

The Conditions of the Realization of Theft and the Execution of a Penalty

Some conditions are needed to be gathered for the realization of theft in a form that causes penalty the absence of even one of which leads to penalty decline although not to the elapse of punishment in general. Now we turn to articulate these conditions:

1- Property-ness

The stolen object must have property-ness – regarded as a legitimate property according to *Shari'ah* Law to be owned by someone – thus, stealing something like wine which is not canonically declared a property does not lead to penalty.

2- Limit

The property should have reached the limit that is one fourth or fifth of a Dinar.

3- Not being a beneficiary of the property

Stealing from something like the Public Treasury of which the thief is himself a beneficiary is not a theft unless he overreaches his right. Stealing a property of which the thief is a beneficiary is of two kinds:

I) The robber is not able to reach his own right through legal routes and inevitably acquires his right by theft. In such a case, not only the committed action is not theft and is naturally without penalty. Rather, it is not basically a crime and does not lead to arbitrary punishment.

II) The thief is not deprived from legal proceedings to obtain his right, no matter what kind of theft he commits. In this case, although the penalty is not valid, the criminal is punished for trespassing public treasury.

4- Not being participated in property

Stealing from a property that is shared by a number of people including the thief is not theft, and if the property is a trust, then it is an abuse of confidence.

5- Not to be a trust

If someone steals from a property held by him as a trust, his action is not theft but it is a breach of confidence.

6- Safekeeping

The property should be kept safely in a place that could not be easily reached. This condition depends on common sense understanding.

7- Furtive stealing

The property should have been stolen furtively and the existence of exterior force and dominance causes the penalty to be thwarted, although the robber is punished for aggressive domination.

8- Complete involvement

The thief should have been completely involved in the crime in the sense that the thief must have done everything needed for the theft by himself, such as breaking the lock, taking the property and so on.

9- The absence of deception

Stealing something by deceiving its owner is not regarded as theft, but it is an example of other criminal designation.

10- The absence of paternal relationships

A father's stealing from his child's property does not cause penalty, although not vice versa.

11- Knowledge of the subject and judgment

The thief should be informed of the judgment and the subject of the theft. Thus, if he steals something on the supposition that it is not theft or he understands the concept of theft but is not knowledgeable of its judgment, the penalty is declined.

Note: This is a point of supremacy of the legal system of Islam against many schools of law that "do not see the ignorance of law a reason for thwarting the punishment." Of course, the ignorance that shuffles off the responsibility should not be rooted in individual delinquency; to put it otherwise, it must be an effect of the cultural and social situation that needs to be recognized by the ruler.

12- The Material Realization of Theft

What renders the execution of penalty possible is the material realization of theft. Accordingly, if a convict proceeds to steal a property with the intention of theft, while some conditions are absent, the penalty shall be declined.

Note: This is one of the conditions versus other two elements of the fulfillment of crime (spiritual and legal elements), not in general.

Complementary Note: On the intention of theft and its commitment with regards to the very action that is done, two issues are necessary to be taken into account:

I) If someone intentionally steals a property that is not safe-kept, though the penalty shall be removed from him, he will be punished for such crimes as usurpation and the like.

II) If someone intentionally steals a property and then it is revealed to him that the stolen object had been his own, not only is the penalty removed from him, but punishment is also baseless, since the committed action is basically allowed. What is

important here is that the intention of theft is essentially repulsive and the legal authority in charge can punish the convict for reformative purposes.

13- Age of Maturity

The thief should have already entered the age of maturity – which is 16 for men and 10 in women.

Note: If the thief has not yet reached the age of maturity, he will be punished after reaching that age, provided he has consciousness and recognition -- unless he is evaluated as absolutely free from all forms of punishment.

14- Psychological Balance

Committing theft following psychosis or other psychic disorders that blur the person's behavior leads to a removal from penalty. In such cases, it is up to the ruler to take proper actions for ensuring security.

15- Free Will

The theft is to have happened at the thief's own will. Thus,

- I) If the theft has been committed by reluctance, the penalty shall be declined. Reluctance consists of the repression of one's will by other people or a group's wills.
- II) If the theft has been committed under pressure and compulsion, the penalty shall be dismissed. Compulsion consists of one's being removed from his will when he commits the crime.

16- The Absence of Public Emergency

Public emergency may be documented to one of the following triple factors:

- I) Natural hazards such as drought, famine, earthquake, pandemic diseases and the like.
- II) Economic crises
- III) Political turbulences

17- Ownership

If it is proven that the thief owns the stolen property, he will be removed from the penalty.

18- Repentance

If the thief expresses his repentance from the crime he has committed, the penalty is dismissed.

Note: Needless to say that this repentance should not be formal and the criterion of its formality is the repetition of crime.

19- Confession and Repentance

In this case, the consequent punishment after the decline of the penalty is decided by the ruler.

20- Intimidation

Intimidation of the act of theft during the process of investigations that causes the stolen object to be returned leads to penalty dismissal.

21- Crime Demonstration

The demonstration of crime and penalty execution needs the thief to confess twice.

22- Eye-witness

This article states that the demonstration of crime needs two just witnesses to attest with the same narratives against the thief.

23- The owner

The execution of the penalty depends on the decision of the stolen object's owner, and he can decide to spare the thief.

24- Preventing the convicts from expressive confession

The ruler can prevent the convict from expressive confession by dictating to him, "Were you in a state of emergency? Did you know the penalty of theft?" and other questions like this so as to inflame the sense of repentance in the convict and save him from the doomed penalty.

25- Doubt thwarts the penalty

As soon as doubt is raised about one of the constituent elements of theft, the penalty is removed. This is based on a jurisprudential principle that reads: "doubt thwarts the penalties".

26- There are also other secondary conditions that can be found in jurisprudential books on the subject.

Conclusion

The conclusion that is drawn from this brief discussion is that chopping off the thief's hand as the penalty of theft is more similar to actions that are called "deterrent punishments" in modern law rather than the penalties that are necessarily executed.

This penalty is like an unsheathed sword in the hands of the blindfolded angel of justice that had not chopped off any hand for a long time. If social and individual education finds a logical configuration, it is quite likely that generations will come after one another without any hand hewn with this unsheathed sword.¹

In fact, this penalty is for protecting people's properties that sometimes cost innocent blood.

1- We must once again emphasize and reiterate that penalty suspension here does not mean the absolute suspension of punishment; in fact, it refers to paler forms of discipline.

Someone's property might be stolen, and although it may seem worthless in price, it can nevertheless be vital for that person's whole life and cause unbelievable troubles. Accordingly, in the early days of Islam, we see that some penalties were executed. We read these 26 conditions for prominent lawyers and they were convinced, stating that with all these conditions, the thief is a real threat to a nation. These 26 conditions are like 26 red lights that are being passed by an individual, and such an individual could jeopardize a nation for his selfishness.

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