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İslam Hukuku ve Türk Ceza Kanunu Açısından Hırsızlık Suçunun Mukayeseli Bir Analizi

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Özet

Hırsızlık, ilk insanlardan beri var olan, çeşitli tür ve yöntemleriyle hemen hemen her toplumda görülen bir suçtur. İnsanoğlu tarih boyunca canını ve onurunu koruduğu gibi sahibi olduğu mallarını da korumaya üstün gayret göstermiştir. Bu sebeple her dönemde üst otorite tarafından konulan kanun ve kurallarla kişilerin can ve malları haksız tecavüz ve saldırılara karşı hukuki koruma altına alınmıştır. Hırsızlık suçuna konu olan malın mahiyeti ve miktarı hususunda farklı görüşler bulunsa da, tarihten günümüze kadar düzenlenen tüm hukuk sistemlerinde bu suça karşı bir takım cezai müeyyideler öngörülmüştür. Bu çalışmada, hırsızlık suçunun oluşumu için gerekli şartlar, gerçekleşmesi halinde öngörülen müeyyideler hem İslam hukuku hem de Türk Ceza Kanunu esas alınarak mukayeseli bir analizi yapılmıştır. Bu sayede, ayrı zamanlarda yürürlükte olan iki hukuk sistemi arasında oluşan benzerlik ve farklılaşmalar sistematik olarak ortaya konulmuştur. Buna göre iki hukuk sistemi arasında hırsızlık suçunun oluşumu açısından benzerlikler olmakla birlikte suça öngörülen cezada farklılıklar olduğu tespit edilmiştir.

Anahtar Kelimeler: *İslam Hukuku, Türk Ceza Kanunu, Hırsızlık Suçu, Hukukî Sonuç, Ceza.*

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A Comparative Analysis of the Crime of Theft in Terms of Islamic Law and Turkish Penal Code

Abstract

Theft is a crime as old as human history and appears in every society in different methods and types. People strive to protect their properties as much as they take care of their own lives, dignities and prides. Therefore, in every period, the lives as well as the properties of every individual in the society are legally protected with the laws and the rules set by higher authorities against the unjust offense and attacks. Although, there are different approaches in the nature and the quantity of the property subject to theft crime in the legal systems that have been regulated from history to the present, some sanctions have been imposed against the crime of theft. In this study, a comparative analysis of the conditions necessary for the occurrence of the crime of theft and the sanctions envisaged in the event of its occurrence was carried out on the basis of both Islamic law and the Turkish Penal Code. In this way, the similarities as well as the differences between the two legal systems at different times have been systematically revealed. Accordingly, although there are similarities between the two legal systems in terms of the formation of the crime of theft, it has been determined that there are differences in the penalty prescribed for the crime.

Keywords: *Islamic Law, Turkish Penal Code, Theft Crime, Legal Consequence, Punishment.*

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Introduction

Theft is a prohibited act in every society as well as in most belief systems. In the societies they live in, people have not only prohibited this act through the laws they have enacted to protect individual rights and maintain social order, but they have also endeavored to avoid this act as a requirement of their beliefs. In Islamic law, the most important essential interests are categorized under five main headings: life, reason, property, family and religion. As in all divine religions, all actions of those who

violate these interests, which Islam aims to protect, are considered crimes, and various penal sanctions are envisaged for the perpetrators. The act of theft is also prohibited in Islam because it violates the right to property. In short, it is explained in verses and hadiths that the perpetrator is responsible for the act of theft, which can be defined as secretly taking someone else's property from its place of protection, both in this world and in the Hereafter. The severe corporal punishment prescribed for the crime of theft in Islam has caused Islamic jurists to be more sensitive to the conditions sought in the formation of the crime. The right to property is one of the fundamental values of society. Civilizations and the legal systems they have created have protected this right with various rules and laws in order for the individual and society to live in peace and security. One of the crimes committed against property is theft. By committing this act, the perpetrator takes possession of someone else's property without the right to do so. Unlawful possession obtained through illegitimate means is prohibited in all legal doctrines along with Islamic law. In the Turkish Penal Code No. 5237, the crime of theft is dealt with in Chapter Ten within the scope of Crimes Against Property. In this section, the definition and types of theft are defined, and the penalties prescribed according to the form and type of the criminal act are codified separately.

In this study, the crime of theft is analyzed in terms of both Islamic criminal law norms and the Turkish Penal Code, and it is aimed to reveal the similarities and differences as a result of this analysis. Because the comparison to be made on the relevant subject is important in terms of the reflections of the two legal systems, which were in force at different times,

to the present day. Both in Islamic law and in the current legal system, the act of theft is considered a crime and various sanctions are envisaged for this act. The limits of our subject are the comparison of the formation and legal consequences of the crime of theft in these two legal systems. In order to make a consistent comparison of this act, which is considered a crime in both legal systems, it is certain that the basic concepts related to the act of stealing must first be understood correctly. In addition, since Islamic law is a legal system based on evidence, it is of particular importance to examine the verses and hadiths regarding the aforementioned criminal act. It will also be necessary to include the views and approaches of Islamic jurists regarding the relevant criminal act, avoiding comprehensive discussions and disputes. For these reasons, in this study, first of all, the basic concepts that should be known about the relevant criminal act, then the nasses that constitute the source of the criminalization of the act and the opinions of Islamic jurists based on these nasses are mentioned in general. On the other hand, the forms and types of the crime of theft in the current Turkish Penal Code and the penalties prescribed for this crime are examined and the approaches of today's jurists on the subject are included. Subsequently, a comparison has been made between both legal systems regarding the formation and legal consequences of the crime of theft. This comparative analysis will provide us with the opportunity to understand how an act that is foreseen as a crime in two different legal systems is evaluated, rather than having an opinion on a particular legal system or law regarding any criminal act.

The present study is based on the comparison of the Islamic law's view of the crime of theft, which is essentially based on the Islamic faith and has produced solutions to individual and social events in the lands dominated by this faith for many years, and the section on theft in the Turkish Penal Code in force in Turkey today. The study aims to reveal the view of two legal systems, one of divine and the other of human origin, on the crime of theft, especially in terms of the formation of the crime and its legal consequences. This comparative analysis will provide us with the opportunity to understand how an act that is prescribed as a crime in two different legal systems is evaluated, rather than to have an opinion on a specific law regarding any criminal act. Since the classical period, the crime of theft and the different approaches to this crime have been included in the works of hadith and the fiqh sources of different sects. Analyzes on this crime have not gone beyond examining different approaches between sects. In our literature review, considering the fact that there are two different legal systems for the crime of theft, we did not find a comprehensive comparative study, especially with the Turkish Penal Code. Only two master's theses prepared by Emine Sümeyye Kökçam at İnönü University Institute of Social Sciences in the field of Public Law in 2018 and Hasan Çelik at Siirt University Institute of Social Sciences in 2020 were found. In these studies, it was observed that the authors did not utilize basic hadith and fiqh sources. On the contrary, in our modest study, in the context of analyzing the crime of theft, basic hadith works and basic fiqh sources were consulted, and the relevant parts

of the Turkish Penal Code on theft were compared with the data obtained from them. Thus, efforts have been made to obtain more accurate results.

Concepts Related to the Act of Theft

In order to make a coherent comparison between Islamic law, which is based on the divine source, and two legal systems whose origin is human, first of all, the four basic concepts that we encounter due to the act of stealing must be understood correctly. These are the concepts of property, possession, ownership and theft. The origin of the word " commodity/mal/مال " is Arabic and means anything that a person owns (Ibn Manzūr, n.d.; Zabīdī, 1287: 8/121). As a legal term, all physical objects subject to ownership and all rights subject to property are called 'property/mal' (Türk Hukuk Lügati, 1991: 216; Hacak, 2003). In the Mecelle-i Akkam-ı Adliye, the same concept is *defined as all kinds of movable and immovable things that human beings are inclined to by creation and that are collected and stored in order to use them when needed* (Mecelle, 1329: art. 126). *Property/mülkiyet/*ملكية is derived from the word *'mulk/*ملك*'. Property is what a person owns and can dispose of, whether it is real or beneficial* (Mecelle, 1329: art. 125; Seyyid Bey, 1332-1334: 131). Based on this concept, property is the right of full and exclusive ownership over something. Therefore, although everything that is property expresses ownership, things that are subject to ownership, such as interests and claims in possession, are not considered property (Küçük Ali Haydar Efendi, 1912: 1/229).

Possessor/zilyet means *a person who actually possesses something and can actually dispose of it*. *Possessor*, on the other hand, refers to the actual control and disposition of a person over a thing (Türk Hukuk Lügati, 1991: 371). As for the concept of theft, this concept, which is expressed as 'سرقة/sirkat' in Arabic and 'uğrulamak' in old Turkish, is defined in the dictionary as taking someone else's property secretly by using various methods (Türkçe Sözlük, 1988: 1/641; Bardakoğlu, 1998: 17/385; Ibn Manzûr, n.d.: 10/155). As a legal term, theft is defined as taking the movable property belonging to another person without the consent of the possessor, with the intention of obtaining any benefit for oneself or another person (Turkish Penal Code (TPC), 2004: 141/1; Türk Hukuk Lügati, 1991: 125). All these concepts are important for a more accurate understanding of the offense of theft in two legal systems that were in force at different times.

Theft in the Historical Process

With the transition to social life, the crime of theft began to be seen among people with different methods and types. We do not have precise information about how this crime, which is almost as old as human history, was treated and punished in the early periods. However, it is known that in ancient China and India, the person who committed the crime of theft was made to pay for the property he stole, taking into account the social class to which he belonged (Okandan, 1951: 68). Again in the Sumerians, very severe penalties resulting in death were imposed for the same crime (Şensoy, 1963: 14). In the Code of Hamurabi, the

Babylonians made the perpetrator pay thirty times the amount of the stolen property, while they punished the perpetrator with death for theft from kings and temples (Okandan, 1951: 145). In ancient Iranian law, the same crime was punishable by chains and death, and in ancient Greek law, depending on the nature of the offense, by fine or death (Okandan, 1951: 222, 294; Şensoy, 1963: 14). In the Exodus chapter of the Old Testament, in response to the commandment not to steal, the perpetrator of this crime was ordered to pay for the crime in kind, and if he did not have the means, to be sold as a slave (Bible, Exodus 22/3). In the case of the crime of theft, which was called *Furtum* in the Romans, different penalties were imposed on the perpetrator, ranging from compensation for the damage to enslavement (Okandan, 1951: 485-490; Şensoy, 1963: 15-18; For the historical process, see Akalın, 2019: 27 etc.). In Islamic jurisprudence, the crimes whose penal sanctions are determined by the Qur'an and the Sunnah are considered as crimes punishable by hadd.[2] The crime of theft is also included in this category since its punishment is determined by divine authority. The verses and hadiths on this subject constitute the legal basis of the relevant criminal act. The crime of theft is mentioned in the Holy Qur'an as follows:

"Cut off the hands of the man and woman who steal as a punishment from Allah as an example for what they have done. Allah is the saint and the judge. Whoever repents after his wrongdoing and makes amends, Allah

[2] For the classification of crimes in Islamic law, see the *Legal Consequences of the Crime of Theft* section.

will surely accept his repentance. Allah is forgiving and merciful" (Qur'an 5/38-39).

According to this verse, Allah Almighty has ordered the punishment of cutting off the hand of the person who commits the crime of theft by stealing someone else's property. On the other hand, we see that this was the practice of the Prophet (saw) in accordance with the narrations from the Prophet (saw):

Abu Hurayrah narrated that *Allah may curse the one who steals an egg and his hand is cut off, and the one who steals a rope has his hand cut off* (Bukhari, 1992: Hudūd 7, 13; Muslim, 1992: Hudūd 7).

It was narrated from Aisha that *the Prophet (saw) used to cut off the hand of the one who stole a quarter dinar or more* (Ahmad b. Hanbal, 1992: 4/104, 249; Abu Dawud, 1992: Hudūd 13; Malik b. Anas, 1992: Hudūd 24-25; al-Nasa'i, 1992: Saraiq 9).

It is narrated on the authority of Aisha that *the thief's hand should be cut off only if the value of the stolen property reaches a quarter of a dinar. If it is worth less than this amount, do not cut off his hand.' At that time a quarter dinar was equal to three dirhams. One dinar was then equivalent to twelve dirhams.* (Ahmad b. Hanbal, 1992: 4/80)

According to these statements in verses and hadiths, theft is considered a crime in Islam and the punishment of cutting off the hands of the perpetrator is prescribed as a severe corporal punishment.

Conditions for the Incorporation of the Crime of Theft

Islamic jurists, based on the relevant verses, hadiths and the practices of the Prophet's Prophet period, have gathered the conditions sought in the formation of the crime of theft under four main headings. These are *the conditions related to the perpetrator, the conditions related to the victim, the conditions related to the stolen property, and the conditions related to the place and time of the crime*. If all of these conditions are met, it is possible to apply the corporal punishment mentioned in the verse to the perpetrator of the crime. If one or more of these conditions are not met, it is stated that they will directly affect the punishment to be given to the perpetrator.

Conditions Related to the Perpetrator of the Crime

For the crime of theft to be constituted, one of the main conditions for the perpetrator is that the perpetrator has the criminal capacity. Accordingly, the perpetrator must be an adolescent and mentally stable. Adolescence with mental maturity is the basic principle that Islam seeks in all criminals within the framework of criminal responsibility towards the person. The acts of stealing by minors and persons who do not have mental capacity are not considered within the scope of the crime of theft because they do not have the power of appeal. Due to the lack of criminal intent, the hudud of theft is not applied to these people (Ibn al-Humam, 1912: 4/220; Kasānī, 1910: 7/67; Māverdī, 1994: 372; Sahnūn, 1323: 6/275; Shirāzī, 1996: 5/418). The absence of a property partnership between the perpetrator and the victim is one of the situations that should be taken into consideration in this section. If one of the partners steals company

property over which he has the right of disposition, the hudud of theft is not applied. This is because each of the partners has a right to the stolen property (Bukhūtī, 1394; Abu Yusuf, 1973; Ibn al-Humam, 1912; Sahnūn, 1323; Shirbīnī, n.d.). In this context, the hudud of theft is not applied in the case of theft of public property. Because every individual has a right to public property (Ibn al-Humam, 1912: 4/235). The kinship between the perpetrator and the victim, either by blood or marriage, also prevents the application of the hadd punishment of theft. This is because theft between parents and their children and close relatives who are not related by marriage is not punishable by hudud (Bukhūtī, 1394; Ibn Qudāma, 1984; Ibn al-Humām, 1912; Qāsānī, 1910; Shirbīnī, n.d.). The Qur'an says: *"And there is nothing wrong with you eating from your own houses, or from the houses of your fathers, or from the houses of your mothers, or from the houses of your brothers, or from the houses of your sisters, or from the houses of your uncles, or from the houses of your aunts, or from the houses of your uncles, or from the houses of your aunts, or from the houses to which you have the keys, or from the houses of your friends."* (Qur'an 24/61) In the case of spouses stealing each other's property, although there are differences of opinion, the majority of Islamic jurists are of the opinion that khad cannot be imposed. This is because spouses have the right to use each other's property (Abu Yusuf, 1973: 266; Ibn al-Humam, 1912: 4/239; Kasani, 1910: 7/75). In the Turkish Penal Code, the conditions attached to the perpetrator in the formation of the crime of theft are as follows. According to Article 6 of the Law, persons who have not yet completed the age of eighteen are considered children. Article 31 of the Law

evaluates the minority of age in terms of criminal responsibility. Accordingly, children who have not completed the age of twelve are not criminally responsible. If deemed necessary, only child-specific security measures are applied to this age group.[3] The criminal responsibility of children who have completed the age of twelve but have not completed the age of fifteen is subject to the condition that they have developed the ability to perceive the criminal responsibility of the act committed or to direct their behavior. The judge decides on this depending on the report of the authorized institutions. As for children who have turned fifteen but not eighteen, the law states that these children are criminally responsible. However, a reduction in the prison sentences to be imposed on this age group is envisaged due to their minority (TPC, 2004: 31/1-3). In this case, according to the Turkish Penal Code, children under the age of twelve do not have criminal responsibility, while children between the ages of twelve and eighteen have limited criminal responsibility. Those who are mentally ill are addressed in Article 32 of the Law. Here, mental illness is divided into two groups. The first group is those who do not understand the legal meaning and consequences of the act they commit, and it is stated that these persons are not criminally responsible. It is stated that only security measures will be applied to these persons.[4] The second group is the persons whose ability to direct their behavior related to the act they

[3] Child-specific security measures are mentioned in Article 56 of the Law, and the nature of these security measures is discussed under the title of Protective and Supportive Measures in Article 5 of the Child Protection Law.

[4] The security measures to be applied to those with mental illness are explained in Article 57 of the TPC.

have committed due to mental illness has decreased. The imprisonment sentences to be imposed on them may be reduced, and security measures specific to the mentally ill may also be applied, provided that the duration of the sentence is the same (TPC, 2004: 37/1-2). Article 144 of the Turkish Penal Code deals with the offense of theft committed by the perpetrator of the offense on a property owned by a shareholder and jointly. Accordingly, if the perpetrator steals more than his/her own share in the property that he/she is a shareholder or co-owner, it is seen as a mitigating factor in the penalties for the crime of theft. In the event that he takes his own share, the act is not considered within the scope of the crime of theft. According to Article 142 of the Law, in the event that the theft crime is committed in public institutions, places of worship or on goods provided for public service, the relevant act of theft is considered within the scope of the crime of qualified theft, and in return, the prison sentence for the crime has been increased. The condition that there is no kinship relationship between the perpetrator of the crime of theft and the victim arising from blood ties or marriage contract has also been included in today's criminal laws, and it has been adopted that no punishment can be imposed in case of theft between spouses and close relatives (Dönmezer, 1959a: 18/1-2, 49). In Article 167 of the Turkish Penal Code, except for plunder, the acts of wrongful possession of each other's property by spouses, siblings and close relatives living in the same place are considered as a reason for personal impunity and it is determined that these persons cannot be punished.

Considering the conditions related to the perpetrator in the formation of the crime of theft, it is seen that there is no significant difference between the conditions stipulated in Islamic law and the relevant provisions of the Turkish Penal Code. This is because the Islamic jurists considered the deficiencies related to the perpetrator of the crime as a reason for lowering the limit of the hadd punishment. According to the relevant articles of the Turkish Penal Code, the deficiencies that arise regarding the perpetrator of the crime are seen as a mitigating factor. The theft of only public property and goods is considered within the scope of the crime of qualified theft and this is considered as an aggravating factor.

Conditions Related to the Crime Victim

From the point of view of Islamic law, in order for the crime of theft to be established, the conditions for the victim of the crime must also be fulfilled. The first of these is the condition that the victim of the crime must be known. Even if the crime is fixed and the perpetrator is known, if the victim of the crime cannot be identified or the owner of the stolen property is unknown, the perpetrator cannot be subjected to the hudud of theft. In this case, there is no plaintiff or defendant. The prohibition applies only to property whose owner is known. This is not the case with the property that has no owner (al-Bukhūtī, 1394: 4/144; Ibn Qudāma, 1984: 10/285-294; Ibn al-Humam, 1912: 4/252; al-Qasānī, 1910: 7/82). Another condition related to the victim of the crime is that the victim must be the possessor or owner of the stolen property. Accordingly, the stolen property must have passed from the possession of the victim to the

possession of the perpetrator. If the stolen property is not removed from its place of storage, it is not considered to have passed into the possession of the perpetrator (Ibn Qudāma, 1984: 10/297; Ibn al-Humam, 1912: 4/241; al-Qasānī, 1910: 7/65). In this case, the act of theft remains only at the point of attempt. Apart from that, in order for the victim to have a say over the stolen property, he must have an ownership or valid possession of it. According to the general opinion of Islamic jurists, the legal benefit protected by the criminalization of the act of theft is the right of ownership together with the right of valid possession. This is only possible if the person is the owner, tenant or agent, or if he has the property on loan, in trust, or in pledge, all of which implies the possession of the property in accordance with the law. If the property is stolen from these people, only the perpetrator can be subjected to the hudud of theft. Therefore, if the property obtained as a result of the act of theft is stolen by someone else, the crime of theft does not occur because the first thief has wrongful possession. The second thief who commits the act of theft is not subject to the hadd punishment (Bukhūtī, 1394: 6/140; Ibn Abidīn, 1982: 8/320; Ibn Qudāma, 1984: 10/255; Qasānī, 1910: 7/80; Serahsī, 1324: 9/144). In Article 141 of the TPC, while dealing with the subject of simple theft, the expression *'whoever takes a movable property belonging to another without the consent of the possessor... from the place where it is located...'* is included. According to this statement, the law has determined the legal interest protected by theft as possession. However, it did not check whether this possession is valid or not. In other words, it is sufficient that the possessor does not have the consent of the stolen property.

Accordingly, the theft of the stolen property from the thief by someone else is also considered as a theft crime. In addition, the phrase *'...taking from where it is located...'* in the wording of the law stipulates that the goods subject to theft must leave the control of the owner and pass into the possession of the thief for the crime to be constituted. In other words, it is deemed necessary that the actual sovereignty of the victim over the property ends and the perpetrator, the thief, establishes the actual sovereignty over this property. For this, the property must be removed from its place by the perpetrator. Otherwise, the crime will remain at the point of attempt (Dönmezer, 1959b). In addition, in Article 43 of the Turkish Penal Code, while the subject of successive offenses is regulated, the offenses whose victim is not a certain person are explained in the first paragraph. Accordingly, if the same offense is committed against a person more than once, a single penalty is imposed, but this penalty is increased from one-fourth to three-fourths. The reason why this is evaluated in this way is that the basic form of a crime and its qualified forms that require less or more severe punishment constitute the same crime. The provision of this article is also applied to crimes whose victim is not a known person. In this case, the crime is considered to have been committed even if the victim is not a certain person. As it can be seen, when the conditions related to the victim of the crime are taken into consideration in the formation of the crime of theft, it is seen that the general understanding of the Islamic jurists is that what should be understood from possession is the possession of the seven-i sahih, that is, valid possession. It is emphasized that the hudud of theft can be applied accordingly. According

to the Turkish Penal Code, the fact that the victim has wrongful possession does not constitute an obstacle to the formation of the crime of theft. Even in this case, the perpetrator is punished for the act of theft. In addition, the fact that the victim is not known is seen as a reason to reduce the hudud of theft according to Islamic jurists. According to the Turkish Penal Code, the fact that the victim is not a certain person is not seen as a reason to prevent the formation of the crime, and it is considered as the crime itself, such as the basic and qualified forms of the crime being considered as the same crime, and it is stated that the punishment should be given accordingly.

Conditions Related to Stolen Property

Property constitutes the material subject of the crime of theft. Islamic jurists have stated that stolen property must have certain qualities in order to be subject to the crime of theft. These qualifications can be listed as follows: the item subject to theft must be legally recognized as property, it must be movable, it must have economic value, it must be movable, it must reach the nisab amount, that is, the value limit sought in the relevant crime, it must be under protection (hırz) and its ownership must belong to another person. The thing subject to theft must legally be property. For something to be considered property means that it has a material value, it is customary among people to acquire property, and it is subject to trading (Ibn Qudāma, 1984: 7/79; al-Qasānī, 1910: 10/240). In addition, the stolen property must also have the property that can be obtained and kept under control and from which benefit is derived. Things that cannot be obtained

are not subject to theft (Qubaysī, 1971: 132). The question of whether slaves, who existed until recently and were subject to trading, should be considered property or not has been included in classical sources with the disputes that arose over it. During the periods when the understanding of slavery in societies was on fire, slaves, even though they were human beings, were considered as movable property and could be subject to theft due to the fact that they were subject to trading. According to the majority of Islamic jurists, a free person, whether a child or an adult, is not subject to theft. The one who commits such an act cannot be subjected to the hudud of theft (Ibn Qudāma, 1984: 10/240; Ibn al-Humam, 1912: 4/230; al-Qasānī, 1910: 7/67). However, in the case of the theft of slave children, according to the majority opinion of the Islamic jurists of the classical period, the perpetrator is subjected to the punishment of theft. According to the Hanafi jurist Abu Yusuf, no hadd punishment is imposed on the perpetrator if a child is stolen, even if he is a slave. Because even if they are slaves, they cannot be considered as property and are not subject to theft because they are children or adults (Bukhûtî, 1394: 6/129; Ibn Qudâme, 198410/242; Ibn al-Hümam, 1912: 4/230; Kasânî, 1910: 7/67; Mâverdî, 1994: 373). Today, the institution of slavery has completely disappeared. In our opinion, it is not correct to consider human beings as property in themselves, and to subject them to the crime of theft. Although in the previous Turkish Penal Code No. 765, theft of a person was included within the scope of crimes against property, in the new Turkish Penal Code No. 5237, this act was evaluated within the framework of crimes committed against personal freedom and the criminal sanction was

determined within this scope. [5] Goods that can be moved from one place to another without damaging their value and quality are called movable goods (Türk Hukuk Lügati, 1991: 216). Goods that can be transported, money, goods, animals, motor vehicles, etc. are examples of movable goods. The act of theft is possible when the perpetrator takes the property subject to the crime from its place and takes it to another place. For this reason, in order for the crime of theft to occur, the goods subject to the crime must be movable. The concept of movable property includes everything that can be moved and taken away from its place. From this point of view, things that were originally immovable but were made movable during the crime may also constitute the subject of theft. As a matter of fact, if the planks, iron parts or doors and windows of an immovable building are dismantled / disassembled and stolen, it shows that that immovable has now become movable. Although these parts were originally parts of the immovable property, they are now subject to theft because they have become movable as a result of the act of dismantling. In case of theft of such property, the perpetrator of the crime is subjected to the hudud of theft (Udeh, 1990: 4/203). In Article 141 of the TPC, while explaining the offense of theft, the expression *'...taking a movable property belonging to another person... from its place...'* is included. According to the law, the fact that the property subject to the crime is movable is deemed necessary for the formation of the crime of theft.

[5] See TPC, Official Gazete 320 (1926) art. 499; TPC, Resmi Gazete 25611 (2004) art. 109.

According to Islamic jurists, the stolen property must be a movable property, that is, a property that is legally permissible to be used, bought and sold. In Islamic law, things that are not considered permissible for Muslims and forbidden to be utilized are not subject to the crime of theft since they are not considered under legal protection. For this reason, since goods such as liquor, pork, carrion, etc., which are forbidden to be utilized and used, are not under legal protection, the hadd punishment of theft is not applied in case of theft of these goods (Bukhûtî, 1394: 6/129; Ibn Qudâme, 1984: 10/278; Kasânî, 1910: 7/67; Shirâzî, 1996: 4/434). A similar situation exists in today's Turkish Penal Code. The law prohibits the possession and acquisition of drugs such as opium and heroin, and criminalizes their possession except in special cases specified in the law (TPC, 2004: 188-191). For this reason, the possession of the person who possesses the aforementioned goods is not protected except in cases permitted by the legislator, and if these goods are subject to loss or theft, they are not punished with compensation. This approach of today's modern criminal law coincides with the Islamic jurists' concept of al-muqawwim/al-muqamir property. In terms of Islamic law, the stolen property must also have economic value. In other words, the stolen property must be an item that is not objectionable to be utilized and has an economic value among people and can be bought and sold by custom. In the case of theft of goods that have no economic value, which are called tafih in Islamic legal literature, the perpetrator is not subjected to the hadd punishment. Examples include grass, soil, ordinary wood, etc. that cannot be traded (Ibn Abidîn, 1982: 8/329; Ibn al-Humam, 1912: 4/226; Qasani,

1910: 7/67; Serahsî, 1324: 9/154). However, it should not be forgotten that such goods may differ from one society to another, and they may also change in value over time and the ruling of tāfih on them may also change. As a matter of fact, many goods that did not have economic value in the past may have economic importance in later times. The reaching of the limit of the economic value of an item subject to theft and the application of the hudud of theft based on this has also been included in the narrations of the Prophet (saw):

In the narration of Hazrat Aisha, it is said, *"In the time of the Prophet (saw), the hand was not cut off for a worthless thing (tâfih)"* (al-Bayhaqi, 1354: 7/255; Ibn Abî Shaybah, 1981: 9/477; Ibn Hajar, 1959: 14/111; Zaylali, 1997: 3/360). In another narration from 'Urwa, it is stated: *"In the time of the Prophet (saw), the hand of the thief was cut off only if the stolen item reached the price of a shield, and the hand was not cut off for worthless things"* (Ibn Abi Shaybah, 1981: 9/475; Ibn Hajar, 1959: 14/111; al-Nasā'ī, 1992: Sāriq, 10; al-San'ānī, 1980: 10/235; Zaylāī, 1997: 3/360). In a narration from Aisha, the Prophet (saw) said, "*The thief's hand is not cut off if he steals an item whose value is less than a shield*" (al-Nasā'i, 1992: al-Sāriq, 10). Based on these narrations from the Prophet (saw), Islamic jurists have stated that in the case of theft of goods that do not have economic value, the perpetrator of the crime will not be subjected to the hudud of theft. In Islamic law, it is also considered necessary for the property subject to theft to reach the amount of nisab, that is, its economic value to reach the value limit required for the crime of theft (Ibn al-Humam, 1912: 4/221; Kasānī, 1910: 7/77; Serahsī, 1324: 9/137; Udeh,

1990: 4/237). This is also clearly stated in the narrations from the Prophet (saw):

"The hand of a quarter dinar or more is cut off" (Bukhari, 1992: Hudūd, 13; Ibn Māja, 1992: Hudūd, 22).

"The hand of the thief is cut off only if he steals a quarter dinar or more" (Ibn Māja, 1992: Hudūd, 22; Muslim, 1992: Hudūd, 2-5)

"The Prophet (saw) used to cut off the hand of anyone who stole a quarter dinar or more" (Malik b. Anas, 1992: Hudūd, 24-25; al-Nasa'i, 1992: Saraqiq, 9)

"It has not been so long that you have forgotten; the cutting of the hand is a quarter of a dinar or more." (Malik b. Anas, 1992: Hudūd, 24)

"The Prophet 'A'isha (ra) was asked, "What is the value of a shield?" She replied, "It is a quarter of a dinar." (Al-Nasa'ee, 1992: al-Sariq, 10)

Based on these narrations from the Prophet, the majority of Islamic jurists have adopted the opinion that a certain value limit (nisab) must be sought in absolute terms for the stolen property. Only in this case can the perpetrator of the crime be subjected to the hudud of theft (cutting off the hand). The lack of value of the goods in the crime of theft is also included in the Turkish Penal Code. Accordingly, if the value of the goods subject to the crime is low or worthless, the penalty may be reduced or the punishment may be waived by taking into account the manner and characteristics of the crime (TPC, 2004: 145). This principle in the law is similar to the conditions for the reduction of the hadd punishment to be

imposed for the theft of tâfih property in Islamic law and for the theft of stolen property that does not reach the nisab amount. In Islamic law, especially according to Hanafi jurists, even if its economic value reaches the amount of nisab required for the crime of theft, the goods that are the subject of theft should not be of the perishable type (mutesari al-fasad). This is because such goods cannot be kept fresh for a long time and do not have significant economic value in society. Again, the customary practice of taking such perishable consumer goods without permission may be tolerated. For this reason, if fresh fruits and vegetables, yogurt, milk, fish, meat, etc. are stolen, the perpetrator is not subjected to the punishment of theft (al-Qasānī, 1910: 7/69; al-Sarahsī, 1324: 9/153). Islamic jurists other than the Hanafi madhhab disagree on this issue. According to the imams of the other three madhhabs, protected movable property that can be traded and acquired is also subject to theft (Bukhûtî, 1394: 6/139; Kasânî, 1910: 7/68; Sahnûn, 1323: 6/285-286; Shafiî, 1973: 5/133; Zurkanî, 1996: 4/177). This view is also dominant in today's legal systems. Today, all kinds of perishable consumer goods such as fruits, vegetables, milk, etc. can preserve their freshness for months by using various methods and technology. In the Turkish Criminal Code, no distinction is made regarding non-durable consumer goods in terms of being subject to theft. The fact that the stolen goods are movable goods with economic value is deemed sufficient for the formation of the crime of theft (TPC, 2004: 141-147). In Islamic law, the fact that the stolen property is under protection is one of the conditions sought in the formation of the crime of theft. This situation is referred to as *hırz* in the literature. According to custom, theft

means a place where a good is protected and hidden. Although Islamic jurists have adopted different opinions on the methods and forms of theft, they agree on the condition that the relevant item/goods must have been stolen while it was being protected in order to constitute the crime of theft (Ibn Qudāma, 1984: 10/246; Ibn al-Humam, 1912: 4/238; Shirbīnī, n.d.: 4/474). Places that are under protection are divided into two categories: places that are under direct protection and places that are under indirect protection. Places such as chests, safes, shops, and houses that are forbidden to be opened or entered without the owner's permission are places under direct protection. Places that are not specifically built to protect goods but are considered to be under protection due to the presence of a guard or watchman are places under indirect protection. Places of worship that are partially or fully open to the public, official offices, pastures can be given as examples. These places are considered indirectly protected only if there is an officer or guard present. Although Islamic jurists are unanimous that the goods stolen from places under direct protection will be subject to the crime of theft, different interpretations have been made in the formation of the crime of theft in the case of theft of goods under indirect protection. For example, the theft of furnishings of places of worship such as carpets, lamps, etc. Hanafi, Hanbali and Zahiri jurists are of the opinion that the hudud of theft should be applied in the case of theft of furnishings such as carpets, lamps, etc. in places of worship, while Shafi'i and Maliki jurists state that hudud of theft is not required in the case of theft of items such as carpets, lighting, priests, etc. used for the benefit of people in places of worship (Bukhûtî, 1394: 6/139;

Ibn Hazm, 1352: 11/329; Ibn Qudamah, 1984: 10/252; Ibn al-Humam, 1912: 4/242).

The Turkish Penal Code does not specify precise rules regarding the condition of the possession of the stolen property in the offense of theft. Only in the article explaining the offense of theft, the expression *'without the consent of the possessor... who took it from its place...'* is included. In our opinion, the fact that the law uses the expression 'where it is located' instead of 'where it is protected' reveals that it does not require the property subject to theft to be under protection (TPC, 2004: 141). However, the law has increased the penalty by considering the realization of the theft crime about the goods offered for the benefit of the public such as public institutions and organizations, places of worship, transportation vehicles offered for the benefit of the public within the scope of the crime of qualified theft (TPC, 2004: 142).

Conditions Related to the Time and Place of the Crime

According to Islamic law, in order for the crime of theft to be established, the act of theft must take place in a country where Islamic law is applied (dâru al-Islam). The crime of theft that takes place in a country where non-Muslims rule (dāru al-harb) or in a region where there is rebellion and insurrection (dāru al-bagy) does not require the hadd punishment. This is because the crime was not committed in Islamic lands under the rule of a Muslim ruler who came to power through legitimate means. Such a situation constitutes an obstacle to the application of hadd punishment (Ibn Abidîn, 1982: 8/316).

If the crime of theft is committed in times of famine, poverty and hunger, the hudud of theft is not applied. This is because living conditions become difficult for people in these times. The person faces a life-threatening danger due to his inability to meet his needs. In these times of necessity, the person who steals enough to meet his needs does not have to be punished for theft. However, after this situation has passed, the perpetrator is responsible for compensating for the property he took (Bilmen, 1985: 3/276; Kubaysi, 1971: 320; Udeh, 1990: 4/260). In the Turkish Penal Code, the state of necessity related to the crime of theft is defined in Article 147. Accordingly, it is stipulated that if the crime of theft is committed in order to meet an essential and urgent need, the punishment to be imposed may be reduced or waived according to the nature of the situation. In addition, in the section on determining the punishment in Article 61 of the law, it is stated that the judge will determine the basic punishment between the lower and upper limit of the punishment stipulated in the legal definition of the crime committed, taking into account the facts such as the way the crime was committed in the concrete case, the means used, the time and place of the incident. Accordingly, the law considers essential and vital needs as a reason for reducing or lowering the penalty.

Legal Consequences of the Crime of Theft

In Islamic law, crimes are evaluated in three main categories in terms of the penalties prescribed. These are crimes punishable by hadd, crimes punishable by qisas and diyet, and crimes punishable by tazir. Crimes

punishable by hadd refers to the punishments that are strictly determined by the Shāri'ah in order to prevent people from committing ugly acts. Crimes such as slandering a chaste woman for adultery (qadf), adultery, drinking intoxicating liquor (shürb), theft, road cutting and banditry (hırâba) are included in this section. The crimes that require partiality and diyet are crimes against the bodily integrity and the right to life of individuals (such as wounding, intentional killing). Crimes that require tazir are crimes that do not have a specific punishment or sharia hadd, but involve acts that are generally prohibited by the Qur'an and Sunnah. This includes offenses such as bribery, insult, interest, etc. The punishment of these criminal acts is left to the political authority governing the Islamic society. In Islamic law, there is no limit to tazir punishments, and the determination of their type and amount is left to the political authority, namely the head of state and the judiciary authorized by him (Akalın, 2019: 33; Çalışkan, 1989: 31/373; Dağcı, 1996: 23; Abu Zehrâ, 1994: 57; Udeh, 1990: 1/81). In Islamic law, the crime of theft is included within the scope of hadd punishments whose penalty is determined by Allah Almighty. Accordingly, two basic penal sanctions, one physical and the other financial, are prescribed for the crime of theft, which is legally fixed. The severe corporal punishment is the punishment of cutting off the hand of the perpetrator who intentionally commits the crime of theft, while the financial punishment is the return of the stolen property for the purpose of compensating the victim. If the property subject to theft has been destroyed, the perpetrator of the crime should be made to pay for it (Bilmen, 1985: 3/282).

The main punishment prescribed by Islamic law for the perpetrator of the crime of theft is amputation. The legal basis for this sanction is the Qur'anic verse, *"Cut off the hands of men and women who steal as a punishment for what they have done and as a sign from Allah. Allah is the Owner of Glory and Wisdom"* (Qur'an 5/38). Apart from this, the words narrated from the Prophet (saw) regarding the related crime and his practices in this regard, as well as the judicial decisions taken by the Companions in these cases, clearly reveal that the corporal punishment prescribed for the crime of theft is in this direction.[6] This severe corporal punishment prescribed for the crime of theft has the characteristics of deterring and rehabilitating the perpetrator who intends to steal, preventing unjust assignment against the property of individuals, and protecting the social structure in this direction and forcing it to take the necessary measures. The perpetrator of the crime of theft is also obliged to compensate the victim. There is a consensus among Islamic jurists that if the perpetrator retains the stolen property after the theft crime is detected, it must be returned to its owner. However, if the stolen property has been consumed or lost, there is a dispute as to whether it should be compensated. According to the jurists of the Hanafi school, the perpetrator of the crime is not obliged to compensate if hadd was imposed. This is because this is a double punishment for a crime. According to the jurists of the Shafi'i and Hanbali schools, there are two violations in the crime of theft, one against the right of Allah and the other against the right of the

[6] For the relevant hadiths, see The Crime of Theft in Islamic Law.

servant. For this reason, the perpetrator of the crime is obliged to make restitution along with the hadd. The jurists of the Maliki madhhab, on the other hand, have made the obligation of compensation along with the hadd punishment dependent on the economic capability of the perpetrator. If the thief has economic means, he has the obligation to compensate along with the hadd, if not, he does not (Ibn Qudāma, 1984: 10/274; Ibn Rushd, 1995: 4/1752; Serahsī, 1324: 9/156; Shirāzī, 1996: 5/447; Udeh, 1990: 4/269). In the Turkish Penal Code, the offense of theft and the penalties prescribed for this offense are included between Articles 141 and 146. The law divides the offense of theft into two parts: simple and qualified theft, and prescribes prison sentences for both types of theft offenses. Article 141 sets out the qualifications for simple theft and provides for imprisonment of one to three years for the perpetrator. Article 142 of the Law deals with qualified theft offenses. The qualified theft crimes in the first paragraph of the article are punishable by imprisonment from three to seven years, and the qualified theft crimes in the second paragraph are punishable by imprisonment from five to ten years. If the offense is committed against energy, imprisonment from five to twelve years is prescribed. If this crime is committed by an organization, the penalty is increased by half and a judicial fine of up to 10 thousand days is also stipulated. If the crime is committed at night, the penalty to be imposed is increased by up to half (TPC, 2004: 142, 143). In the event that the crime of theft is committed with the intention of using the property temporarily and returning it to its owner with the intention of benefiting from it, it is envisaged that the punishment to be imposed will be reduced by half,

depending on the complaint of the victim (TPC, 2004: 146). It is stated that the penalty may be reduced by up to two-thirds if the perpetrator shows remorse after the completion of the criminal act but before the prosecution is initiated and compensates the victim for the damage suffered by the victim in kind or by compensation. In the case of compensation or partial restitution, the consent of the victim is taken into consideration in order for the perpetrator to benefit from effective remorse (TPC, 2004: 168). In terms of the prescribed penalty, the Turkish Penal Code differs from Islamic criminal law. The current Turkish Penal Code is based on sanctioning the crime of theft with imprisonment and judicial fine, taking into account its nature. In Islam, on the other hand, this act is included within the scope of crimes requiring hadd and the perpetrator of the crime is ordered to be punished with the severe corporal punishment of amputation.

Conclusion

The conditions required for the formation of the crime of theft directly affect the legal consequences of this crime. In order for the crime of theft to occur, the conditions related to the perpetrator and the victim must be met, as well as the conditions related to the stolen property and the place and time of the act of theft must also be met. When Islamic law and the current Turkish Penal Code are compared in terms of the formation of the crime of theft, it is seen that although they are similar in many points, they differ from each other when evaluated in terms of the punishment

prescribed for the crime. The verses and hadiths prohibiting the act of theft in Islam constitute the legal basis of the crime. In accordance with the mandatory provision in the Qur'an, the punishment for the crime of theft in Islam is amputation of the hand. As a matter of fact, the narrations from the Prophet Muhammad and the practices in this direction clearly confirm the legal sanction for this crime. It is certain that the severe corporal punishment prescribed in Islam for this crime, which has serious negative effects on the individual and social life and is seen in almost every society, carries a strong deterrent element. In the current Turkish Penal Code, on the other hand, there are no corporal punishments for the perpetrator of the crime. Instead, various prison sentences and judicial fines are prescribed, depending on the type and severity of the offense. In the Turkish Penal Code, the crime of theft is divided into two types: simple and qualified theft, and imprisonment penalties are prescribed for the perpetrator for both types. In case this crime is committed in an organized manner, additional judicial fines are stipulated for the perpetrators. Considering the prevalence of the crime of theft today, it is certain that the deterrent aspect of the prescribed penalties is insufficient. The existence of verses and hadiths explaining that the act of theft is a crime in Islamic law clearly shows us that the legal basis in this regard is the Qur'an and Sunnah. Depending on these verses and hadiths, the conditions sought in the formation of the crime of theft are basically discussed under four main headings. These are listed as the conditions for the perpetrator, the victim, the stolen property and the place and time of the crime. The Turkish Penal Code, which is in force today, has deemed similar

conditions necessary in the formation of the relevant crime, and has clearly revealed the effect of the presence, lack or absence of these conditions on the punishment prescribed for the relevant crime. In Islamic law, it is deemed necessary for the perpetrator to have the criminal capacity for the crime of theft to occur, and for this reason, the acts of theft committed by mentally unstable persons and children who are incompetent are not considered within the scope of the crime of theft that requires the hadd punishment. In addition, it has been determined that the hudud of theft cannot be applied in cases where there is a bond of descent and kinship between the perpetrator and the victim, and where there is a property partnership. The Turkish Penal Code requires the perpetrator to have criminal capacity for the same crime, and also states that there should be no property partnership, kinship and marriage ties between the perpetrator and the victim. Failure to fulfill the conditions for the perpetrator is considered as a reason for reduction in punishment or impunity. However, the law considers the theft of public goods and goods within the scope of qualified theft. Although the person has the right of direct or indirect use, the theft of public property is accepted as an aggravating factor in the law. In order for the crime of theft to be established, the conditions related to the victim of the crime must also be met. Accordingly, in Islamic law, the victim of the crime must be known and the owner of the property must have valid possession of the stolen property in order for the perpetrator to be punished for theft. According to the Turkish Penal Code, the fact that the victim's possession of the stolen property is not valid is not an obstacle to the occurrence of the crime of

theft. In such a case, the crime of theft is considered to have occurred and the perpetrator is punished for his act. In addition, according to the law, the fact that the victim is unknown does not prevent the occurrence of the crime of theft. As can be seen, there are differences between the two legal systems in terms of the conditions sought for the victim in the formation of the theft crime.

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