



Fiqhī and Legal Analysis of Ghaṣb (Usurpation) in the Context of Hadd-Based Theft Code

Sayyid Hamid Husayni Alarzi¹ , Muhammad Baqer Girayeli² ,
and Husayn Ebrahimzadeh³ 

1. PhD Student in Criminal Law and Criminology, Razavi University of Islamic Sciences, Mashhad, Iran.
Email: 2851365az@gmail.com
2. Corresponding Author, Assistant Professor, Department of Law, Razavi University of Islamic Sciences, Mashhad, Iran. Email: bagher_grayly@miu.ac.ir
3. PhD Student in Criminal Law and Criminology, Razavi University of Islamic Sciences, Mashhad, Iran.
Email: ebrahimzadeh1881370@gmail.com

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ABSTRACT

Theft that warrants the hadd penalty (fixed punishment) is subject to specific conditions, among which are the breaching of a secure location or breaking into safe custody (*hirz*) and the non-usurped (*ghaṣbī*) nature of the property. The legislator articulates the ruling for a usurped secure location (*ghaṣbī hirz*) in Article 270 of the Islamic Penal Code and specifies the condition that the stolen property must not be usurped in Article 268 of the same code. However, upon careful examination of jurisprudential (*fiqhī*) texts and legal analysis, it becomes evident that this issue involves different hypotheses and categories. The legislator has either not provided a general ruling for some of these cases, or their ruling cannot be derived from the apparent meaning (*ẓāhir*) of Articles 270 and 268 of the Islamic Penal Code. Through conceptual inference, and in light of the statements of the jurists (*fuqahā'*) and general legal principles, the verdict in some hypotheses affirms a theft punishable by hadd, while in others, it negates it. In the context of theft from a ghaṣbī hirz, the taking of property may be carried out by the owner (*mālik*), a person with equivalent legal standing, or a third party. The ruling for this third case is not explicitly stipulated in the law. Although a ruling on this matter could be inferred by applying the argument from the converse concept (*mafhūm al-mukhālafah*) of Article 270 of the Islamic Penal Code, this inference conflicts with certain jurisprudential (*fiqhī*) and legal principles (*qawā'id*). Regarding usurped property (*māl al-ghaṣbī*), the legislator has confined itself to merely stating the condition that the stolen property not be usurped in the last paragraph of Article 268 of the Islamic Penal Code. This is despite the fact that this issue also presents various hypotheses. These include the owner retrieving the property from the usurper (*ghāṣib*), a third party stealing the property of the usurper, the owner, or both, and whether the usurped property is partitioned (*mafrūz*) or jointly owned (*mushā'*). The ruling for each of these hypotheses may differ.

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Introduction

Theft is considered the oldest crime recognized in human law. From antiquity, thieves have been punished in different ways under various legal systems. In Iranian law as well, different forms of theft are prescribed with different punishments. Since Iranian law is derived from Islamic jurisprudence (*fiqh*), it enumerates thefts that are punishable by *ḥadd*. Given the severity of the punishment, this type of theft is subject to special conditions, and only when these conditions are met may a ruling of *ḥadd* punishment be issued. Because the punishment of *ḥadd* theft is grave, examining the conditions required for its application is of significant importance. Among these conditions are that the stolen property and the *ḥirz* (secure enclosure) must not be *ghaṣbī* (usurped).

Methodology

After a brief explanation of certain relevant terms, the rulings concerning them are examined. This study is written using a library-based, analytical, and descriptive method, relying upon statutory provisions and the opinions of jurists (*fuqahā*).

Findings

In the terminology of the majority of jurists, *ḥirz* is defined as a locked or enclosed place. The legislator, in Article 269 of the Islamic Penal Code (IPC), defines *ḥirz* as follows: “*Ḥirz* is a suitable place in which property is customarily safeguarded against theft.”

Theft of property within a *ḥirz* necessarily involves the violation (*ḥatk*) of that *ḥirz*, and the removal of such property entails this violation; however, violation does not always require the breaking of a lock or similar means. The majority of jurists define *al-ghaṣb* as the usurpation and subjugation of another's property through injustice. The legislator, in Article 308 of the Civil Code, defines *ghaṣb* thus: “Seizing the right of another in an unlawful and aggressive manner”

Theft from a Usurped *Ḥirz*

One of the conditions of *ḥadd* theft is that the property be located within a *ḥirz*. In Article 270, the legislator discusses theft from a usurped *ḥirz* in a general way, which applies to theft by the owner and those considered equivalent to the owner, as well as, by implication (*maḥmūl mukhālif*), to theft by a third party.

First Scenario: If the owner of the property violates the *ḥirz* and removes his property from it, in such a case the theft is not a *ḥadd* theft, because with respect to the owner no violation of *ḥirz* has taken place. However, it may be pursued as a theft subject to *ta'zīr* punishment.

Second Scenario: If a third party (neither the owner nor one deemed equivalent to the owner) violates the *ḥirz* and steals property from a usurped

estate, two views exist. The correct view, according to the evidence cited in this article, is that of scholars such as ‘Allāmah, who hold that the theft is not a *ḥadd* theft, for “*al-dār al-maghṣūbah laysat ḥirzan ‘an ḡayr al-mālik*” (“a usurped house is not a *ḥirz* against someone other than the owner”). Thus, the property and estate taken by usurpation do not constitute a *ḥirz* against the owner of the property itself nor the owner of its usufruct. Therefore, theft committed by the owner, by one in his stead, or by a third party, does not constitute *ḥadd* theft.

If the stolen property itself is usurped, and the usurper has placed it in a *ḥirz* belonging to himself, the ruling can be examined under two categories:

1. The thief is the owner of the usurped property.
2. The thief is a third party.

Each of these has further subcases:

If the thief is the owner of the property:

First Case: If the owner steals only his own property that is in the hands of the usurper, then clearly this does not constitute theft at all (neither *ḥadd* nor *ta‘zīr*), since theft requires the taking of property belonging to another (Art. 267 IPC), which does not apply here.

Second Case: If the owner steals his own undistinguished (*ḡayr-mumtāz*) property together with the usurper’s property, then if the property is jointly owned (*musha‘*) and the partner takes more than his share amounting to the threshold (*niṣāb*) of theft, two views exist. The correct view permits a ruling of *ḥadd* theft. The legislator, in Article 277 IPC, likewise adopts this position concerning *ḥadd* theft of jointly owned property.

Third Case: If the property is separate (*mafrūz*) from that of the usurper, and the owner, after violating the *ḥirz*, steals both his own property and that of the usurper, then: if the usurper’s property does not reach the threshold, the act is not *ḥadd* theft but subject to *ta‘zīr*. If it reaches the threshold, two opinions exist. Shaykh Ṭūsī’s view is considered correct: since the violation of the *ḥirz* was committed for the purpose of theft, a ruling of *ḥadd* theft applies. Shaykh Ṭūsī considers this position consistent with Shī‘ī traditions.

If the thief is a third party:

First Case: The thief steals the owner’s property, but the *ḥirz* belongs to the usurper. In other words, the thief violates the usurper’s *ḥirz* but takes the owner’s property. In such a case, a ruling of *ḥadd* theft cannot be given, because one condition of *ḥadd* theft is that the stolen property not be usurped.

Second Case: If the thief steals only the usurper’s property, then this is *ḥadd* theft, since the *ḥirz* has been violated and the property belongs to the usurper; it is not usurped property. Thus, provided the other conditions of *ḥadd* theft are met, the ruling applies.

Third Case: If the thief steals both the usurper’s and the owner’s property together, then: regarding the theft of the owner’s property, no ruling of *ḥadd*

theft can be given, because one of the conditions of *ḥadd* theft is that the property not be usurped, and the owner's property in the usurper's possession is considered usurped. But regarding the theft of the usurper's property, provided the other conditions are met (violation of *ḥirz*, reaching the threshold, etc.), a ruling of *ḥadd* theft applies.

Conclusion

Concerning usurped *ḥirz*, the legislator has addressed only the case of the owner of the *ḥirz* and those authorized by him, in Article 270 IPC. With regard to theft by a third party from a usurped *ḥirz*, neither this article nor any other provision speaks explicitly. From the implication (*mafhūm mukhālīf*) of this article, one might infer the *ḥadd* punishment of theft by a third party; however, such an inference, and the ruling of *ḥadd* theft for a third party, is contrary to the opinion of the majority of jurists, the general legal principles, and the principle of *dar'* (presumption of avoidance of *ḥadd* in cases of doubt). Therefore, it is recommended that a specific statutory provision (*mādde-yi wāḥidah*) be enacted regarding theft by a third party from a usurped *ḥirz*, in a manner consistent with legal principles and the statements of jurists.

Regarding usurped property, the legislator has sufficed with clause (j) of Article 268 IPC: "The stolen property must not itself be stolen or usurped." However, in order to issue a ruling of *ḥadd* theft, one must pay attention to the various possible scenarios, each of which has been separately examined and analyzed in this study. The ruling differs depending on the particular case.

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