahdha Al-Arabiya Publishing House, Cairo, 1990.

### ***Part Two***

#### ***Methods of Conversation's Eavesdropping***

Methods of eavesdropping on conversations differ according to the type of conversation. Conversations can be oral or televised, both has its own methods of eavesdropping as follows:

***First: Methods of Eavesdropping on Private Oral Conversations:*** there are many means and methods to eavesdrop private oral conversations such as:

#### **A- Devices that Can Eavesdrop on External Wire or Wireless Communication**

A microphone can be hidden in a place where conversation is intended to be heard. The microphone is connected by using microscopic wires, that are easily hidden, to the listening device outside the place.

It is noteworthy to mention that there are modern infinitesimal microphones similar in size to match. These microphones can operate wirelessly without the need for external wires to connect them to the recording device outside the designated place. They are equipped with a transmitter that works with small battery. These microphones can be attached to the hidden parts of the furniture inside the designated room or by using a magnet to attach them to metal objects (Dr. Hasan Mohammed Rabea', 1985).

### ***B- Devices which can Capture and Record from Inside the Place***

Conversations are captured and recorded simultaneously inside the place designated for eavesdropping. This method needs its holder to be inside this designated place. This method takes the forms of familiar shapes which do not attract doubt or suspicion to its holder such as a pen, lighter, and clothes' buttons. These devices are very small in size that they can be planted in a person's teeth by a dentist. They are so small that a person can swallow them without being aware. Not to mention the fact that a person designated for eavesdropping can be turned into a device by placing a microphone in his jacket's button, a radio device in the second button, and a battery in the third button. As for the wires connecting the devices to each other, they are sewed around the edges of the jacket's folds and can also act as an antenna for the device.

### ***C- Devices for Hearing and Recording Conversations from Outside the Place, among which include:***

#### ***1- Directional Microphones***

They can record conversations from inside the closed place by directing them towards any openings such as windows and vents. Moreover, these microphones can even catch conversations even through closed openings and this is made usually in close distances (Dr. Ashraf Hamid Abid Al-Shafee', 2013).

#### ***2- Contact Microphones***

They are small-sized microphones which can be placed on the external surface of a wall of the room designated for eavesdropping. They operate by capturing vibrations that touch the surface of the place to which they are attached. These vibrations result from the impact of sound frequencies generated by the speaker into this wall. These vibrations are later enlarged (Dr. Emad Hamdi Hijazi, 2008).

#### ***3- Screw Microphones***

These microphones rely on the same method of the previous microphones; however, they are specific to the thick walls in the room designated for eavesdropping. Technicians prefer to use this type of microphones that are equipped with miniature screws that can penetrate through this wall. Their function is to capture the miniature vibrations and transfer them to contact microphones attached on the outer wall of this place (Dr. Mohammed Al-Shahawi, 2005).

#### ***4- Laser Microphones***

Conversations made inside a closed space can be captured through infrared ray by using mobile microphones that operate using laser. These microphones can send invisible infrared ray half inch thick. The continues direction of this ray allows it to move to distant distances from the source of directing it to the target room. This ray ran over a mirror two inches of dimension which was installed beforehand in the target room by the individuals carrying out the eavesdropping (Dr. Ameen Mohammed Khirsha, 2012).

Therefore, we can clearly notice that neither the French legislator, in Article No. 1/368 of Old Penal Code, nor Egyptian or Iraqi legislators mentioned that recording or transferring must be made by a specific device. Instead, they used the expression "a device of any type". The same goes with the French legislator in Article No. 1/1-226 of the New Penal Law regardless of using additional expression "by any means" (Dr. Midhat Abdulhaleem Ramadhan, 2000).

#### ***Second: Methods of Eavesdropping on Phone Conversations***

There are two types to accessing conversations made by a person using a phone:

##### ***First: Direct Eavesdropping***

This method is considered the first modern methods used to eavesdrop phone conversations. The line to be monitored can be accessed wirelessly by using a headphone which can be connected to recording devices in the central location. The wires of this headphone can be connected to wires of the joint circuit in any location (Dr. Tariq Ahmed Fathi Suroor, 1991).

##### ***Second: Indirect Eavesdropping***

This method is made without the need for direct connection of phone's wires. Phone conversations can be captured wirelessly depending on the fact that each phone line has a magnetic field. The headphone used for eavesdropping is connected to this line (Dr. Mamdoah Khaleel Bahar, 1983).

One of the modern methods of wireless eavesdropping and phone recording is the that made by placing a radio and recording device inside the target phone. Therefore, the devices placed inside it work automatically upon connecting this phone to the line or when using it. These devices work to transfer the conversation and record it (Dr. Tariq Ahmed Fathi Suroor, 2004).

#### ***Second Requirement***

##### ***Types of Conversations the Extent of their Protection***

As previously stated, there are two types of conversations; phone conversations and private conversations. In this requirement, we attempt to answer the question of the legal protection provided to these two types of conversations by presenting two parts, one tackles phone conversations and the other tackles private conversations.

##### ***Part One***

##### ***Phone Conversations***

Phone conversations are considered one of the aspects of peoples' private lives. The speaker can speak to others by means of phone lines (J. Pradel, 1991). These conversations are spaces for exchanging personal secrets and ideas without disconcertion or fear from being eavesdropped. Those individuals feel safe from the curiosity of eavesdropping. It is no doubt that the feeling of safety during phone conversations is an important guarantee to exercising private life. Therefore, the inviolability of phone conversations stems from the inviolability of the individual's private life as these conversations and calls are an expression of this private life (Dr. Ahmed Rifa't Al-Khafaji, 1989).

Notwithstanding the importance of phone conversations and their inviolability, the French legislator ignored, in both new and old penal code, criminalizing infringement of phone conversations. The responsibility therefore fell on French jurisprudence to provide protection in this respect as will be discussed later. As for Egyptian legislation, it ensured that phone conversations are protected according to Article No. 309 duplicate of Penal Code. The same goes for Iraqi legislator in Article No. 438 of the foregoing Penal Law. As for the law, Article No. 309 duplicate, of Egyptian Penal Code No. 58 for the year 1937 as amended, and Article No. 438 of Iraqi Penal Code No. 111 for the year 1969 as amended, made an irrebuttable presumption, which may not be overruled, that phone conversations are considered private conversations, and therefore, enjoy legal protection even if they include a general subject. By nature, phone conversations are considered private conversations because the container of these conversations is wires which are private by nature (Dr. Tariq Ahmed Fathi Suuroor, 1991). It is noteworthy to mention that the Egyptian legislator has made equal the libel through phone and libel through other public means. But by returning to the explanatory memorandum, we find a ground for this approach; "the increase of offenses by insult and libel day and night through phone. The problem worsened and people were hearing the ugliest profanity and words. Offenders were safe by the secrecy of phone conversations and were satisfied that law would not punish them for insult and libel with a severe punishment unless there is the condition of publicity, which is unavailable in current texts." From the explanatory memorandum, we can see that Article No. 303, Penalties, did not extract the phone from its private nature and made it public, nevertheless, the legislator intended from this text to include punishment to insult and libel which are made through phone regardless of being in an unpublic situation (Dr. Abdulhammed Al-Shawarbi, 2002). Some scholars contend that the expression: "conversations made on phone" stated in the beginning of Article No. 309 duplicate, extend to include conversations made through internet. Phone lines are the main method used in communications through internet. Based on this, if an individual eavesdropped on conversations made through internet or recorded or transferred it, he shall be punished (Dr. Midhat Abdulhaleem Ramadhan, 2000). The US Law, fourth constitutional amendment, does not include any protection to phone conversations, nor it prohibited the use of modern scientific means to eavesdrop. Therefore, the Federal Supreme Court validated the evidence of monitoring phone conversations. This was in made while looking into the case of Olmsted. In this case, Olmsted was dealing with prohibited goods. His phone calls were

monitored and the resulted information was used as evidence against him. His defense lawyer in this case stated that phone eavesdropping is considered an unaccepted intervention in citizens' private lives and is also considered an unaccepted inspection according to the rules of fourth constitutional amendment (Dr. Tariq Sideeq Rasheed, 2013).

The ruling passed with regard to Olmsted's case majorly opposed by many legal scholars. This led the US Congress to pass Federal Communications Code for the year 1934. Article 605 of the said Code stipulated that eavesdropping or disclosing phone conversations whether on federal or country level is prohibited. Thereafter, US Congress passed the third chapter of public vehicles monitoring and streets security code on 19<sup>th</sup> June 1968. This Code aims at protecting phone conversations and private oral conversations and prohibits their monitor unless under prior judicial permission in accordance with Article No. 2511. The said Article prohibits illegal monitor of any oral or phone conversations, disclosing or using information obtained through illegal monitor unless under law.

## ***Part Two***

### ***Private Conversations***

We have previously identified the meaning of private conversations. However, is it necessary to have the conversation made at a private place to be within legal protection, or is it sufficient to consider it private even if made at a public place? Legislations differed on answering this question. This difference was not only in legislations, it also extended to jurisprudence and law as follows:

#### ***First: Jurisprudence***

Jurisprudence was divided in this regard into three directions:

##### ***First Direction***

Advocates of this direction stress on the necessity to follow an objective criterion. For them, the act is protected with respect to the location regardless of the status of privacy of the individuals. French jurisprudence, which is an advocate of this direction, endorses the same by stating that the preparatory works preceding voting on 17<sup>th</sup> July 1970s Code suggested to replace the idea of "private place" with "private" indicating private status. As this suggestion was refused, the legislator favors objective criterion over personal criterion (French Journal Official, 1970).

The majority of Egyptian jurisprudence adopt this direction on the ground that it is a must to follow the exact text and avoid broad interpretation of criminal matters (Dr. Mahmood Mahmood Mostafa, 1994).

Iraqi, Egyptian, and French legislators adopted the private place in private life assault crimes due to its influence by libel crimes. The publicity made in libel is achieved by speech or reference made in a place where people can see or hear. Therefore, the private place in private life assault crimes has the same

connotation as that in violation of honor crimes due to the similarity between the two (Dr. Mahmood Najeeb Husni, 1987).

Moreover, an individual who pronounces a private talk in a public place without paying attention whether he might be heard or not, discloses his secrets and therefore has no right to demand protection for it (Dr. Mohammed Zaki Abu-Amir, 1979).

### ***Second Direction***

Advocates of this direction contend that the privacy of conversation cannot be restricted by private place only as an individual can speak with another in a private conversation while being at a public place. In other words, it is the private status of individuals that has to be the center of focus. This statement is in line with provisions of Egyptian law, particularly Articles No. 44 and 45 which stipulate to protect private life regardless of the place in which the conversation is made. The legislator should not restrict such protection to a specific place (Dr. Tariq Ahmed Fathi Suroor, 1991).

Advocates of this direction in the French jurisprudence believe that personal conversations are made based on the individual's freedom of expression, in other words, it is derived from a psychological attitude which has a personal characteristic irrespective of the place in which the conversation is made. Further, personal conversations in a public place is a frequent event. The person holding this view adds by saying that the legislators forgot to take into consideration the key difference between pictures and conversations. In other words, the objective criterion of place which is totally accepted with respect to taking pictures might not be sufficient for conversations (Becourt, 1970).

Some of Egyptian legal scholars endorse this direction on the basis that Article No. 45 of the Constitution stipulates that: "Citizens' lives are inviolable and protected by law and the same goes for phone conversations and other means of communication." This text is absolute and does not contain any limitation or specification which might limit the legal protection of private life. A legislator's limitation of the same in accordance with Article No. 309 duplicate, is an attempt to diminish the guarantees recognized in the constitution to protect private life against infringement (Dr. Hisham Mohammed Fareed Rustum, 1992). In addition, freedom of expression requires protection of conversations while considering their subject and not their place, therefore, private conversation should be protected irrespective of its place (Dr. Husamuldeen Kamil Al-Ahwani, 1978).

### ***Third Direction:***

Advocates of this direction believe in the necessity to balance between the privacy of a place and the privacy of a conversation. A conversation made at a private place so long as it is inaudible is considered a private place irrespective of whether the speaker owns, acquires, or visits the place. The place is private

and lowering the voice is an absolute feature that the conversation is private. As for conversations made in public places, they are considered private if made with low voice and separately from the attendants of this place unless there is evidence to the contrary. Whereas if such conversations are made with loud voice, this is an absolute indication that the content of the conversations is public (Dr. Mubdir Al-Wais, 1983).

### ***Second: The Position of Comparative Legislations***

#### ***A- Iraqi Law***

As done by Egyptian law, Iraqi law adopted the idea of private place as stipulated in Article No. 438 of Penal Code, whether the conversation was private or public. The privacy of the place determines the protection of a conversation, therefore, if a conversation is made in a public place, it would not be under legal protection (Dr. Ammar Turkey Atiya Al-Sa'doon, 2004).

#### ***B- Egyptian Law***

As stipulated in Article No. 309 duplicate (A) of Penal Code No. 58 for the year 1937 as amended, a conversation is under legal protection if made in a private place irrespective of the privacy of the conversation itself. The privacy of the place determines the protection to be provided to the conversation. Therefore, a conversation made in a public place is not under legal protection even if the speaker pronounced private matters (Dr. Mahmood Najeed Husni, 1982).

#### ***C- French Law***

The old French Penal Code for the year 1976 adopted the objective criterion of private conversation, in other words, it adopted place as the determining factor and not the nature of conversation. The legislator used the expression "lieu prive" and refused to use "enprive" which means the status of privacy in Article No. 1-368 of Penal Code. The legislator changed his previous position upon passing the new French Penal Code to criminalize infringement of these conversations if they were of private nature without considering the nature of the place they were made in. This amendment was made in accordance with Article No. 1-226 of Penal Code which stipulated: "Any individual who, on purpose, infringed by any means the private life (the private conversation) of others using eavesdropping, recording, or transferring without the consent of the latter shall be punished." The legislator used the expression "atitre prive ou confidential" which means "private characteristic" or "private" (Emmanuel Dreyer, 2002).

### ***Third: Judiciary***

#### ***A- Iraqi Judiciary***

Iraqi Courts stressed on the idea that an evidence obtained from voice recording is considered legitimate if such recording was made with appropriate legal procedure as required by law and security and under judicial permissions. The legitimacy of such evidence is further conditioned by being a clear recording and made by the voice of the accused person. This was followed by Court of Appeal in Qadisiya, acting as a court of cassation, when it dropped voice recording as an evidence in the case due to being suspected that it does not

belong to the accused person. According to its ruling, the said court stated: "The evidence obtained from the case is the testimony of the complainant which mentioned that the accused person threatened him by phone. This was also confirmed by the testimony of the two witnesses, who were the complainant's sons, who heard through the phone that the accused person threatens their father during his phone conversation. Considering that the voices on phone change and cannot be distinguished easily from one another, the two testimonies cannot be taken as valid evidence. Such suspicion falls in favor of the accused person as evidence should be interpreted on reasonable basis rather than on doubt or belief (Dr. Ammar Al-Hussaini, 2017).

### ***Second: Egyptian Judiciary***

Egyptian judiciary adopted the place privacy criterion to favor protection over conversation. Egyptian judiciary jurisprudence considered voice recordings set forth before the Egyptian judiciary in 2008, the phone calls pertaining to the case of the murder of artist Suzan Tamim made between her and the accused person (Nawf Hussein Matrook Al-Ajarma, 2019).

### ***Third: French Judiciary***

Some French courts adopted private place as basis for trial. In a ruling by Aix-en-Provence Court, the following was stated: "What should be relied upon is not only the private status of individuals, but also the nature of the place itself." The court added by saying that if we considered the nature of individual's status to determine the existence of their privacy and the case was related to a public place, it means that we should add to the legal text of Article No. 368 of Penal Code a non-required matter and interpret the Code broadly. This shall in effect be inconsistent with criminal matters (Trib corr-aix-en-provence 16 oct, 1973, j.c.p. 1974).

### ***Third Requirement***

#### ***Criminalizing Eavesdropping***

Eavesdropping does not distinguish between a conversation under investigation and other types of conversations to the extent of reaching the secrets of other persons due to their mere connection through phone or meetings with the suspect. Eavesdropping means listening to conversations by stealth. Eavesdropping is achieved upon listening to conversations whether these conversations were recorded and transferred to others (Dr. Mohammed Zaki Abu-Amir, 1990).

Egyptian legislator considered eavesdropping a crime as stipulated in Article No. 309 duplicate (A). In response to this article, Cairo Criminal Court ruled on 3/11/1981 with respect to the case; a testing technician and four others (have not been convicted) appeared before court with the accusation of spying on phone conversations made between girls and their friends. The accused spied on these girls and threatened them to disclose what he illegally obtained unless they fulfil his wishes. The court found that the acts of the accused are considered crimes under Criminal Code, particularly Articles No. 309 duplicate, and 309

duplicate (A). The court ruled to punish the accused by imprisonment for a period of five years (Public Prosecutor's Office – Case No. 1864 for the year 1981).

French legislator has also criminalized eavesdropping in both old Penal Code for the year 1976, Article No. 368, Paragraph No. 1, and the new Penal Code for the year 1992, Article No. 1-226/1.

The same goes for Iraqi legislator as stipulated in Article No. 438 of Iraqi Penal Code No. 111 for the year 1969 as amended, which states: "An individual, other than those stated in Article No. 328, who reviewed a message, a telegram, or a phone call, and disclosed it to individuals other than those for which it is intended, with the aim of causing harm to an individual."

The question to be raised here is that; does eavesdropping have to be made by a device, or is it possible that it is made by ear? Legal scholars, in answering this question, were divided into two directions:

**The First Direction;** its advocates believe that eavesdropping is applicable to those cases where listening is made stealthily through a device and not by ear. This contention is based on the Swedish and German legislators who did not set punishment for eavesdropping by ear. The legislator requires that the act is made through a device of whatever type (a device means here any device produced through modern technological development). Therefore, an act shall not entail a crime unless made through technologically developed devices. In other words, it is not considered a crime if the accused did not use such device (Dr. Mahmood Najeeb Husni, 2016). In addition, when the French legislator amended Penal Code by reformulating Article No. 1-368 of the old code into No. 1-226/1, he ruled out the expression (*ecouteir*) stipulated in the old code, and replaced it with the expression (*capteir*) which means to capture. It is understood that capture is only made through a device. This means that word (*wiretap*) stipulated in Article No. 368 of the old French Penal Code which corresponds to the word (*eavesdrop*) stipulated in Article No. 309 duplicate, of the Egyptian Penal Code means that it is possible for eavesdropping to be made by ear or through a device (Dr. Midhat Abdulhaleem Ramadhan, 2000). The French Court of Cassation endorsed this direction in a recent ruling (Cass. Cim, 22avril, 1992, Bull Crhm n189, D. 1995, *Jurispe*).

**Second Direction:** The advocates of this direction believe that the basis for eavesdropping is ear; however, this does not mean that it cannot be made through a device of any type. In addition, if the legislator means that an act is not considered a crime unless by using a device, he would not have included two options of recording and transferring that fall under the crime (Dr. Mahmood Ahmed Taha, 1999).

In the opinion of the researcher, and in accordance with Article No. 438 of Iraqi Penal Code, Article No. 1/368 of old French Penal Code, and Article No. 309 duplicate, of Egyptian Penal Code, eavesdropping has to be made by using a device of any type. This is demonstrated through the use of the French and

Egyptian legislators of the expression "a device of any type" which indicates that eavesdropping has to be made through a device and not by ear.

While Iraqi Penal Code No. 111 for the year 1969 as amended, Egyptian Penal Code No. 58 for the year 1937 as amended, and the new French Penal Code for the year 1992 require the use of a device of any type for the act to be considered a crime, this limitation is not applicable in the field of the civil law. The reason for this is that the act entails violation of the right to privacy by eavesdropping, spying (Dr. Husamuldeen Kamil Al-Ahwani, 1978).

Thereby, it is necessary to know that the crime of eavesdropping or recording and transferring a conversation is deemed intentional crime. The perpetrator has to have the two elements of mens rea which are knowledge and will. This means that the perpetrator has to be aware of the nature of the place in which the conversation is made at the time of eavesdropping, recording, or transferring (Dr. Mahmood Ahmed Taha, 1999).

This is endorsed by French jurisprudence by stating that infringement of conversations has to be made intentionally and that it has to have a preparation prior to the conversation. Therefore, it is no crime if a police officer listened to a phone conversation that is made in his presence without fraud or deceitfulness on his part (Jean pradel et Andre varinard 2003).

## CONCLUSION

The research reached a number of results and recommendations, among which are:

### *First: Results*

- 1- Conversations mean every sound which expresses a collection of interconnected meanings and ideas whether speaking is made in a foreign, national, or sign language (language of the deaf and mute), or by using codes.
- 2- Phone conversations are considered one of the aspects of peoples' private lives. The speaker can speak to others by means of phone lines. These conversations are spaces for exchanging personal secrets.
- 3- The criterion derived from the characteristic of place is clearer than that of private characteristic of the conversation. As the latter may raise controversies which cannot be solved under legislative policy. Iraqi, Egyptian, and French legislators adopted the private place in private life assault crimes.
- 4- Eavesdropping on conversations is considered one of the most dangerous means of monitoring information. The danger of such type is represented in the unawareness of the suspect that his conversations are being eavesdropped and monitored, not to mention the potential of recording the details of his private life.

### *Second: Recommendations*

- 1- Now that infringement of the right to privacy, especially conversations, is frequently made by the public authority, we recommend adding a provision to the Iraqi Constitution for the year 2005 which includes considering every infringement of the like a crime the victims of which are fairly compensated by the government.
- 2- The researcher recommends to amend Article No. 40 of the Iraqi Constitution for the year 2005 to read as follows: "the freedom to communications and correspondences are guaranteed by law and must not be monitored or eavesdropped unless under a judicial permission and for a limited period of time in accordance with provisions of the law."
- 3- The necessity to subject all government acts under the supervision of the judiciary given the fact that the absence of such supervision leads to infringement of human rights and freedoms, including the right to privacy (conversations).
- 4- Activating the role of the Iraqi Higher Federal Court in ascertaining the extent to which laws passed by the legislative authority comply with provisions of constitution.

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