

The Specificity of the Mental Element in Customs Crimes in Algerian legislation: Smuggling Crimes as a Model

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Received
18/12/2025

Accepted
07/04/2026

Published
11/04/2026

Abstract:

If the material element is the body of the crime, then the mental element is its spirit and the basis of criminal responsibility for it; there is no crime unless a material element, a legal element, and a mental element are all present.

However, economic crimes, in view of their connection to the state's economic policy—especially smuggling crimes—have been considered by the legislator as purely material crimes, such that the crime occurs merely through the commission of the criminal conduct. Accordingly, we question the extent to which the mental element is required as a necessary component for criminalization.

key words: body of crime , material element ,crime, economic crime,criminalization.

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Introduction:

Smuggling crimes are considered among the most dangerous crimes that affect the national economy. Due to their seriousness, the legislator has given them utmost importance and singled them out with a preventive punitive procedural law independent from the Customs Code, namely the Anti-Smuggling Law¹. Smuggling has been defined as acts described as smuggling in customs legislation and regulations. The legislator has specified smuggling crimes in Articles 10 to 15 and subjected them to criminal penalties commensurate with their legal classification.

As economic crimes, they possess several characteristics that distinguish them from ordinary crimes, the most important of which are:

- The harmful and direct impact of smuggling crimes on the national economy.
- Smuggling crimes are characterized by the fact that they simultaneously negatively affect the state's economic policy and, at the same time, negatively affect society due to the actual or potential harm they cause to an important and necessary economic interest.
- Smuggling crimes have a changing nature and vary according to the state's priorities.
- It is difficult to enumerate smuggling behaviors due to their special and distinctive nature.

In view of all this, the crime of smuggling is a purely material crime in which the role of the mental element is diminished.

Section I: The Dominance of Materiality and Formalism in Smuggling Crimes

An economic crime is any act or omission that occurs in violation of the rules established to regulate or protect the state's economic policy, if its criminalization is provided for in this law or in special laws. It is any infringement of an interest related to the economy of the state and its individuals or to the economic policy adopted therein, where

1- Order No. 06/05 dated 23 August 2005 relating to the fight against smuggling, as amended and supplemented.

such infringement constitutes a violation of a text or regulation stipulated by law¹.

Through these definitions, we find that the legislator has considered economic crimes, for the most part, as crimes of danger, in that whenever it appears to the legislator that a certain conduct constitutes a social danger to an interest worthy of protection, he decides to criminalize this conduct without regard to the occurrence of harm to a specific interest².

This is what is termed material–formal crimes, and on this basis we will define both material crimes and formal crimes, and this applies to crimes.

A crime is material when the law requires the realization of a specific result as an effect of the offender's conduct, and the crime is not considered complete unless this result occurs.

Formal crimes are defined as crimes in which the legislator criminalizes the conduct independent of any result; committing the conduct in itself constitutes a crime, without regard to the effect it produces³.

A formal crime is one in which the offender's conduct does not result in a material outcome in the known sense; this means that it is completed in full merely by committing the conduct, without the need for the realization of such a result, that is, the conduct of the perpetrator does not bring about any change in the external world as an effect of this conduct⁴.

Accordingly, the legislator expressly provided in the text of Article 32 of the Anti-Smuggling Law that the reports drawn up by judicial police officers or by at least two sworn agents from among those mentioned in the Code of Criminal Procedure, or by two sworn agents from among customs officers, tax service officers, officers of the

1- Nasreen Abdel Hamid, *Traditional and Emerging Economic Crimes*, no edition, Modern University Office, Egypt, 2009, p. 130.

2- Ibid, p. 14.

3- Ibid, p. 66.

4- Fattouh Abdullah Al-Shadhili, *Explanation of the Penal Code*, no edition, Dar Al Maref, Egypt, p. 103.

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National Coast Guard Service, or agents charged with economic investigations, competition, prices and quality, and the suppression of fraud, for the purpose of ascertaining acts of smuggling criminalized under this order, shall have the same probative force recognized for customs officers with regard to the material findings they contain, in accordance with the rules stipulated in customs legislation. Accordingly, the report drawn up by two competent sworn agents has been granted by the legislator absolute probative force, which may not be contested except by forgery, whereas the report drawn up by a single agent, or what it contains of the violator's statements, has relative probative force subject to proof to the contrary.

Section II: The Minimal Role of the Mental Element in Smuggling Crimes

By referring to most laws, we find that the legislator did not address the mental element in economic crimes in general, and in smuggling crimes in particular, as he was content with mentioning the material element constituting these crimes. The texts were formulated in a manner that does not reveal whether criminal intent is required or not. Moreover, the researcher in this field concludes a tendency to consider these crimes as purely material and formal crimes, without examining intent or fault.

A segment of legal doctrine has considered that in economic crimes in general, criminal responsibility is based merely on the commission of the material element of the crime, without examining intent or fault¹.

While another group takes the view that the rule in the law of economic crimes differs from the rule in general criminal law. On the one hand, the legislator does not care to specify in the text of criminalization the form of the mental element required; on the other hand, this is interpreted as meaning equality between intent and fault,

1- Anwar Muhammad Sidqi Al-Musaida, *Criminal Liability for Economic Crimes*, first edition, Dar Al-Thaqafa, Jordan, 2006, p. 2518.

and this is through the establishment of a single sanction whether in the case of intent or fault¹.

The problem arises when one of the crimes stipulated in Law No. 06/5 is committed by the offender due to negligence, forgetfulness, or lack of precaution: is it fair to hold him accountable on the basis of an intentional crime?

In this regard, and concerning economic crimes in general, many jurists have called for the necessity of retaining the principle of fault while introducing some flexibility to it, such that it revolves around the extent to which it is possible, according to this principle, to depart from the general foundations of criminal law.

In this direction, DEPREZ considers that despite some manifestations suggesting the existence of the offense without fault, it is accepted in this regard that all crimes presuppose, for their existence, a mental element, and that this element is fault, which may be unintentional. The public prosecution may be exempted from proving it, but it exists and is realized merely by the violation of laws and regulations, which is what has been termed regulatory fault².

Regulatory fault is the mental element required in material crimes and has arisen as a result of doctrinal development opposing the idea of criminal responsibility without fault in the field of such crimes. Its scope is determined, according to what this doctrine agrees upon, within contraventions and regulatory misdemeanors³.

The proponents of this view are divided into three groups: some see that fault in business crimes in general is of a special nature; others call for equality between intent and fault; while the third opinion considers fault to be presumed.

A) First Opinion: Fault of a Special Nature

There are business crimes that neither intentional nor unintentional fault can explain. These situations were imposed by the

1- Nasreen Abdel Hamid, Op. Cit, p. 730.

2- Jean DEPREZ, Faute pénale et faute civile en quelques aspects de l'autonomie du droit pénal, DALLOZ, Paris, 1956, p. 157.

3- Mohammed Hammad Mehraj Al-Habbti, Presumed Fault in Criminal Liability, Dar Al-Thaqafa for Publishing and Distribution, Amman, Jordan, 2005, p. 126.

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necessity of providing effective protection for the state's economic policy. These crimes have a special nature in their material element, which is based on the violation of regulatory obligations that results in exposing interests worthy of protection to danger. They often arise without the occurrence of harm and derive their danger from the act rather than from the perpetrator.

B) Second Opinion: Equality Between Intent and Fault

The legislator's silence regarding the clarification of the mental element of these crimes, whether deliberate or due to generalization, is not to be interpreted as an exclusion of the role of the mental element in the crime. Rather, it is understood that the legislator punishes in both cases with the same penalty. This is due to the nature of these special crimes, which are centered on preserving public interests and safeguarding the national economy. Therefore, the legislator has considered them crimes of danger rather than crimes of harm, meaning that the offender is punished merely for committing the criminal conduct without waiting for the occurrence of a result.

French jurisprudence requires that the equivalence between intent and negligence be based on material and convergent presumptions that have a fixed origin in the case file. This is because it is necessary for the trial judge to carry out a factual and objective classification of the fault, even if it is unintentional, even when its basis is negligence or recklessness¹.

This theory, although it provided a solution to the issue of searching for the form of fault necessary for the establishment of the crime, nevertheless left the burden of proving this fault on the public prosecution, which must prove the availability of the mental element of the crime, whether intentional or unintentional.

C) Third Opinion: Considering Fault as Presumed

This opinion is based on the notion that a material crime in fact presumes fault on the part of the offender, meaning that it assumes that the material act committed occurred as a result of the offender's

1- Abdel Azim Morsi Wazir, *Presumed Conditions in the Crime*, Dar Al-Nahda, Egypt, 1987, p. 44.

negligence, forgetfulness, or even ignorance. What is punishable from the theoretical standpoint is negligence, just as in the case of crimes of omission¹.

Accordingly, it can be said that business crimes, in most cases, do not require proof of criminal intent, as it is presumed merely by committing the material conduct. The perpetrator must prove the absence of this criminal intent or the existence of a cause preventing his responsibility for the act. Thus, business criminal law adheres to the mental element in all cases, but presumes it in order to facilitate proof of the crime².

However, this theory has been subject to criticism on the grounds that presumption contradicts the presumption of innocence, which is considered a fixed principle according to general rules and must apply equally to both the material and mental elements.

What is customary in criminal law is that it is not sufficient, for the conviction of a person for a crime, to establish its material element; rather, it is necessary to establish his knowledge of the dangerousness of his criminal activity and of the elements constituting the material element of his crime, that is, this knowledge must be proven in fact and not presumed³.

It is worth noting that smuggling crimes are material and formal crimes that occur merely through the commission of abstract conduct. Apparently, there is no room for the application of this rule, especially since the crime occurs as soon as the criminal conduct is committed. Consequently, there is no need to search into whether these crimes were committed intentionally or by fault; it is sufficient that the legal rule has been violated.

Section III: Criminal Intent in Smuggling Crimes

A smuggling crime is any violation of the rules established and defined in customs legislation, as these crimes have been criminalized

1- Abdel Raouf Mahdi, *Criminal Responsibility in Economic Crimes*, Dar Al Maref, Alexandria, Egypt, 1976, pp. 178–179.

2- Amin Mustafa Mohammed, *Penal Code: General Part*, first edition, Al-Halabi Legal Publications, Lebanon, 2010, p. 116.

3- Anwar Muhammad Sidqi Al-Musaida, *Op. Cit.*, p. 224.

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under this law. Smuggling crimes represent a danger that threatens an interest worthy of protection, and this interest lies in preserving the national economy.

Smuggling crimes fall under the category of crimes of danger, in which punishment does not depend on the occurrence of specific harm. There is almost complete agreement that criminal intent is required in economic crimes, since the requirement of criminal intent constitutes a punitive standard: the more severe the system, the less intent is required¹.

A) The Concept of Criminal Intent

Criminal intent is defined as the direction of the offender's will toward committing the crime with knowledge and with the availability of its legal elements.

It is also defined as the perpetrator's knowledge of the existence of the elements of the crime and the direction of his will toward committing that act, toward bringing about the result for which the law punishes in this crime².

It is clear from this definition that criminal intent presupposes knowledge of certain facts and presupposes the direction of the will toward producing a certain effect³.

1- The Element of Knowledge in Criminal Intent:

What is meant by knowledge is knowledge of the material element, that is, the relationship of correspondence or linkage between the reality known to the actor and that which the law prescribes. Thus, knowledge relates either to the law or to the facts. Knowledge of the law is presumed for everyone, whereas knowledge of the facts is, as a rule, required⁴.

2- Presumption of Knowledge of the Law:

If publication in the Official Gazette is the technical basis upon which the presumption of knowledge of the law rests, then, based on

1- Nasreen Abdel Hamid, Op. Cit, pp. 73–74.

2- Ashraf Tawfiq Shams Al-Din, Op. Cit, p. 225.

3- Nasreen Abdel Hamid, Op. Cit, p. 74.

4- Amin Mustafa Mohammed, Explanation of the Penal Code: General Part, p. 397.

the rule and presumption of knowledge of the law—which is founded on the offender’s knowledge of the law—he may not excuse himself by claiming ignorance. The legislator has considered this a constitutional principle that may not be agreed otherwise¹. The prosecuting authority is not required to prove his knowledge of it, nor is the offender permitted to argue the absence of criminal intent on the ground of ignorance of the law. Knowledge of the law is a legal presumption that does not admit proof to the contrary².

As for modern legislation in the field of economic crimes, some of it has departed from the presumption of knowledge of the law and has required the establishment of the offender’s knowledge of the unlawful nature of his act, due to the breadth of economic legislation, which prevents knowledge of all its complex particularities, making it impossible to presume knowledge thereof. This is the approach adopted by Swiss legislation issued in 1944 and accepted in Dutch jurisprudence³.

The enactment of a law in itself is not sufficient for its applicability; rather, it must be published in the Official Gazette. If the publication process is affected by a defect that prevents it from fulfilling its purpose—namely, conveying the public’s knowledge of the law—then publication is not deemed to have occurred. An example of this is when the law is printed in the Official Gazette and its copies are stored without distribution; in such a case, publication cannot be considered to have taken place⁴.

3- Knowledge of the Facts:

The rule is that for the knowledge upon which criminal intent is based, alongside will, to be established, the offender must be aware of all the legal elements of the crime, that is, of the elements of the crime as defined by the text of criminalization. If knowledge of any of these

1- As Article 74 of the amended and supplemented 1996 Constitution stipulates: Ignorance of the law is no excuse. Every person must respect the Constitution and the laws of the Republic.

2- Ashraf Tawfiq Shams Al-Din, Op. Cit, p. 270.

3- Nasreen Abdel Hamid, Op. Cit, p. 76.

4- Ashraf Tawfiq Shams Al-Din, Op. Cit, pp. 270–271.

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elements is absent due to ignorance or mistake, intent is likewise negated. This means that the offender's knowledge must extend to every fact upon which the structure of the crime is built; it is knowledge of the crime's elements and components. There are facts for which knowledge has an effect, and facts for which knowledge has no effect, in proving criminal intent.

The most important facts whose knowledge has an effect are knowledge of the subject matter of the interest under attack. As a rule, the offender intends to attack an interest protected by law, and every interest has a subject matter¹. The offender's knowledge must therefore be directed to that subject matter. For example, the crime of manufacturing and baking goods that violate specifications is established merely by comparing the incriminated act with knowledge of its nature and of its being contrary to the law².

However, with regard to French legislation and Arab legislations, this view is rejected. The basic rule is that knowledge of the Penal Code and all supplementary laws is presumed. Accordingly, no one may be excused for his ignorance that an act is unlawful and punishable by law, so long as it is proven that the law was published to the public in the Official Gazette and that everyone was thereby able to know it³.

Nevertheless, this presumption is not absolute⁴. The most important cases in which the plea of absence of knowledge of the law may be accepted are either cases of force majeure or failure to publish the law.

As for the first case, which means the existence of circumstances that prevent the offender from being able to know the law—circumstances not attributable to him and which he cannot avert⁵—it is

1- Fattouh Abdullah Al-Shadhili, Op. Cit, p. 439.

2- Nasreen Abdel Hamid, Op. Cit, p. 74.

3- As Article 74 of the amended and supplemented 1996 Constitution stipulates: Ignorance of the law is no excuse. Every person must respect the Constitution and the laws of the Republic.

4- Ashraf Tawfiq Shams Al-Din, Op. Cit, p. 270.

5- Ibid, p. 270.

therefore permissible to plead ignorance, as such circumstances make it impossible for persons to know the law¹.

As for the second case, the established rule is that penal laws are applied only from the date of their publication, unless they are more favorable to the accused. Accordingly, knowledge of the facts also includes knowledge of the dangerousness of this activity to the legally protected interest, as well as knowledge of the special characteristics required by the law.

As for facts whose knowledge the law does not require, whether the offender knows them or not is irrelevant. This concerns the issue of capacity, as the offender's knowledge or ignorance of the elements of criminal capacity does not affect the existence of intent. A person who believes, at the time of committing the criminal act, that he is suffering from a mental illness or lacks criminal responsibility, but the opposite is later established, intent is nonetheless considered to be present with respect to him².

Excluded as well from the scope of knowledge are facts that do not enter into the legal constitution of the crime, even if they affect its penalty or the offender's responsibility for it. The conditions of punishment produce their effect merely upon being met, whether or not the offender knew of them. Likewise, the facts upon which an aggravating circumstance is based that does not change the legal characterization of the crime, such as recidivism³: the same rule applies to aggravating circumstances of the crime, whether or not the offender knew of them, as knowledge of them does not affect criminal intent.

B) The Element of Will in Criminal Intent

The element of will represents the second element of criminal intent. It is the direction of the will toward the result. Knowledge is necessary and indispensable, but it is not sufficient; the offender's will must be directed toward achieving the criminal result, with knowledge of the legal availability of its elements.

1- Amin Mustafa Mohammed, *Explanation of the Penal Code: General Part*, p. 398.

2- Ashraf Tawfiq Shams Al-Din, *Op. Cit.*, p. 260.

3- Fattouh Abdullah Al-Shadhili, *Op. Cit.*, p. 440.

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What is meant by will is psychological activity aimed at achieving a specific purpose. If the offender's purpose is to achieve a criminal result, then the will directed toward the act and involving the production of the result constitutes criminal intent. The purpose is the immediate goal toward which the will is directed, while the end purpose is the more distant goal by which the offender seeks to satisfy a certain need; the end represents the final objective of the will¹.

A distinction is made between purpose and motive. The purpose is the immediate goal toward which the will is directed, whereas the end is the distant goal of that will, represented in satisfying a certain need. The motive or driving force is the psychological cause of the act. The connection between the end and the motive is close: the end is the satisfaction of a certain need, while the motive is the conception of this end or the drive to satisfy it. In other words, the end has a real existence and thus an objective character, whereas the motive is merely a psychological reflection of this existence².

One view has held that economic criminal law does not take motives into account because it is a law dominated by an objective character, whereas motives relate to the personal aspect. Another view has taken the position that motive has greater importance than in general criminal law. By referring to the Anti-Smuggling Law, we find no trace of the motivating motive affecting the commission of the crime. It can therefore be said that motive or driving force has no effect on the commission of these crimes; rather, the legislator has been content with specifying the criminal behaviors without mentioning the mental element at all.

By referring to the Customs Code, we find that the legislator expressly stipulated in Article 251 that offenders may not be acquitted on the basis of their intention.... Accordingly, the offender's good or bad faith has no effect. This text was drafted specifically for the judge and places a restriction on the judge's discretionary authority. He may not issue an acquittal based on the offender's intention; otherwise, his

1- Ashraf Tawfiq Shams Al-Din, Op. Cit, p. 275.

2- Fattouh Abdullah Al-Shadhili, Op. Cit, p. 450.

judgment would be considered defective. However, the judge may benefit the offender from mitigating circumstances, though the judge may not reduce fines.

C) Thirdly: Proof of Criminal Intent in Smuggling Crimes

Criminal intent is an internal matter harbored by the offender within himself, and therefore it is impossible to prove it by direct means. The court's method of verifying its existence is to infer it from external manifestations that reveal and demonstrate it. In this regard, the judge relies on the acts issued by the offender and the external circumstances surrounding him¹. This means that the inference of intent is a purely factual matter subject to the discretionary authority of the judge, with no oversight by the supreme court. That is, inferring intent is a solely factual matter subject to the assessment of the trial judge according to the evidence available to him. However, this statement is not absolute.

Smuggling crimes, like other economic crimes, require general intent, which is the ordinary intent that the law usually deems sufficient. Most intentional crimes require nothing more than general intent. Since the legislator has considered them intentional, and since the issue of knowledge is an internal psychological matter that is not taken into account in the context of economic crimes in general—because knowledge is presumed—smuggling crimes therefore occur merely by violating the penal provision, on the basis that they are material and formal crimes. In these crimes, the legislator has not given importance to the mental element in general, due to the nature of these crimes and the nature of the interest deemed worthy of protection by the legislator.

Conclusion

Based on what has been stated, the following results can be reached:

- There is no room to speak of specific criminal intent, and there is no need to search for the motive or purpose behind the commission of smuggling crimes. If we accept that specific criminal intent is² the direction of the offender's will toward a

1- Fattouh Abdullah Al-Shadhili, Op. Cit, p. 459.

2- See Rahmani Mansour regarding his definition of specific criminal intent, p. 85.

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particular act with the aim of achieving a certain motive, then there is no room to search for this motive. What matters is the criminalized conduct and not the purpose or motive behind the commission of these crimes, especially since they are crimes of danger and not crimes of harm.

- The presumption of knowledge and intent constitutes a departure from the principle that the accused is presumed innocent, and this principle is considered a fundamental principle for guaranteeing legality. The implication of this principle is that every person accused of a crime, regardless of its gravity, is innocent and must be treated as such until his conviction is proven by a final judicial judgment¹. This results in a change to well-known concepts in criminal law, particularly the rule that doubt is interpreted in favor of the accused, because the original position is the innocence of liability. That is, this presumption conflicts with constitutional principles, especially the principle of innocence.
- Reversal of the burden of proof: the basic rule in criminal matters is that the collection of evidence of accusation lies with the public prosecution, which must prove the attribution of the crime to its perpetrator. The court must weigh the defenses and seek the truth even on its own initiative. The presumption of knowledge in smuggling crimes leads to a type of responsibility even when the offender did not know that the act was criminalized. Such presumption leads to imposing on the accused a real obligation for a result that has occurred and punishing him automatically for it, despite the fact that his will may not be culpable in reality².

Accordingly, the legislator has considered smuggling crimes as crimes of danger, so these crimes occur merely upon the commission of their criminal conduct. The legislator has specified the criminal behaviors constituting these crimes in a manner consistent with the

1- Anwar Muhammad Sidqi Al-Musaida, Op. Cit, p. 271.

2- Anwar Muhammad Sidqi Al-Musaida, Op. Cit, p. 276.

specificity of the interest worthy of protection and the nature of the economic system adopted in the state.

Accordingly, the mental element is presumed in smuggling crimes. The position of presumption gives rise to several consequences, especially with regard to procedural matters, as previously mentioned. This is logical given their material and formal nature. There is therefore no room to speak of criminal fault in smuggling crimes, because the crime occurs merely by violating the legal provision, without any need to search at all into the mental element.

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2- Constitution of the People's Democratic Republic of Algeria, Article 74, amended and supplemented; 1996.