



## Fundamentals of Criminalizing the Use of Inside Information in the Stock Market

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<http://dx.doi.org/10.18415/ijmmu.v13i1.7321>

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### Abstract

Inside information is information that has not been disclosed to the public, which is directly or indirectly related to the securities being traded or their issuers and, if published, would affect the price or decision-making of investors to trade. The Securities Market Law has criminalized the use of inside information. Its criminalization has been based on principles such as protecting the public interest of the market, administering justice, establishing economic security, eliminating and preventing market disruption, and the principle of no harm or resentment. Although the scope and inclusion of these principles encompass all crimes, more attention has been paid to economic crimes, especially crimes of the stock exchange and securities markets; the crime of inside information, according to the Securities Market Law, is committed by legal entities such as brokers, broker-dealers, market operators, and companies registered in this market, and like other ordinary crimes, it has material, moral, and legal elements. The securities market, which is a specialized market; Therefore, the crimes formed in it have more problems than ordinary crimes; considering such problems, it is obvious that criminalization, its foundations, pillars, and conditions need to be discussed in terms of criminal law; so that the market is protected from the anomalies and disorders that have been created in it, so that losses and damages do not occur to marketers, and justice prevails in the capital market.

**Keywords:** *Insider Information; Fundamentals; Crime; Capital Market; Criminal Liability*

### Introduction

Introduction The capital market has three pillars: The first pillar: the tools and contracts used by shareholders and investors in the market. The second pillar: the institutions for which the law has stated the duties in the capital market and the stock exchange and has committed them to it. Such as brokers, broker-dealers, publishers, market makers, consultants, and other natural and legal persons (Vahid, Feyzi et al./2017: 641) These institutions play a role in the capital market in accordance with the law. And the third pillar: the place and space, whether online and electronic or physical and real, where the transaction took place. The place of occurrence of crimes committed in the stock and capital market is related to

institutions and tools. Crimes related to tools such as usury, gambling, debt transactions, real estate transactions, and formal transactions ... which can be realized by role players in the market. Crimes committed by institutions are sometimes committed independently by legal entities such as brokers, broker-dealers, issuers, investment advisors, market makers, traders and investment companies. One of the common crimes in the capital market that can be committed by institutions is the use of inside information. According to Article 1, Paragraph 32 of the Securities Market Law, inside information is defined as "any information not disclosed to the public that directly or indirectly relates to the securities being traded or their issuers and, if published, would affect the price or the decision of investors to trade." According to Article 46, Paragraph 1, the same law criminalizes the use of inside information. The use of inside information by institutions that have been informed of it in the capital market and stock exchange based on their duties, if they use such inside information, is considered a crime under the Securities Law in accordance with Article 64, Paragraph 1. This article aims to investigate the foundations, elements, and conditions of the crime of using confidential information.

A) The principles of criminalizing the use of confidential information in the stock market The market, like other social institutions, should be on the line of moderation so that no one or more people are harmed. If the market takes the path of excess and is dominated by a group of profit-seekers and profiteers, the market will be disrupted and as a result of the disruption in the market, many people will be harmed. If natural or legal persons who are in the market in accordance with their duties become aware of confidential information and, based on this information they have, use it to benefit themselves or others or to ward off harm from themselves or others, causing anomalies in the market and disrupting the market and pushing it out of moderation and causing harm and damage to others, criminal law, which protects the interests of society and creates justice in society and to relieve and ward off tension in the market, takes action and considers such acts as a crime and provides punishment for its perpetrators. As legal scholars have introduced the principles of criminalizing behaviors according to the classical school of "social contract" and according to the realization school of "dangerousness"; that is, according to the classical theory, the moral responsibility of the individual is determined within the limits of his mental error or fault, as in the realization school of criminal responsibility and risk-based criminalization, which is free from any kind of moral evaluation. Considering these two important bases in the field of law, the punishment that occurs in criminal behaviors that take place in the capital market is based on "social contracts" and the tools that have been used in the market; the right to punish the perpetrators can be considered legitimate; as by committing these crimes, many risks are faced by the country's economy and therefore the punishment will be deserved. However, it can be claimed that the basis and criteria for criminalizing abnormal behaviors in the capital market are the following principles, which are briefly mentioned:

1. The principle of protecting the values and public interests of the market According to a well-known opinion, the most important goal of criminalization and punishment is to maintain order and defend the public interests of society (Ardebili, Mohammad Ali/2005: 188), and protecting the interests of the victims is also conceivable in this general principle. Given this situation, in most crimes, their interests must be given due attention. The points of view that have been expressed regarding the principles of criminalization with respect to individual or collective interests are different. However, they can all be summarized into three categories - which cannot be merged with each other - namely: liberal, moralist and patriarchal, each of which is a competitor to the other. From each point of view, the views they have regarding the interests and benefits of the victim and the injured person are different.

In the theory of the patriarch, the emphasis on the interests against which the individual takes actions has been of interest. In this view, it is difficult to imagine a different understanding of the victim from the criminal, so that only his interests come into play. From the moralist point of view, morality is in fact like a mortar that binds together the different components of society. According to this view, the emphasis is on the harm that a person can cause to

himself in the form of a certain behavior, and the main emphasis is not on the individual who is harmed and the victim; but much attention is paid to the harm of the victim and his interests. In fact, the essence of the principle of harm as a rule of criminology is the defense against the harm caused by the actions and omissions of others that have been considered permissible for individuals. The principle of harmful behavior is the origin of the theory that intrusion into the interests and security of the victim is the best license for criminalization. (Rahami, et al./1400: 220) However, public and collective harms cause the criminalization of a person's harmful behavior, not personal and minor harms, which do not have the ability to be criminalized. It has been quoted from Shenshak that if a behavior is to be criminalized, it must have successfully passed three components, and those three components are: the principle component, the presupposition component, and the functions component. In the principle component, it is examined whether the state has the right to interfere in such behavior or not? In the presupposition component, it is examined whether there is another and better way other than criminalization or not? If there is another way other than punishment, it is not the turn to criminalization. In the third component, it must be seen how much cost and benefit criminalization has, is it worth criminalization or is its cost greater? If the cost of criminalization increases, there is no need for criminalization and another path must be followed, and among that path and the best path is to pursue restorative justice, which must be pursued and pursued.

Considering the above, all aspects of the case should be considered and decided, and only if criminalization does not cause more significant harm to the injured and victimized person, it can be criminalized. In the stock market, based on the different interests that exist in it; it has always faced a conflict between the rights of individuals, because man has been a greedy and greedy creature, firstly, and the direct intervention of legal entities of public law of the state has also been in conflict with the interests of individuals who are traders in the market, secondly, each one does not hesitate to violate the rights of others to achieve their hopes and desires, violating the rights of others is anti-value and contrary to social norms. While society has been dependent on preserving social values and norms, firstly. And social values demand and defend the right to life, freedom, property, physical health, etc., and secondly. If someone violates them, he will face a negative reaction from society, which is punishment, thirdly. Therefore, if the stock market and capital market become inflamed and turbulent by using inside information and as a result many people suffer, society will react in sympathy with the affected individuals and will try to prevent this loss and damage (Zeraat, Abbas/ 2007: 48). And the easy and convenient way to criminalize such harmful behavior has been to prevent loss and damage from the individuals of society.

2. The principle of justice Kant's order was: "The duty of punishment is, before anything else, to satisfy the sense of justice that lies within the human soul and is born with that feeling." From the perspective of justice, it requires that any behavior that causes harm to others must be compensated for in order for justice to be upheld. If evil is responded to with evil other than with evil, which is a form of punishment, and the victims have the right to compensation for the harm caused, then the very essence of justice and equity has been the basis of criminal law. (Golduzian, Iraj/ 2005: 35) From Kant's perspective: A criminal is someone who violates moral orders because crime is a harmful phenomenon contrary to morality. As a result, crime throws the moral order of society into chaos and disorder. Therefore, it is necessary to punish the criminal to restore moral order. When someone in the general public is trying to plan a program that disrupts the market and results in the harm of a large number of people, morally, the punishment is equal to morality and justice. (Ardebili, previous) If we assume that society is indifferent to the victims, by the individuals who have caused abnormal behavior; in addition to the fact that the order of society and community in the capital market has been

- disrupted, justice has certainly been damaged. The use of confidential information disrupts the comprehensive order of the capital market, and criminal justice prevents the disruption of order against those who have disrupted the order. If we leave those who have confidential information free and use that information for their own benefit to the detriment of most shareholders and investors, they will no longer be a healthy and trusted market in society.
3. The principle of establishing security Every person in society should feel secure in their life, property, property and reputation. Although the constitutional, civil, commercial and other laws have considered and recognized certain rights for individuals, such laws have not fully guaranteed the implementation of civil and social rights. Rather, the guarantee of the implementation of civil and social rights is fully the responsibility of the criminal law. Because criminal laws, in addition to accepting the principle of the legality of crimes and punishments, which have determined crimes and punishments in advance so that people understand their duties, must be completely safe and comfortable from the harm and loss that people suffer and endanger their property; providing and guaranteeing an important part of this security has been the responsibility of criminal law. In the capital market, real and legal persons who have committed abnormal behaviors and as a result, many people have lost their rights must seek help from criminal laws to maintain their financial security and comfort and resort to punishment, the purpose of which is to ensure security.
  4. The principle of eliminating fluctuations in the stock market By creating abnormal market behavior in the capital and stock market, fluctuations from rising and falling are dragged on for months, weeks, days, and even hours and minutes. In fact, this has become an abnormal trend and path of the stock and capital market. Society has reacted negatively to the creation of this trend and has also caused strikes in several cities in the country. (Khabarban/1403). It seems that in response to the question of why the market has experienced severe and sudden negative fluctuations? In response, it should be said: In particular, two major triggers can be briefly mentioned, which are: First, that various governments in Iran have always focused seriously on the policy of suppressing the exchange rate in recent years. This suppression of the exchange rate and its price control, in turn, causes the realities of the market to not be able to coordinate themselves with the exchange rate very much. An issue that shows an objective manifestation in the form of the collapse and fall of the stock market. Of course, the government has also adopted contractionary approaches in its monetary and fiscal policies, and some experts believe that these policies are also not ineffective in the continuous and continuous declines of the stock market. Therefore, until reforms are made in the two aforementioned areas and policies do not change direction, a change in the stock market situation is not very likely, and we should still witness various fluctuations in our country's stock market, as in the past. Second, the social capital of the stock market has been greatly distorted in the eyes of public opinion in recent years. This issue is also not ineffective in creating a negative atmosphere in the daily lives of the capital market from a general perspective. In this regard, some objections are raised regarding the framework related to the transparency of the stock market, which should also be addressed seriously. From a general perspective, it seems that until the social capital of the stock market is restored and some effective economic policies related to this market are also reformed, we cannot expect positive changes in our country's stock market and we will continue to witness occasional fluctuations.
  5. The principle of no harm Legal scholars believe that criminal law was developed and formulated to prevent harm and damage to others. If a behavior does not cause harm to others, there is no reason to criminalize that behavior because when a behavior does not cause harm to the life, property, honor, dignity, or freedom of others, criminalizing such behavior

would be pointless. (Rahami, Mohsen/2008: 58) In the opinion of John Stuart Mill, “the only purpose for which power can be rightfully exercised over any member of a civilized society, against his will, is to prevent harm and injury to others... “An act is considered immoral for which punishment is permissible, and punishment is permissible only for acts and behaviors that cause harm and injury to another.” (John Stuart Mill/2010: 22) According to this view, the creator of negative behaviors for people unaware of the stock market has caused severe financial losses and damage, and statistics of people’s material losses have indicated this loss.

Although, in his opinion, a harmful and damaging act is one that is direct and immediate. Accordingly, he does not consider actions resulting from statements and statements that are later in harm and injury to be immediate and believes that even if the statements and statements of others carry a danger to others, this danger does not occur immediately and its occurrence is likely in the future, as a result of which restrictions on them are not permitted and it is not possible to recognize a harmful person as a criminal and punish him based on those provocative statements. However, it should be noted that if a behavior, even if not immediate and direct, but causes great harm to the general public, the state has the right to intervene and criminalize it. Jurists believe that a human behavior should be considered a "crime" and punished when that behavior involves harm to others, and if the behavior does not cause any harm to the body, property, or freedom of others, it should not be considered a crime and punished. (Rahami, et al., Piyshin) The greatest loss in the capital market and stock market is the loss that occurs to the property of the investor and the investing companies; after huge financial losses and damages, the affected person may commit suicide and also suffer a life-threatening injury. However, the general criteria for the title "harm" are the same as those that scholars and jurists have stated under various titles under the topics of the objectives of Sharia, which are: religion, life, appearance, and property. However, the loss in the discussion of the capital market is financial loss.

Part of the sharp decline in the stock prices of companies and the stock market index is due to the negative behavior of traders, which is attributed to those who play a major role in the market, such as stock traders. Small companies, shareholders, and newcomers to the stock market, with their reckless behavior due to their lack of economic analysis, especially in the stock market, have caused them to gain nothing but losses. Given the existence of such a trend in the market, and under the influence of repeated invitations from people by brokers and trading brokers, this had paved the way for this market to deviate from its main path and for people to suffer heavy losses in the capital market. Unfortunately, the apparent mismanagement of government officials in the capital market, which led to the irrational and bubble growth of the stock market index in the first half of 2020 and the subsequent 45% decrease in the index in the second half of 2020, caused losses and even anger among a significant portion of small and new shareholders in this market, which included a large population. (Voice of the Stock Exchange/1401: 17) In 2019 and 2020, the registration statistics in the Sajam system for the Iranian stock market exceeded expectations: In addition to the incitement and encouragement of officials, open-market transactions also entailed losses that cannot be avoided, although they exist in all markets. In the US market, huge economic problems were created by stock traders. According to the principle of the "no harm, no harm" rule, such a loss-making transaction cannot be considered permissible; Because, transactions that do not involve a service, or that provide a service that is less than its profit and results in double losses, resulting in losses to the other party or the entire economic system of the country, will not be acceptable to common sense and reason.

6. The principle of absence of resentment In addition to defending the principle of loss of will and completing this theory, Joel Feinberg mentions the “principle of resentment” as one of the

justified principles of public morality and the permission of state intervention in public freedoms. From this perspective, the principle of resentment is a suitable reason for the criminal prohibition of acts that cause severe resentment to persons other than the actor himself. In Joel Feinberg's view, the conditions for the realization of the principle of resentment are: a. The imposition of an unpleasant situation and state on another; b. This unpleasant state and resentment have arisen as a result of the wrongful act of another person; and c. The person who has an unpleasant situation imposed on him as a result of the wrongful act of another person is offended and angry by this act. (Feinberg, 1986: synopsis of volumes one and two.) In the capital market, in addition to losses, the resentment of the general public who have lost their property cannot be denied. According to this view, actions that cause people to be offended can be criminalized. In the discussion of the stock market, all the points that were made about the principle of loss also apply to the principle of offense, and its repetition has been avoided.

- B) Use of confidential information 1. Use of confidential information In the discussion of the use of confidential information, according to Article 46 of the Tehran Securities Market Law of 1384, two crimes related to confidential information have been criminalized. Rather, three crimes can be considered in connection with confidential information: one is the crime of using confidential information, the other is the crime of misusing confidential information, and the third is the crime of dealing with confidential information. However, in the first paragraph of Article 46 of the Securities Market Law, the use of confidential information has been criminalized, and in the second paragraph of this article, dealing with confidential information has been considered a crime and punishment has been provided for it. According to the Securities Market Law, confidential information means any information not disclosed to the public that; It is directly or indirectly related to the securities, their transactions, or their issuer, and if published, it affects the price or investors' decision to trade the relevant securities. (Tehran Securities Market Law, Section 32, Article 1) Thus, this type of information is of great importance to market participants, and unequal access to it disrupts the transparency of transactions.

For this reason, the legislator has criminalized the use of this confidential information. In other words, punishment has been determined for any person who uses confidential information related to securities that has been made available to him in the course of his duties, to the detriment of others or for his own benefit or for the benefit of persons who represent him in any capacity, before its public publication, or who provides the means for its disclosure and publication in other than the prescribed cases.

- 1-2. Holder of confidential information The first time the executive regulation "Publication of news of transactions based on inside information" approved by the Stock Exchange Council in 1378 has been enacted and approved in the legal system of the Islamic Republic of Iran. In the first article of this regulation, holders of confidential information affecting the stock price are divided into two groups, and the basis for this division of confidential and inside information is direct access to internal, confidential and indirect information. Direct information holders are those who have primary confidential and secret information. These are those who have access to primary and basic information due to their duties, or due to their position and job. That is, individuals or legal or natural persons have confidential and secret information in their possession directly and without intermediaries due to their position and job. In fact, for the realization of confidential information, it is necessary that a relationship between the job and position and the information in question be established, so that if the position and job were not for those persons, they would definitely not have access to confidential and secret information.

1-2-1. Holders of direct and primary information The Securities Market Law approved in 2005 defines the following persons as persons possessing confidential information: One, company managers, including members of the board of directors, the board of directors, the managing director and their deputies, Two, inspectors, accountant consultants, auditors and lawyers of the company, Three, shareholders who, alone and together with their dependents, hold more than 10% of the company's shares or their representatives, Four, managing director and members of the board of directors and relevant managers or representatives of parent companies who own at least 10% of the shares or have a member on the board of directors of the investee company, Five, other persons who have access to confidential information due to their duties, authorities or position.

1-2-2. Indirect and secondary information holders Secondary and indirect information holders are those who have directly or indirectly obtained inside and confidential information from those who have primary and direct information and enter the market and make transactions based on their access to inside and confidential information. Unfortunately, in the Iranian legal system, with regard to the executive regulation of "Publication of Transaction News Based on Inside Information" approved in 1999 by the Stock Exchange Council and also with regard to the Iranian Securities Law approved in 2005, there is a gap and ambiguity in the lack of explicit introduction of secondary and indirect information. In fact, secondary holders of confidential and secret information have not been explicitly considered and identified in the Iranian legislative system. However, the Iranian legislator has not explicitly stated the holders of secondary confidential and secret information, but has used and is used by stating "any person..." at the beginning of the second paragraph and also in the fourth paragraph of Article 46, which generally includes all persons who are aware of confidential information; however, at the stage of proving and proving it, this general title itself will be problematic.

The files issued from Branch 1192 of the Special Complex introduced the individuals who traded securities and benefited from inside information and stated: "The first-tier defendants, Ms. M.T. and the second-tier defendants, Ms. A.N., should be included among those who used and benefited from inside information in a secondary and indirect manner, because Ms. M.T. is the daughter and Ms. A.N. is the niece of Mr. R.T., the third-tier defendant, who was the chairman of the board of directors of the company (S.M.A.) and the aforementioned company was the major and main shareholder of the "Expansion of Agricultural and Construction Machinery of Iran" company." That is, the third defendant was aware of the confidential information due to his job, and he was informed of the confidential information and was the owner of the confidential information. After obtaining confidential information from the aforementioned company, Mr. R.T. persuaded the third defendant, Mr. H.A., who has a causal relationship with him, to pay the cost of purchasing shares by the first and second defendants, and the fourth defendant accepted it, and for this reason, in the aforementioned verdict, the fourth defendant was rightly convicted of the charge of assisting in the execution of a securities transaction using confidential information. (Alireza, Mohammadi/2010: 293)

1-2-3. Content of inside information The content of inside information, its examples are not mentioned in the law; however, based on the definition of inside information in Article 1, Clause 32 of the Securities Market Law, it is an asset with the following characteristics: It is information that has not been disclosed and published to the public and that the general public of investors is unaware of. First, it is information related to securities that is directly related to transactions and issuers. Second, if it is published and disclosed in a manner other than the prescribed case, it affects transactions and issuers in terms of price and investment decisions. Third. The criterion for obtaining this inside information, as stated in its definition, is that persons who have a duty in the market can be informed of this information. Fourth.

- 1-3. Criminalization of the use of confidential information To commit this crime, it should be noted that the legislator has explicitly stated that the relevant confidential information must have been provided to the offender "in accordance with his/her duty". Therefore, this crime can only be committed by persons who are in possession of confidential information. According to the definition of the law, these persons can be considered managers, inspectors, consultants, accountants, auditors, lawyers, shareholders with more than 10% of the shares, managers of parent companies and the like. According to the law, the crime of using confidential information is realized if the aforementioned persons use confidential information before public disclosure or provide reasons for its disclosure and publication in other than prescribed cases. Examples of such use include providing confidential information to a third party, recommending the purchase or sale of shares based on confidential information, and approving the purchase or sale of securities by a third party based on such information. Examples of the crime of using confidential information include: using confidential information, disclosing confidential information, and disseminating confidential information in cases other than those specified. 1-2-1. Using confidential information for one's own benefit, 1-2-2. Using confidential information to ward off harm from oneself, 1-2-3. Using confidential information to ward off harm from someone one represents in any capacity, 1-2-4. Using confidential information to ward off harm from someone one represents in any capacity, 1-2-5. Using confidential information for the benefit of a third party, 1-2-6. Using confidential information to ward off harm from a third party. All of these six cases are also conceivable in the case of disclosing and disseminating confidential information. According to the Securities Market Law, the punishment for individuals who commit the crime of using confidential information is a prison sentence of three months to one year or a fine equivalent to two to five times the profit gained or loss not incurred, or both.
- 1-4. Elements of the crime of using confidential information 1-4-1. Legal element The legislator obliges his audience to perform a behavior or refrain from a behavior, such as ordering to pay alimony and refrain from theft and fraud, in the first case, the crime is committed by refraining from that behavior and in the second case, by committing that behavior. In the Iranian Securities Market Law approved in 1384, the legal element of trading with confidential information is stated in paragraph one of Article 46 and all the necessary conditions for the commission of this crime are mentioned, and Article 10 of the Law on the Development of New Financial Instruments and Institutions has developed this matter in order to assist and facilitate the implementation of the general policies of Article 44 of the Constitution approved in 1388.
- 1-4-2. Material element The material element contains three elements, which are physical behavior, the result, and the causal relationship between the behavior and the result; that is, the result must be the cause and effect of the behavior. However, in some crimes (absolute crimes, behavioral crimes), the realization of the result is
- 1-4-2-1. Physical behavior In the crime of using confidential information, physical behavior is to use confidential information or to cause it to be disclosed and disseminated. The meaning of use is to perform behavior such as using information, making it available to others, submitting and presenting, transferring, recommending and encouraging the use of confidential information, and using confidential information is true for this behavior. The point that should not be overlooked is that "use of confidential information" is prohibited by law, not "misuse of confidential information", although this use may also be misuse in some cases, and perhaps in terms of examples, there is a special general logic between use and misuse. That is, it may be use without misuse, as in cases of misuse, it is without use, and in most cases, use has been accompanied by misuse, and for this reason, some have equated the



use of confidential information with misuse of confidential information. (Ilham Soleyman, Dehkordi, Samira, Piriai/2019: 35).

Physical behavior is sometimes carried out as a direct agent and sometimes as a cause, and in cases where there is a possibility of combining the direct agent and the cause, if it is a direct agent, such behavior can be realized as an act, and its realization is intended and contemplated as an omission of the act. However, if it is carried out as a cause or a combination of the direct agent and the cause, its fulfillment is not far from being expected. In the case of disclosure and dissemination of confidential information, what comes to mind is that both direct, causal, and cumulative can be realized; similarly, in the case of a cause and combination between the direct agent and the cause, such a crime is also realized by omitting the act. For example, someone who uses, discloses, and disseminates confidential information and the relevant authorities remain silent about such actions, and with this silence, the crime is realized.

1-4-2-2. Conclusion For the commission of a crime, although the occurrence of an act or omission of an act is necessary, the punishment requires the realization of its result in addition to the existence of the act and omission of the act. If the purpose of using, disclosing, and publishing confidential information is to harm another or to benefit oneself by benefiting from it, this crime is bound by the result. However, if the purpose of using, disclosing, and publishing is not to benefit or to ward off harm from oneself or to benefit and ward off harm from another, but rather to merely use confidential information, this crime is considered an absolute and formal crime. Although the appearance of the article has made benefit and ward off harm from oneself and others the result of the behavior, it is clear that this crime was bound by the result. Apart from that, this legislator has mentioned this crime in paragraph one of Article 46 and has criminalized transactions based on confidential information in paragraph two; this precedence and delay in criminalization indicates that the use of confidential information was a "preventive" crime. Because it has been criminalized so that it is not drawn into the crime of insider trading. In fact, the criminalization of using insider information was a prelude to insider trading. Its criminalization was made so that the result of trading using insider information would not be based on it. Therefore, it has been included in paragraph 1 and the crime of trading using insider information has been mentioned in paragraph 2.

1-4-2-3. Relationship between behavior and outcome The capital market and the stock market are specialized markets, and the behaviors that take place in them are also specialized behaviors, and as a result, if cause and effect prevail between behavior and outcome, it is also a specialized matter. Therefore, if stock market experts realize that any person has used inside information and as a result has gained a lot of profit for himself or someone else and prevented loss from himself or someone else; and between this behavior and the outcome, there was a cause and effect situation, such a person can be considered accused of the crime of using inside information, and nothing else.

1-4-2-4. Conditions for the crime of using confidential information The following conditions are required for committing this crime: One, the information, disclosure, and publication must be related to securities. According to Article 1, Clause 24 of the Securities Market Law, securities are: "Any type of paper or document that contains transferable financial rights for the owner of the thing or its benefit" and according to Article 3 of the Securities Law, the Stock Exchange Council, which is the highest market body responsible for approving the general and macro policy of the market, determines the securities that can be traded. Two, the second condition is that it must be confidential information. Because information is the most important asset in the stock market and capital market, as it is the main basis for decision-making in the stock market and risk control in this market. In fact, most stock exchange rules and regulations in countries around the world, given the important fact that their shares are

bought and sold on the stock market, have mandated that they provide their financial and performance information to all investors on a continuous and uniform basis so that investors can make decisions about trading their shares or maintaining their shares based on this information and avoid accepting major and significant risk in their transactions. (Easterbrook/1991: 17)

Three, important information has been entrusted to the individual: In terms of terminology, holders of confidential information are those who are given access to it according to their duty. Because they have access to key information that affects the prices of securities more than others due to their special position. This group of individuals, according to the will of the legislator, has the right to benefit from this information to the detriment of others or to their own benefit before public publication or has provided the means for its disclosure and publication in other cases than those stipulated. Therefore, if someone who has no duty to the company that the information is available to him or whose job cannot require such a situation and does not access confidential information as a result of his job, and takes an action that was based on confidential information, he has not committed the crime of "using confidential information". Three, the use must take place before public publication. Based on this condition, there are three cases of use, and in one case, the person has committed a crime. The first case: use of confidential information before publication, the second case: use of final information after publication, the third case: use of confidential information at the time of publication, only in the first case if it is used, a crime has been committed, and the second case is specifically excluded, and in the third case, based on the rule of interpretation in favor of the accused, the crime has not been committed. Four, the fourth condition is that the use of confidential information has a benefit by preventing loss for those who have used it or another person. According to this condition, if the use of confidential information is made but the market is in a state of excitement and the person does not benefit by using confidential information and cannot prevent a loss from himself, the crime of using confidential information has not been committed. Five, the use of confidential information, its disclosure and publication are made in other than prescribed cases: If the use is made in the prescribed case, the person has not committed a crime. According to Article 15 of the Executive Regulations of the Securities Market Law, confidential and confidential information is classified and the determination of the access of persons to it is determined by law, which is proposed by the organization and approved by the council. Six, the specificity of the information: Not every information is considered confidential information, but information that has an impact on transactions is considered. Although this condition is not mentioned in the Iranian Securities Market Law, this condition has been obvious and certain, because not every type of information is confidential information, and if it is confidential information, if it does not have an impact on the transaction, its presence or absence is of no benefit.

1-4-3. Spiritual element In order to commit a crime, in addition to the failure to comply with the laws and prohibitions of the legislator, the result must be the will of the perpetrator of that behavior, that is, a specific mental and psychological relationship must be established between the perpetrator and the crime in order to hold the perpetrator guilty, as the legislator has indicated in Article 144 of the Criminal Code, approved in 1392. The meaning of the mental or spiritual element or element of a crime is that the criminal act is the result of the person's fault; that is, in the murder and injury that occurred, the person himself wanted to do this act and did it with intent and purpose, or if it was not with intent and purpose, he did it out of criminal error. (Saeed, Qamsi/1403: 298) There are three theories about the mental element of this crime: The first theory is that this crime must have both general and specific malicious intent; That is, the intent to use confidential information and also the intent to benefit and avoid harm to oneself or others, such as Australia, transactions based on confidential information must be carried out "intentionally". The second theory is that this crime is a purely material crime, meaning it does not require a material element to be realized. The crime is committed simply by violating the laws, because the perpetrators of this crime are mentioned in Note 1 of Article 46 and are considered to be aware of the

presumed information. In addition, because this is an economic crime and economic crimes are typical, in some countries such as "Finland, Norway" if transactions are made intentionally or unintentionally, even if they are made inadvertently, in both cases the trader has committed a crime and it is considered a purely material crime. The third theory is that these perpetrators of this crime have the intention and intent in the act, even if they do not have the intention and intent in the result, meaning that mere knowledge of having confidential information and knowledge of the violation of the legal prohibition by the perpetrator is not enough and there is no need to know the result of the specific intention to benefit and avoid harm to oneself or others. Some authors have considered the crime of using confidential information to be an absolute crime and stated: "This crime is one of the absolute crimes that does not require a specific result such as gaining a benefit or warding off harm from oneself or causing harm to others, and is accomplished simply by acting to buy and sell in the presence of other legal elements." (Elham Suleiman, Dehkordi, previous/44) However, in the opinion of many, this crime is limited to the result as stated in the article below, which is to gain a benefit for oneself or others and ward off harm from oneself or others as the result of using confidential information.

- C) Criminal liability for using confidential information in the capital market Responsibility in the general sense means the obligation of the person who caused the damage to answer before the court and to assume the burden of bearing civil, criminal and disciplinary consequences, whether it is a duty or obligation towards the victim or the community; however, criminal liability is the obligation to answer for criminal acts and to bear the guarantee of criminal execution according to the conditions and forms stipulated by the law. (Reza Farajollahi, 2019:21) Criminal liability is based on two important elements, which are fault and criminal capacity. Therefore, without committing a criminal error and fault, or having criminal capacity, liability is unthinkable. Because the party committing the error or fault is not enough to realize criminal liability, but there must be a causal relationship between the error and the criminal result. This relationship is causality or material evidence, meaning that the act is materially attributed to the perpetrator, which is not sufficient on its own; rather, there must also be spiritual evidence, meaning that the perpetrator committed the material act in a situation where that act is characterized by the power of consciousness, perception, and freedom of will. Criminal responsibility means having a response to any behavior that violates values in society for which the legislator has determined a punishment. Whether that behavior has tangible consequences in the outside world or not. In criminal law, punishment is secondary to criminal responsibility. Criminal responsibility is also based on conditions whose combination justifies the imposition of punishment on an individual. (Sayyid Sina, Abtahi/1398: 216) A study of jurisprudence books shows that, from the perspective of Islamic jurists, the basis for the criminal responsibility of perpetrators of capital market crimes was not the inherent sanctity of those acts, but rather the cause of "harm" and "removing and warding off tension in the capital market." Because from the point of view of jurisprudence, some behaviors are inherently forbidden and considered a crime, the amount, rate, and quality of which are specified and clarified in Islam under the title of "limits". This type of responsibility is neither too much nor too little, and in some cases it is unforgivable, and intercession is not allowed. Such as theft, murder, adultery. However, some actions and practices are inherently forbidden and not a crime; they do not even contradict good morals; the prohibition of these types of actions by Sharia is not due to their inherent sanctity or because they cause harm to others and the community and society; but rather because if these types of actions are prescribed, they cause tension and disruption in the general order of the market and society; such as the prohibition of carrying weapons, the prohibition of traveling through the path of common pathogens such as cholera and Corona. In the stock market, the prohibition of using secret information, manipulation, etc. In fact, by prescribing these actions, the interest of the community and the general order of the market becomes tense; therefore, they are considered prohibited. (Abdul Qadir, Odeh, 1405 AH: 127). Similar interpretations have been expressed in Ardebili's book Fiqh

al-Hoodud (Sayyid Abdul Karim, Ardebili Mousavi, 1427: 41). Therefore, the punishment for behaviors that have been considered crimes in the capital market is not because those actions are inherently forbidden; but rather because of the harm and tension they cause for the market society.

1. The causality of criminal liability of legal entities in the capital market The basis and root of criminal liability is the freedom of will and choice of man. Provided that we consider man to be a free and free-willed being, holding him criminally responsible and assigning reward and punishment to his actions and behavior is justified and acceptable when he has will and choice over his behavior. If he does not have will and blaming and punishing a being without will is far from fairness and justice and is considered an abomination by the wise because a being without will is like a pawn whose behavior has never been attributed to his will. If someone wants to make a transaction in the capital market and stock market, to execute his transaction, he must refer to one of the stock market brokers. By referring to the broker, he can complete his buy or sell order according to his wishes and submit it to them. Brokers are legal entities that trade securities for others on their behalf. In fact, brokers play the role of an intermediary between buyers and sellers in the capital market and are the factor that matches the supply and demand of securities by buyers and sellers. Brokers are selected through a number of specific procedures and tests to ensure that they have the necessary skills and expertise, and they have a variety of duties in the capital market. (Gholamali, Mirzaei/previous: 34).

In view of this important point, the basis of criminal liability of legal entities in the capital market has been in the form of attribution; that is, a natural person called a broker or a trading broker, which is defined as a legal person in the law; has directly committed the physical behavior, while criminal liability has been directed at legal entities called brokers and trading brokers. In fact, holding a legal entity responsible has been due to the behavior of a natural person and a natural person has entered the scene of the capital market and stock exchange in the guise of a legal person, in fact, the legal entity has performed the act through a natural person and has been considered responsible. In the discussion of institutions existing in the market such as brokers, trading brokers, market operators, etc., if it has been carried out by legal entities of public law, the discussion of freedom of will and authority and its causes has faced some challenges in terms of law and jurisprudence because the idea of a legal entity having authority has been impossible at first glance; especially if a legal entity is considered and assumed to be a credit and imaginary thing. (Reza, Farajollahi/Previous) Therefore, if a natural person commits an illegal behavior in the course of performing his duty in the market, which is characterized as a broker, broker-dealer, market operators, publishers, etc., the responsibility has shifted from such natural persons, who are the stewards of the actions and behavior, to the public legal person who caused the actions and behavior, with a leap and has been directed at legal persons.

2. Punishment for using confidential information In general, legal enforcement guarantees can be divided into three categories: administrative, civil, and criminal. Administrative enforcement guarantees are penalties imposed on individuals by the organization's law enforcement authorities or relevant ministries for administrative violations committed by employees. Civil enforcement guarantees are applicable against harmful acts or breaches of obligations of individuals in society towards each other and appear in the form of compulsory civil liability with a contract. Finally, criminal enforcement guarantees mean that a criminal regulation is violated and a significant violation of the basic norms and values of society occurs, for which administrative and civil penalties are not considered sufficient and a more severe reaction is carried out in the form of penalties such as execution, imprisonment, and fines. Punishment

has certain principles, including the proportionality of the crime and the punishment. The proportionality of the crime and the punishment says that a hammer should not be used to crack a hazelnut. These principles are based on a philosophical basis that believes in the deservingness of punishment, and according to philosophers, punishment is to correct the unfair advantage that the criminal has acquired through the crime, and punishment should be carried out in such a way as to take this unfair advantage back from the criminal so that balance can be achieved in society. The punishments stated in the Securities Market Law can be divided and categorized in different ways. In terms of criminals and defendants, punishments can be divided into natural and legal persons:

- 2-1. Punishment of a natural person According to Article 51 of the Criminal Code, in the event that the violations stipulated in this law are committed by legal entities, the penalties foreseen in the case shall be applied to those natural persons who have been responsible for making decisions on behalf of the aforementioned legal entities. The Islamic Penal Code approved in 1392 states the principle, and the punishment of a legal person is considered an exception and contrary to that principle, and in Article 143, it has been stipulated that “in criminal liability, the principle is the responsibility of the natural person, and a legal person is criminally liable if the legal representative of the legal person commits a crime in the name of or in the interests of the legal person. The criminal liability of legal persons does not prevent the liability of natural persons who commit a crime.”
  - 2-2. Punishment of a legal person A legal person is a hypothetical and valid entity that is basically created by law or contract. This person can consist of a group of individuals such as a company or organization, the government and the ministry, or even an object such as a ship and an airplane. (Yousef, Khorramabadi/2019: 424) Based on this principle, the punishment of a legal person is reported in Article 20 of the Criminal Procedure Code and it has been stipulated: “If a legal person is found liable based on Article (143) of this law, he shall be sentenced to one or two of the following cases, considering the severity of the crime committed and its harmful consequences. This does not prevent the punishment of a natural person.” It is inferred from the beginning and the end of both articles that the principle is the responsibility of the natural person and the legal person will be subject to criminal liability under the conditions mentioned in Article 143 of the Criminal Procedure Code. In the Capital Market Law, the punishment of a legal entity is directed at a natural person according to the same principle, and the legal entity is punished accordingly to the natural person, while the perpetrators of crimes in the capital market are directly legal entities, and the legal entity should be punished.
- In other words, in Article 143 of the Criminal Procedure Code, the case is stated as follows: That is, the perpetrator of a crime by a natural person who represents a legal person or acts in its interests has jumped from a natural person to a legal person, and the criminal liability has been shifted to the legal person.
- 2-3. Type of punishment Punishments are divided into imprisonment and fines in terms of type According to Article 46, the punishment is a penal punishment, which is imprisonment for a period of three months to one year or a fine equal to two to five times the profit gained or loss not incurred, or both; this type of punishment applies to perpetrators of the four crimes mentioned in paragraphs one to four of Article 46, which are: - Using confidential information - Trading based on confidential information - Manipulation - Publishing or announcing an underwriting without a license.

## **Conclusion**

1. In the Securities Market Law, the first issue that is criminalized is the use of inside information. It should be noted that the use of inside information is considered a crime, not the misuse of inside information. Although the use of inside information is itself considered abuse in the market, there is a difference in criminal law between the use of inside information and the misuse of inside information because the use of inside information may be an absolute and purely material crime, while the misuse of inside information is a crime subject to consequences.
2. The use of confidential information is a general matter, it includes any type of transfer, presentation, submission, use of information and making it accessible to others. In addition, this crime is also general in terms of management and attribution and includes both areas. In addition, it can sometimes be imagined and realized in the form of an act and in some cases in the form of an omission.
3. The only condition that the law has taken into account in committing this crime is that the person has obtained confidential information based on his/her duty. If he/she obtains confidential information and does not have a duty in the organization and discloses it, it is considered a crime in terms of criminal law, especially with two important principles that are accepted as certain in criminal law, which are the narrow interpretation of the law and the interpretation in favor of the accused. Despite these two principles, a person who has obtained confidential information but did not have a duty cannot be accused and tried.
4. The crime of using confidential information is a restricted crime, as it is stated in the law that the purpose and objective of using confidential information was to benefit a person or another and to prevent harm from a person or another. Therefore, if confidential information is used and no results are obtained, the crime has not been committed. 5. The lack of proportionality of the punishment to the crime in the use of confidential information is evident, because the use of confidential information creates great tension and tension in the market, causing distrust, risk and severe danger for shareholders and investors, and the punishment is not very proportionate to these criminal results.

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