

COMPARATIVE INVESTIGATION OF INTELLECTUAL ELEMENT (MENS REA) IN THE CRIME OF ROBBERY (THEFT) IN THE PENAL LAWS OF ISLAMIC REPUBLIC OF IRAN AND AZERBAIJAN REPUBLIC

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ABSTRACT

As one of the crimes against properties, robbery is a crime that, as Mr. Garofallo puts it, that is realized as being natural in the majority of the countries disregarding the time and place of its perpetration. But, the thing that seems to be more important is that no action is envisioned as a crime without criminal intention and/or at least without criminal mistake. In other words, the main principle of the penal lore is that all the crimes are intentionally perpetrated unless penal mistake is replaced by intention in the law. The recognition of the intellectual or psychological pillar of this crime is of a great importance because it differentiates the criminal liability from civil liability hence crime from otherwise. In crime of robbery, malicious intention appears both in general and specific forms with the former being the intention for performing the material behavior of robbing and the latter being the intention for depriving another person from a property forever, i.e. intending to cause property losses to the owner thereof. In the legislations of Iran and Azerbaijan, the intellectual element of the crime has not been directly predicted in any special article thus contemplation over some of the issues in this regard seems to be useful.

Keywords: *guilt, intention, will, robbery, intellectual pillar, laws of Azerbaijan*

INTRODUCTION

The Arabic term “Serqat” has been derived of the root “Saraqat” meaning robbing (Ma'aluf, 2001, p.468); its infinitive form is “Serqah” and this term with the same meaning has been used in “Eesteraqa Sam'e” [eavesdropping]. (Najafi, 1984, p.476.) In dictionaries, the term “robbery” has been defined as taking an object covertly and it has stealth and covertness latent therein (Ahmad Ibn Fars Zakariyya, “Mo'jam Maqabis Al-Loqah”, 2019). Therefore, one meaning of robbery is performing an action in a stealth and covert manner and “stealing” means robbing furtively (Muhammad Ibn Ya'aqoub Firouz Abadi, 1987). Eavesdropping means listening to one's conversations slyly (Ibn Manzour, 1984). In the holy Quran, as well, it has been ordered that “Elā Man Estareqa Al-Sam'e Fa Atba'ahū Shahābon Mobin” meaning “except [every devil] that approached the skies for eavesdropping in which case it was followed by a vivid meteor (SŪRAH AL-HAJAR, ĀYA 18).

In defining robber [Sāreq], Ibn Manzour states that “robber is the person who covertly moves towards a house and takes what is not belonging to him or her” (Lisan Al-Arab).

According to the above-presented materials, it can be understood that robbery has three pillars or, as stated by some others, four elements from the perspective of lexicologists: 1) picking up an object; 2) being in possession of another person; 3) stealthiness; and 4) movableness which is associated with such a concept as being takable because immovable things cannot be picked up. Thus, it is not necessary to deal with it independently (in the legal system of some of the countries like England, movability is not deemed as essential for the actualization of robbery because, from their perspective, only possession suffices the perpetration of robbery and picking up is not necessary and taking possession of a thing is consistent with the immovability of an object).

In penal law terms and in article 197 of the former Islamic Penal Code of Law, robbery had been defined as stated in the following words: “robbing another person’s property stealthily”. The explanation of such a definition only includes a type of robbery deserving Hadd punishment but, if use had been made of fraudulently instead of stealthily, the robbery deserved both Hadd and Ta’azir punishments in which case robbery has to be defined as “fraudulently robbing a movable property belonging to another person”. Now, in article 267 of the Islamic penal code of law, passed in 2013, the term stealthily or covertly has been removed and the legislator has intended to generally define robbery in such a way that it can be penalized by both Hadd and Ta’azir punishments. In jurisprudence, no clear-cut definition has been presented for robbery but the conditions of the necessity and enforcement of Hadd punishment for robbery have been expressed (Imani, 2003, p.291).

Types of Robbery:

From the perspective of Iran’s regulations, the various kinds of this crime can be divided into the following sets:

- 1) Robbery deserving Hadd punishment
- 2) Specific robbery
- 3) Robberies not qualified for Hadd punishment but causing disorder and/or bolding the perpetrators or others.
- 4) Simple robberies deserving Ta’azir punishment

In terms of the type and amount of punishment, robbery can be divided into crimes deserving Hadd and Ta’azir punishments.

Robbery deserving Hadd punishment: robbery deserves Hadd punishment when it has all the conditions and specifications mentioned in article 267 of the Islamic Penal Code of Law otherwise it is viewed as a crime deserving Ta’azir.

The Legal Element of Robbery in Iran’s Islamic Penal Code of Law:

The legal element of robbery has been introduced in several articles of law that will be mentioned:

- A) Articles 185 and 197-203 of the former Islamic penal code of law that present the legal elements of a robbery of the type deserving Hadd punishment.
- B) Articles 651 to 667 of the Islamic penal code of law as well as articles 544, 545, 546, 559, 683 and 684 of the Islamic penal code of law.

- C) Articles 88 to 92 of the law on the punishment of crimes by the armed forces, passed in 2003
- D) The single article in the bill of law on the intensification of the punishments of the armed robbers who enter the houses of the individuals, passed in 1954
- E) Single article of the law on the punishment of armed robbery from the banks and money exchange offices, passed in 1959
- F) The law on the intensification of the violating drivers, passed in 1956 (Habibzadeh, 2006, p.38).

All of the abovementioned cases, except (A), give the legal elements of the robbery deserving Ta'azir punishment.

- G) Articles 267 to 278 of the Islamic penal code of law, passed in 2013

MATERIAL ELEMENT OF ROBBERY:

The material element of robbery is constituted of the positive material action which can be snatching, picking up, taking, grasping and so forth. There are four pillars in the material element of such a delinquency as robbery (Yazdanian, no.19, p.38). The first pillar is snatching: the main pillar of robbing in Iran's laws is snatching without the actualization of which the material element of robbery would be missing (Mir Muhammad Sadeghi, 2004, p.205). Snatching is a fraudulent action without the owner's satisfaction with its prerequisite being moving a property from a place to another and its result would be getting the property out of proprietary reach of its owner (Yazdanian, Ibid, p.38).

Therefore, from the perspective of Iran's laws, robbery can be actualized about the movable properties that can be moved hence stolen (Mir Muhammad Sadeghi, Ibid, p.205). The precondition for snatching is that the robber should stealthily or vividly take possession of another person's property through surprising the careless owner against his will and satisfaction (Golduzian, 2004, p.437).

Note:

It seems in Iran's laws that the mere apparent satisfaction of the owner in giving a property to another person causes the non-actualization of such an element as snatching. Therefore, the person who uses a weapon to threaten another person and takes his or her property and runs away and/or takes a property from a shopkeeper to look at it but escapes has perpetrating snatching hence robbing from the perspective of Iran's laws (Mir Muhammad Sadeghi, Ibid, p.206). Anyway, the absence of this component (snatching) bars the actualization of robbery; so, if a person gives a thing to another knowingly and the other intentionally takes possession thereof, snatching has not taken place even if the deliverer is found having actually made a mistake (Habibzadeh, Ibid, p.41).

Materiality as the Second Pillar:

The subject of robbery should be material. Material property is a thing with economic value and profit as stated by the intellectuals. The property that can be snatched is the subject of robbery and only the inherently immovable properties cannot be taken or whatever the thing considered immovable in the civil law (secondarily immovable) can be snatched. The other point is that a specific property can be the subject of robbery not its rights and interests (Hojjati, 2005, p.406).



Therefore, for example, only plagiarism is literarily similar with the type of robbery discussed herein but it is considered as a separate kind of robbery. Moreover, the lien right or interest right or credit right cannot be robbed. Things like air, insects or spoiled food are useless hence commonly not realized as being exchangeable with another valuable goods unless in exceptional conditions (for instance, the air existent in a diver's oxygen canister) so they are not considered as properties so that they can be snatched. On the other hand, commodities like means of pleasure or alcoholic drinks that inherently have no value from the perspective of Islamic jurisprudence and Iran's laws are not viewed as properties hence snatching them is not envisaged as robbery except in exceptional cases (such as when a non-Muslim snatches alcoholic drinks from another non-Muslim or when legitimate use of them is exceptionally imaginable) (Mir Muhammad Sadeghi, Ibid, pp.209-210). A human being cannot be also the subject of robbery for s/he is not considered as a property.

Some jurists believe that the definition of property does not include some of the objects that can be robbed (such as stealing of a family photo which is valuable for the owner thereof) hence the robbery subject should not be limited to properties rather the term "object" should be used in lieu of "property" in which case the definition can incorporate both properties and objects (Ibid).

Belonging to Another as the Third Pillar:

In order for the crime of robbery to take place, the snatched property should be belonging to another person (to wit, it has to be under the possession of another person). Therefore, snatching of the unowned properties is not considered as robbery. For the inclusion in the robbery subject, it does not matter if the owner is identified or not rather the belonging of a property to another person (real or legal) suffices such an inclusion (Mir Muhammad Sadeghi, Ibid, p.219).

By belonging to another person, the possession of a specific property by a person is intended. Thus, in case that an exact property is found under the possession of the snatcher, robbery has not taken place. This way, snatching the endowed or leased property by the renter or mortgager is not considered as robbery. As for rentals, the future interests of the rented property are not still existent so that it can be robbed (Ibid).

The stealing of the legitimate properties is not also considered as robbery. There are two contradicting theories adopted in this regard by the jurists. In some's ideas, since every part of a shared property belongs to all the partners, it cannot be called "another person's property" in respect to each of the partners in real terms hence the crime against shared properties by one of the partners is not imaginable. It is held in the opposite theory that a person can be exempted from the perpetration of crimes against properties if s/he is the owner and because all the partners share every component of a shared property, it cannot be viewed as the exclusive property of each of the partners. The result of this theory would be considering as a crime the criminal behavior of each of the partners in a shared property hence causing the actualization of one of the crimes against properties in a case-specific manner. In case of approaching the subject inn solely legal terms, the first theory should be preferred for all of the crimes against properties (except destruction for which a procedural unity has been reached) because, in doubtful states between two reasoning kinds that are equal in terms of strength and weakness, the sure case and the theory and reasoning should be accepted that result of which is more in favor of the culprit and it is in this case the first theory which narrows the inclusion circle of such crimes (Mir Muhammad Sadeghi, Ibid, pp.162-164).



Furtively, the Fourth Pillar:

Stealthiness of the snatching is only pertinent to the robbery deserving Hadd punishment with this condition appearing in the form of “dissatisfaction” in Ta’azir-deserving robbery and this lack of satisfaction often occurs in the form of unknowing and furtiveness; however, dissatisfaction is not exclusively limited to stealthiness (Habibzadeh, p.34). This constraint does not mean that the robbed person or others might have not been at all witnessing the perpetration of robbery rather it means the robber’s perpetration of crime in an stealth manner. “Stealth snatching” includes a sort of snatching carried out covertly and stealthily and not before the public eyes; however, the owner or others’ haphazard observation of the robbery does not make such snatching exit the stealthiness or covertness.

By the robber’s effort for stealth perpetration of the robbery, his or her effort for keeping “snatching” hidden not his or her hiding of his or her identity is intended. Therefore, the action by a masked robber who attacks a bank on a bright day before everyone’s eye is not a hidden and stealthy action even if s/he has endeavored to hide his or her identity via wearing a mask (Mir Muhammad Sadeghi, Ibid, pp.224-225).

Intellectual Element of Robbery:

- A) General Malicious Intention: one of the conditions making a crime of robbery deserve Hadd punishment and being actually the intellectual pillar of the crime is the intentional and malicious perpetration of the action. Robbery is an intentional crime meaning that its actualization needs general malicious intention which is the very intention for snatching another person’s property.
- B) Special Malicious Intention: one of the conditions making a crime of robbery deserve Hadd punishment and again related to the intellectual pillar thereof is a person’s picking up of another person’s property with the intention of robbing it and it is the very special malicious intention and/or intending the result.
- C) Knowing the Property’s Belonging to Another Person: in the same way that the possession of a property by another person is the common element of the material pillar inn all of the crimes against the properties, knowing of a property’s belonging to another person during robbery is also the common element of the intellectual pillar of all the crimes against properties.
- D) Knowledge of the Action’s Forbiddance: paragraph 6 of the appended article 268 and the former article 198 of the Islamic penal code of law stipulate that “if the robber knows and be aware that robbing is prohibited” (Habibzadeh, Ibid, pp.94-96).



It is worth mentioning that “intending to rob” does not here mean that the person should have intended robbing during picking it up because robbery occurs if a person steals another person’s property stealthily.

In other words, intending to rob is not a precondition rather having no intention to rob bars the inclusion. In better terms, it is with the picking up of a property in a stealthy manner that the robbing intention is actualized unless there has been no intention for robbing which bars the actualization of robbing intention. In the interpretation of article 665 of the Islamic penal code of law that stipulates “when the snatching of another person’s property is not given the title of robbery”, one of the professors of penal law explains that “if a person picks up another person’s property with the intention of temporary use and is found having intended to return it to the

owner after use, it cannot be called robbery and his intention is not to be viewed as intention for robbing and this is the very thing posited in paragraph 14 of article 198 of Islamic penal code of law, passed in 1991; in the above-introduced assumption, such an intention is annulled. This saying is not flawless because intention for possession has not been intended in the definition of robbery in Iran's laws leave alone the intention for permanent possession.

Laws of Azerbaijan Republic:

The judicial system of Azerbaijan Republic which is the heritage of the former Soviet Union was generally revised and reconstructed based on democratic principles drawn on the legal-judicial reforms at the presidency tenure of Haidar Aliyev. These reforms led to the enactment of numerous regulations, including the "law on the constitutional law", "the law on the courts and judges", "the law on the public prosecutor offices", "the law on the police", "the law on the investigation and prosecution interventions" and other regulations that are completely different from their former counterparts.

Reformations made in the regulations of Azerbaijan Republic have been in line with increasingly higher adjustment of this country's regulations to the international regulations, especially human rights. Therefore, the third chapter of this country's constitution has been devoted to the individuals and citizens; amongst them, the principles of fair trial are also of a considerable importance and position. As an example, the principle of the individuals' equality before the law and in the courts can be pointed out and this has been stated in both paragraph 1 of the act 25 of this country's constitution and also in article 4 of Azerbaijan's penal law. Furthermore, the exemption and its various dimensions have been completely stated in the Act 63 of the constitution. In addition, act 64 of Azerbaijan's constitution points to the maxim "prohibition of double punishment". The axiom of "non-retroactivity" of the penal regulations, as well, has been explicitly stipulated along with its exceptions, i.e. in cases that the new law is found having a weak effect or being in favor of the culprit, in paragraph 7 of the act 149 of the constitution and in paragraph 1 of article 10 of Azerbaijan Republic's penal law.

It is worth mentioning that Azerbaijan Republic has joined the European convention on the support of human rights and fundamental freedoms since 2002 and it has accepted the jurisdiction of the European court of human rights and this court has reminded cases of the convention's violation in Azerbaijan to the government of this country in several cases up to now. In line with this, reforms were made in the judicial system by the order of Elham Aliyev, the then president of Azerbaijan, in the legal system of this country parallel to its modernization and adjustment with the scales of the aforesaid convention.

The Definition of Crime and its Pillars in the Law of Azerbaijan Republic:

There are various definitions presented about crime and performing of an action or leaving undone an action that disrupts the social relations has been eventually termed as crime and it has to be found consisted of four elements: 1) material element or Obyekt; 2) the relationship between the material element and the caused loss (Obyektiv); 3) intellectual element or Subyektiv; and, 4) person (subyekt).

In line with this, Professor Fereydoun Samandarov, a citizen of Azerbaijan Republic, writes that the intellectual element of crime immediately influences the criminal's psyche and makes him perpetrate the crime. The intellectual element of crime includes the decisiveness in the perpetration of an action against social security, perception of wants, reflection of wisdom signs



in the creation of a crime and causing loss and the relationship between them and the criminal (Semenderov, 2007).

The intellectual element of crime, guilt (intention and default), motivation, target and the created feeling are amongst the constituents of the crime. Additionally, the specific intellectual element determines and renders different the type of crime. In the penal lore of Azerbaijan, the intellectual element has been shown in a combination of signs: guilt (intention and carelessness), motivation and target of crime; in practice, the crime's being against social security or not should be determined based on the foresaid factors and the guilt's directness or indirectness in the crime's perpetration should be clarified.

Therefore, a crime cannot be determined only based on the apparent signs and intentions rather the psychological moods and signs should be also taken into account. The internal states of an action convey the intellectual element of the crime and stabilize the independent element of crime, i.e. intellectual element, in crime's composition. The direction of the intellectual element reflects the will and wisdom of the criminal during the perpetration of the criminal action.

It has been specified in Azerbaijan's legal sources that the intellectual element of the crime's composition is amongst the controversial and necessary matters. Due to the same reason, it has attracted the thoughts of the law scientists to itself since long ago. To perceive the motivation and goal of a crime, this is not the sole crime exclusively specific to the human beings rather it presents the researchers with subtle recognition of the criminals and the factors giving rise to the perpetration of a crime by certain individuals. Many theories have been offered for these issues in the books and scientific articles.

The intellectual element of the crime has been explored from various aspects such as intellect, will and emotional expectations of the action itself and their differences as well as their interdependencies and also their preliminaries and their co-existence and/or their prospective appearance.

During the perpetration of a crime, certain psychological states are created in the mind of the criminal (culprit) and they can be elaborated based on the following legal scales: guilt, motivation, target and the emotional status of the criminal.

The psychological signs of the criminal stem from certain internal moods and influence the wisdom and will of the criminal when perpetrating the criminal action. Each of these signs has its own specific properties. These signs determine the type of the loss caused (material element) with the intellectual element being the definitive component of the crime along with the other indicators and priorities that together strike the mind in the light of mutual effect and simultaneously express the themes and the functions. The variability of the themes are overlooked herein but the guilt, motivation, target, intention and emotional status of the criminal are connected and interrelated together in the creation of the intellectual element of a group in such a way that all of them are stabilized in the psychological states of the criminal during the perpetration of an action. They are the various psychological states. Amongst them (psychological states), one cannot accept the other as the primary component. An action against the social security is considered as a crime when it determines the primary signs of the intention and carelessness, as forms of guilt, as well as motivation, intention and the emotional status of the criminal in regard of the criminal action's perpetration in a specific psychological situation; these are reflected as the necessary signs of the perpetrator's action in many of the cases (Agayev, 2010).



Guilt is amongst the necessary signs of the intellectual element. This can be understood from articles 7, 1, 14 and 24 of Azerbaijan Republic's penal lore in such a way that only performance of an action and leaving undone an action are determined in regard of the perpetrations against the public security and the result of the perpetrator's guilt is considered as the cause of liability and punished as ruled in article 7 of Azerbaijan's penal code of law. The non-guilty persons are not held liable even if losses are caused.

In Iran, the structure and indicator of the penal lore is somewhat different from those of the Azerbaijan's. As a specimen, in the first section of the penal lore (general articles), the domestic regulations (chapter one) have been taken into consideration. In this chapter and in article 2, it is stated that "performance of any action or leaving undone any action for which punishment has been determined in the law is termed crime".

As it is seen, guilt is not the central issue rather, according to the law, performance of an action and leaving undone an action against the social principles matters. Based on the penal lore of Azerbaijan, it is only in the determination of a person's guiltiness in the performance of an action that the crime composition can be talked about. In the crime composition and in the absence of the natural existence of the guilt in a person's action, s/he cannot be held criminally liable hence punished and the crime without guilt is like the crime without intellectual element and it is expressive the exclusion from the crime.

The primary components of guilt are wisdom and will. Wisdom and will do not independently exist and human beings are spending their times in unified psychological states (in common form). Guilt is a concept incorporating various intellectual and volitional elements.

The theme of guilt and the form and nature of guilt can be differently conceptualized. Guilt encompasses the stages and specifications of the incidents as well as the elements and signs. In the actions against social principles, guilt embraces various forms of the psychological relations, intention and carelessness as well as an array of other psychological elements to which wisdom and will can be also added. But, some Russian authors enumerate motivation and intention as being within the inclusion circle of the guilt's theme (Semenderov, 2007).

However, the late well-known Azerbaijani scholar, Fereydoun Samadarov, asserts that the psychological elements of the action against the public security reflect the material signs with the guilt being the connector of them (Semenderov, 2007).

Guilt is not a direct connector of the material signs rather it is also dependent on the structure and composition determined in the law. Many of the crime's elements do not participate in the description and determination of the crime's properties and also in rendering different the other criminal actions against the law; however, even if not being included in the crime composition and if influencing the documented signs of crime hence liability (such as intensification and lightening of the punishment), these states can be included by the psychological reflections of the guilt and show the scale and size of the guilt.

There are certain signs of intention for perceiving the actions against the public security by an individual and rendering possible the results of the criminal action and/or not losing the result before the prediction as well as wishing for the results of such actions beforehand and complete arranging of all the actions in the mind and the final achievement of the results unconditionally are amongst the related matters.

In such situations, the mind reflects the incidents with the existence of authentic documents and psychological image of the human beings. The conditions of perceiving the actions as well as the



crimes against social principles by the individuals can be considered in excluding a non-guilty individual from criminal liability and the absence of criminal intention in the perpetration of a crime can be generally considered for doing so.

Perception of the properties of a perpetrator's crime can be reached for the prediction of a person's criminality before the crime is resulted.

Prediction beforehand means determining the likelihood of a crime's occurrence in future using legal documents. Wishing for the crime's result is indicative of the idea that the same criminal results had been wanted by the criminal.

The result of the crime's occurrence and arranging of the actions in the mind is expressive of a mindset in which the criminal becomes satisfied with if not having wished the action against the public security. In the occurrence of the results of crime, only the possibly real relationships in the action's perpetration along with the reflection of the related results can be considered for showing the existence of active emotions before the performances (Agayev, 2010).

In the laws of Azerbaijan, carelessness becomes different from intentional perpetration of the crime when the criminal action is found having caused losses lower than carelessness and the amount of the crime resulting from carelessness is found lower than intentional perpetration of the crime.

Carelessness enables the prediction of the result of a person's perpetration of a crime in the form of having insufficient concentration and inadequate self-confidence and inability in overcoming the task and being unable to conjecture the result of the performed action and/or in the form of having insufficient precision and caution.

Professor Samandarov writes that "in performing actions with hefty criminal results and hateful wills, there is a proportional relationship between the properties and intentions. Such a relationship is missing in carelessness in such a way that, under certain conditions and especially in the use of technical tools, a little carelessness, forgetfulness or heedlessness can be followed by huge human casualties. In the crimes resulting from carelessness, the guilty persons have been most often found expressing such reasons as tiredness, physical status, existence of family-driven psychological moods and other psychological statuses (Agayev, 2010).

The importance of the crime's intellectual element is sufficiently high. No talk can be made of crime and criminality in the first place when careless actions are found having caused losses. Therefore, the importance of the aspects of the crime's intellectual element can be reflected in the following cases:

- 1) As the most essential component of criminal liability, crime's intellectual element enables differentiation of a criminal from a noncriminal.
- 2) The aspects of the crime's intellectual element enable the recognition of similar crimes based on the material signs (goal). Material elements can be differentiated in many of the similar crimes due to the existence of similar forms of guilt.
- 3) The crime's intellectual element (type of intention and inclination towards it, kinds of carelessness, crime's motivation and crime's goal) specifies the crime's properties and amount and it can immediately take a position amongst the elements of crime immediately in one or another order to showcase its effect on the crime and its description; it is the absence of this intellectual element from the crime's framework that the specifications and amounts of punishment are changed.



According to article 25 of Azerbaijan Republic's penal lore, such a type of intention is specified by two intellectual forms and one volitional aspect. In the first type, the perpetrator perceives that s/he is perpetrating an antisocial action (performance or non-performance of a certain action) and, in the second type, the perpetrator predicts the result of crime beforehand and subsequently willfully perpetrates the antisocial action (doing or leaving undone an action) and is determined to reach the set goals.

In the penal lore of Azerbaijan, stealth snatching of another person's property is the general sign (general malicious intention) of the intention and it is amongst the determinants of an action's criminality along with the intellectual and volitional dimensions (specific malicious intention).

The first intellectual aspect of a crime's perpetration is the criminal's knowledge that the property belongs to another person (legal or real) and that it is against the law. It can be also sought in robbery in issuing the order and setting the conditions for robbery in real terms and the subsequent snatching of the properties by the performance of certain actions or leaving them undone.

The first intellectual (conscious) stance of the criminal is taking possession of a property belonging to an owner (real or legal) without his or her satisfaction followed by illegal use of these same properties or preceded by issuing the command of robbery and setting the ground for robbery all of which are against the law of ownership. The second intellectual stance is robbing another person or a legal owner's property stealthily through previously planning for it (prior intention). The concept "volitional stance" conveys the performing of a criminal action and wishing for the result of such an action followed by making it really happen.

The main purport of intention here is stealthily robbing the other's properties belonging to other persons and the robber's knowledge that s/he has no right in the stolen properties. Robbers have been found mistaken in their perception of the properties' possession by an owner or the other. It has to be pointed out that the robber's mistaken perception of the properties by a person or another and his or her stealth robbery of them does not have any effect on the description of the others' properties because the action of robbery does not bring about any change in its social nature. The robber makes efforts in line with the achievement of his or her own goal on the account of the others' properties. According to the law, the robber imagines that the properties belong to him or her. There are doubts in the documents related to the stealth robbery of the others' properties. At this time, the perpetrated action is in accordance to the intention with the existence of the necessary signs against the administration method and of the arbitrary criminal type, to wit against the law and, in the other legal documented samples, against the citizenship regulations refuting any action by any formation and organization that may cause losses to persons. At this time, determination of the intention's purport and mixed nature of the liability and the intention for robbing the others' properties in a stealth manner become legally important and present guidelines in regard of the other robberies.

In the performance of a robbery, the criminal steals the others' properties stealthily by first imagining the action and step-by-step planning in his or her mind which cannot be read by anyone. This robbery stems from not perceiving the legal behaviors and axioms and causing losses to the others against the principles that are also seemingly not comprehended. At the time of plundering, the criminal knows it consciously that s/he is performing a criminal action and that s/he has previously intentionally and consciously wished for the result of his or her crime.



The intention can be recognized in the intellectual element of stealth stealing of the others' properties only through guilt of the direct type.

Robbing of the others' properties can also happen through carelessness such as when a person puts on another's overcoat after the party is over or when a person borrows a pen to write something and puts it unintentionally into his or her own pocket. It has to be mentioned that these cases do not create the elements of such a crime as stealth stealing of others' properties. At the time of stealth robbing of the others' properties, the first intention for changing the ownership and/or fighting with the guard when stealing the properties and the entry of the third persons and others can be influential. The first purport of intention in robbing the others' properties in a stealthy manner is change of method during the actualization period in the form of vivid robbery and/or coercive robbery or robbery by threatening.

Robbery is done based on covetous motivations and with the goal of grasping something envied. For example, a criminal covetously steals properties in which s/he has no right without paying anything in exchange so as to become rich.

Wuljen Kin explains the covetous motivation in the following words:

- 1) Illegal robbing the others' properties without paying anything in exchange
- 2) In case that the robber's financial status is in a good status, his or her interest for transferring the properties to his or her relatives and others
- 3) The existence of covetous motivations when transferring the properties to the other participants of the plundering

Wuljen Kin also adds that "being a relative and a close friend and having friendly relationships and also owing to the friends are also the other causes of transferring the stolen properties to friends and relatives; robbers are also found gifting their friends and relatives and providing them with financial aids via the stolen properties but not through their own capitals; better said, they help their friends and relatives in such cases at the cost of the others (Levitskiy, 1962). In such cases, the crime motivation can be not covetous but the personal interest.

In participatory robbery, covetous intention appears in a special form. The covetous intention is revealed in the stealth robbing of the properties by a group of participants. In shared robbery, the covetous intention cannot be perpetual and the covetous intention exists in the entirety of robbing the others' properties for endowing them to the other relatives (such as for paying one's own debt to their creditors, landlords and others).

The absence of the covetous intention during the stealth stealing of the others' properties excludes the abovementioned states. For instance, when an individual sells the stolen properties and spends the money on building kindergarten and nursing homes and/or paying the costs of the patients' treatment. In such cases, some other individuals have been benefited so the robbery has not been covetously motivated and he has not performed such an illegal action to become rich. It is very difficult to explain such persons' criminal actions because actions like this have not been predicted nowhere in the laws of Azerbaijan Republic.

Intellectual Element in the Laws of Iran:

According to the changes created in the comparison between the article 268 of the Islamic penal code of law, passed in 2013, and article 198 of the Islamic penal code of law, passed in 1991, the general conditions of the criminal liability have been mentioned in the Islamic penal code of



law, approved in 2013 (in the first book, the chapter on generalities) and the specifications of the robbers (maturity, intellect, will and volition and intention) have been predicted. Thus, the insertions of paragraphs (1), (2), (3) and (4) of article 198 in the Islamic penal code of law (1991) that present the four conditions of a robber's criminal liability have been omitted from the article 268 of the Islamic penal code of law, passed in 2013.

So, one of the conditions for a Hadd-deserving robbery is the robber's intention for snatching a property without the owner's knowledge and satisfaction. It seems that if a person takes another person's property not with the intention of taking possession thereof but for temporary use and returning it to the owner after meeting his or her need, it cannot be stated that s/he has stolen it. The people also will not consider such a person as a robber if they become aware of his intention:

"Fa Enna Al-Nās Ezā Allamū Bi Qasdehi Lā Yasūmūho Sāreqan" (see also Shirazi, Kitab Al-Hodūd wa Al-Ta'azirāt, 214, p.17). so, a person can be said to have stolen a property if his or her intention has been depriving the owner or the occupier from the property permanently otherwise if a person picks up another person's book, for example, so as to study it on the night before the examination and subsequently returns it to him or her, s/he cannot be considered as a criminal though s/he is responsible as a usurper.

The question that can be raised here is that if a person picks up another person's property with the intention of temporary use and s/he subsequently happens to change his or her mind and decides to keep it forever, can s/he be considered as a perpetrator of robbery based on this second decision or not?

In the laws of Iran, such a case cannot be considered as robbery (it has to be mentioned that it is actually a little impossible to prove such a case that the snatcher has intended to permanently deprive the owner from his or her property after snatching and s/he did not intend to do so at the time of taking it). An example of this case is when a person takes another's book to study it on the night before the exam with this decisive intention that s/he would return it on the next day but s/he happens to change his mind on the next day and keeps the book. It can be discerned using a little scrutiny in the foresaid example that although both the material element (snatching) and the psychological element (intention for permanent deprivation) exist here, the third condition that is necessary for the actualization of a crime, i.e. the temporal coincidence of the material and psychological elements¹ is missing hence no single moment of time can be found at which both of these two elements coexist so that it can be stated that a crime has been actualized rather the psychological element (intending to deprive a person from his or her property forever) has been missing at the snatching time and/or the snatching which has been an instantaneous (not continuous) action completed at a single moment is no longer existent. Therefore, two separate elements are encountered here not two elements that unite and create the crime.

The temporal coincidence of the material and psychological elements has not been explicitly mentioned as a condition in the aforementioned law; however, it stems from this evident principle that a crime should anyway occur at an instant of time and that crime is nothing more than the sum of material and psychological elements. So, these two elements should simultaneously be externally manifested. Thus, if a person mistakenly shoots a human being

¹ Coincidence of actus reus and mens rea in time

instead of a bird s/he has targeted and s/he happens to pass by the corpse on the next day and consider it as a live human being and starts shooting at him or her to kill him or her, s/he has not perpetrated murder despite the coexistence of the material element (murdering) and psychological element (intention to kill) because these two elements have not been externally manifested at a single instant of time so that it can be realized as the perpetration of an intentional murder. Similarly, if a person picks up a thing that s/he imagined to be a valueless thing but notices later on that it is a precious antique watch and knowingly keeps it with him or herself and refrain from handing it over to the owner, it would be difficult to call him a robber because the psychological element has been missing at the snatching time and snatching has been missing at the emergence of the psychological element. As for the intention for permanent deprivation, it is noteworthy that if the culprit picks up a property apparently for temporary use but it is found having a high value only for the same specific period of time (such as when a valid ticket belonging to another person is picked up for use during its validity term and returned after the termination of its credit), crime of robbery has taken place because, considering the ticket's worthlessness after the termination of its credit, such a snatching has been of the permanent deprivation type. It should be also noted that the intention for permanent deprivation does not mean that the person has intended to pick up the property to perpetually or for an unlimited period of time deprive a person from the property. For instance, if a person picks up a book belonging to another with the intention of returning it to the owner after thirty years following his or her retirement, s/he will be considered as a robber because such a snatching is commonly deemed as permanent theft.

The last notable point about this condition is that the owner's permanent deprivation of the property is not the prerequisite to the actualization of robbery rather the important thing is the snatcher's intention for "permanent deprivation" of him or her from his or her property. Therefore, if a person snatches a property from a person with the intention of his or her permanent deprivation, s/he is considered as a thief even if s/he returns it to the owner after a short period of time by his or her own will and/or as a result of being apprehended (please look at the contents of note 4 to the former article 198 and the appended article 268 of the Islamic penal code of law).

Occupation of the Shared Property with Robbery Intention in the Islamic Penal Code of Iran and Penal Lore of Azerbaijan:

If a partner occupies a shared property with the intention of robbing it, some of the great jurists like the late Sheikh Mofid, Salar and Fakhri Al-Mohaqeqin (may Allah have mercy on his soul) have decreed based on some narrations with weak documents that "such a person cannot be subjected to Hadd punishment whether s/he picks up an amount equal to, lower than or higher than his or her share because such a case is dubious in either of the foresaid cases" (Mabani Takmilah Al-Minhaj, v.1, p.284).

Influenced by the jurisprudential sources, the law professors have also offered various notions. Some opine that since the snatcher is the owner of every part of the property, such snatching is not to be given the title of theft; in the meanwhile, interpretation in favor of the culprit and the axiom of "annulment of Hadd punishment in doubtful cases", as well, render such a consideration expedient. Some others have expressed that since every single part of the property belongs to other, the action is to be envisioned as robbery. However, some others have explicated



that “if a person picks it as his own property, this action cannot be typically considered as robbery for s/he had not intended to rob it but if s/he picks it up to rob it, it has to be viewed as robbery”.

The other explanation is that if a person picks up a common property to the extent of his or her quotient, it cannot be considered as a robbery but any amount more than his or her share should be viewed as theft (Mir Muhammad Sadeghi, 2004).

The sixth division of Iran’s Supreme Court has stated in verdict no.122, issued on 17th of October, 1942, that “the intervention by any of the partners in the shared property cannot be viewed as robbery”. This verdict’s signification includes all the cases except the use of the term “intervention” instead of “snatching” that shows that a partner should have not intended to pick up an amount more than his or her share and/or steal his or her partner’s property.

In Azerbaijan Republic’s penal lore, in plundering of the others’ properties in a stealthy manner (theft), the robber should be at least 14 years old and have no ownership right in the stolen properties; s/he should be physically healthy and mentally mature. In the stealth robberies, the robbers’ youngness is considered in regard of criminal liability from both private dimensions of the crime and also the social security concerns. Due to the same reason, crimes perpetrated by individuals below the maturity are only suspended on the psychological scales of the criminal as ruled in the constitution. As for the stealth plundering of the others’ properties at 14 or 16 years of age, the prevalence and expansion of such criminal actions between the recently matured persons (adolescents) is indicative of the heightening of antisocial behaviors. In stealth robbery, age properties are important in the creation of the motivation and the absence of covetous intention and motivation during the perpetration of a crime is amongst the impossibility of criminal liability.

The stealth robbing of the others’ properties is sentenced according to the individuals’ general conditions (14 years of age and maturity) as well as based on the parallel specific conditions like being not the owner of the properties or being one of the owner’s relatives at the time of plundering. Also, being not the owner, not complying with the individual having the ownership right and standing against him or her and taking the possession of the properties against the legal principles are some other matters that need to be elucidated. Such characteristics are not positive rather they convey the negative attributes. A person’s ownership is not a characteristic rather it can be used against not being the owner.

There are criminal law theories in the statutory provisions of Azerbaijan regarding the ownership in family by its members; there are discrepancies regarding the spouses’ robbing of one another. It is worth mentioning that the robbery by the family members, including couples, is determined according to the regime-based relations governing the regulations existent for the criminal liability of the family members.

Fointesky showed at the turn of the 20th century that there were three different independent systems in the European laws regarding the properties owned by the family and robbery of them by the family members: there were exercised constitutional punishments between the relatives for the spouses who robbed one another; such robberies were not punished based on the general penal regulations; and, the filing of a lawsuit by the robbed party resulted in the criminal liability. This issue had its own mixed characteristics. On the other hand, exceptions were made for criminal liability of the spouses as well as the close relatives who robbed each other. On the



other hand, the analogy of the robberies performed by the close relatives and spouses and distant relatives shows that individual accusations have been made for the latter.

In the penal law theories proposed in Russia, the stealth robberies by the spouses who live in separate houses are investigated as theft (Kotov, 1974_1973, 836 s).

In the penal lore of Azerbaijan as well as in the trial procedure, no special criminal liability has been considered for the family members' robbing of one another. In stealth robbing of the family members' properties by themselves, holding the thief criminally liable or not is the primary criterion of the system existent in the common relationships in respect to the properties. This type of system is arranged firstly by the family legislator and also by the civil legislator in necessary cases (article 4 of the family law of Azerbaijan Republic). Therefore, investigations of the spouses and relatives' robbing of one another are preliminary focused on figuring out whether the stolen properties are commonly owned or not. Based on certain legal cases of resolving the parties' lawsuits, it has been made clear that whether the existent regulations provide the spouses with the required facilities so that the proper legal system can be chosen for trying the spouses and relatives' stealing from one another in such a way that the specified rules can be changed according to the law if it is demanded by one or both of them and if it is determined in a contract signed between them following which they can adjust their cases to the preferred legal system and accordingly determine the type of their general properties and various kinds of them and/or the spouses' properties and the shares of each of them in them (journal of family law, article 34 of Azerbaijan's law).

Spouses' snatching of their shared properties in a stealthy manner cannot be held criminally liable. It is worth mentioning that the verdict no.9 of the Supreme Court of Azerbaijan Republic, issued on 14th of May, 1999, mentions that "based on the comparative experiences about the stealth robbing of the other's properties and illegal possession of the other's properties" so "the spouses' taking of their shared properties lacks the complete composition of the criminal robbery".

The ownership relations between the parents and children render it necessary to have a separate legal system. Based on the family law of Azerbaijan and in articles 4 and 55, children have the ownership right in their revenues, inheritance or properties they have been gifted as well as their own accounts and capitals and the other properties they have acquired. In the family law and in articles 6 and 55, children do not have ownership rights in their parents' possessions and vice versa.

In such occasions, close relatives, parents and children, grand fathers and grandmothers and grandchildren, brothers or step brothers, sisters or step sisters and adopted children are criminally held liable should they perform stealth robbery of each other.

It has to be noted that the kinship by affinity includes certain legal or natural relations or adoption. Of course, a natural child can use immunity of prosecution when the father is found having accepted him or her as a child. In the meanwhile, immunity from prosecution includes other family members and such persons can be indicted in case of perpetration of robbery.

On the other hand, the legal immunity of prosecution can be enforced in case that the stolen property is found belonging to the foresaid persons not to a third person; such as when a person's father is a seller and/or cashier in a shop and sells the shop items on behalf of the shopkeeper and his or her wife and child happens to rob the fund in which case the issue can be indicted and the culprit cannot be exempted from prosecution.



If the aforesaid persons are found having had accomplices during robbery, they can be indicted and punished as ruled in the laws of Iran; also, the persons who help them by hiding the stolen properties can be indicted.

Iran's legislator does not accept the principle of immunity from prosecution and, if robbery is found perpetrated by the aforementioned persons as well as other close relatives, blood relatives or relatives by affinity, the case is closed after the private plaintiff forgives them.

According to the laws of Iran, if robbery is performed by the family members, as well, the culprit can be prosecuted and punished but the culprit's prosecution is stopped in this case with the plaintiff's excusing of him or her.

CONCLUSION:

General malicious intention means intending to do the material behavior of robbing; the specific malevolent intention includes the deprivation of another person forever from his or her property, i.e. intending to cause losses to the owner of the property. Although the intention for temporary deprivation of a person from his or her property is not called robbery in Azerbaijan Republic, some courts also see the temporary use of and benefiting from a snatched property as a robbery. However, in the laws of Islamic Republic of Iran, the permanent deprivation of an owner from his or her property is not the precondition for the actualization of robbery rather the important thing is the robber's intention for "permanent deprivation" of him or her from his or her property. Therefore, when a person steals another person's property with the intention of permanently depriving him or her from his or her property, s/he will be considered as a thief even if s/he happens to return it to the robber after a short period of time willfully or for the fear of apprehension.

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