Research Paper

Revisiting the Concept of "*Khufyah*" in the Crime of Theft in Islamic Jurisprudence and Iranian Law

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Abstract

Theft is one of the most common crimes across societies, and various legal systems have historically prescribed different punishments for it. Among the conditions frequently mentioned in Islamic jurisprudence (*fiqh*) and legal texts as a component of theft's nature or a prerequisite for specific types of punishment is "*Khafiyyah*" (meaning secrecy or concealment). However, there is no consensus on its precise meaning or how it is realized. Islamic jurists from different schools of thought and Iranian legal scholars have interpreted the concept of *khafiyyah* differently, and the Iranian legal framework does not explicitly address this issue. The primary focus of this research is to explore the concept of *khafiyyah* in the crime of theft. To achieve this, eight prominent perspectives are critically studied, including: being hidden from all people; being hidden from the owner or their substitute; concealment as perceived by the thief; fraudulent conduct and the thief's act of concealment. Based on the findings, the interpretation that defines *khafiyyah* as "the thief's act of concealment" emerges as the most defensible. Although this interpretation is not explicitly articulated in classical Islamic jurisprudence from either Imāmī and Sunni traditions, evidence suggests that some jurists from both traditions have implicitly considered it. The data for this research were collected through library methods, drawing from Shi'a and Sunni jurisprudential sources as well as legal texts. The analysis was conducted using a descriptive-analytical approach.

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Extended Abstract

1- Introduction

Theft is one of the crimes with a long history in human life, criminalized by various legal systems with diverse punishments. In many Imamiyyah and Sunni jurisprudential texts, the condition of "being hidden" *(khufyah)* is mentioned as one of the requirements for absolute theft or *hadd* theft. Post-Islamic Revolution laws in Iran have also considered the role of this condition in theft and its punishment. However, various aspects of this condition are not clear or agreed upon, and several questions can be raised about it. The first question is, "What is the concept of this condition, and how should theft occur for it to be considered 'hidden'?" Changing the criterion for "being hidden" can affect whether a behavior is considered "theft" or "*hadd* theft," leading to consequences such as determining the type of punishment. The Iranian legislator, despite mentioning the "hidden" condition for theft or *hadd* theft, has not referred to the concept of this condition. In jurisprudential and legal texts, there are numerous possibilities and interpretations of the criterion for realizing the *khufyah* condition, which are not necessarily reconcilable. This research aims to enumerate the various possible meanings of this term using the opinions of Imamiyyah and Sunni jurists as well as legal scholars, assess their strength, and prove the more correct view by critiquing and examining different opinions.

2- Method

The data for this research was collected through library methods from Imamiyyah and Sunni jurisprudential sources and legal books (using printed books as well as electronic libraries and reputable internet websites) and analyzed using descriptive-analytical and critical methods. To achieve the research objectives, considerable possibilities mentioned in jurisprudential and legal sources regarding the meaning of *khufyah* were collected, and the strength of each of these possibilities was assessed based on criteria such as customary understanding and related jurisprudential rulings, and the preferred view was determined.

3- Result

1. The disagreement about the concept of *khufyah* is such that one cannot determine a view as the opinion of a specific school of thought or the agreed-upon view of legal scholars.

2. The proposed meanings for *khufyah* criticized in this research can be categorized as follows:

First) Some proposed meanings for the *khufyah* condition are inconsistent with the customary understanding of the concept of theft being hidden, and therefore are not acceptable; unless there is strong evidence for the creation of a religious term for this word, which apparently has no supporters. Views that interpret *khufyah* as being hidden from the owner or their substitute, being hidden from people with a sense of duty, being hidden in the thief's opinion, or being hidden in the opinion of the thief or the victim, are not acceptable due to the aforementioned problem.

Second) Some proposed meanings are inconsistent with the definitive and agreed-upon ruling of proving theft through witness testimony *(bayyinah)*, and

therefore cannot be accepted. The view that interprets *khufyah* as "being hidden from everyone's view" has this problem.

Third) Some interpretations of the meaning of *khufyah* are incompatible with accepted and common terminology in legal science and cannot be accepted; unless a new term is coined, which has not happened so far and apparently has no justification. The view that interprets *khufyah* as "being fraudulent" has this problem.

Fourth) Referring the concept of *khufyah* to custom (the sixth view), although correct in terms of determining the reference for understanding words that do not have a religious technical meaning, does not solve the problem in determining the concept and cannot be considered sufficient. Apart from previous problems, some proposed meanings for *khufyah* show a kind of internal inconsistency that eliminates their reliability.

3. The most defensible view in explaining the meaning of *khufyah* is the thief's preparation and setting the stage for committing theft secretly, which is also close to some other meanings, although they are not necessarily and always identical. This interpretation is consistent with the customary understanding of theft being hidden, and some expressions in jurisprudential books regarding the *khufyah* condition can be evidence of considering this meaning; although no explicit acceptance of this meaning was observed among Imamiyyah and Sunni jurists.

4- Conclusion

In this research, after presenting preliminaries about *"khufyah"* as one of the conditions discussed regarding theft, eight interpretations of its meaning were addressed, and after criticizing the first seven meanings, the eighth interpretation was accepted. These interpretations and the criticism of each are as follows:

1. Being hidden from everyone's view. The main problem with this view is that it is inconsistent with the definitive ruling of proving theft through witness testimony.

2. Being hidden from the owner's or their substitute's view. In criticizing this view, it should be said that accepting it leads to results that are incompatible with the customary meanings of being hidden, and counterexamples can be provided.

3. Being hidden from duty-bound individuals. This interpretation - apart from internal problems in its explanation - is rejected by counterexamples and is not compatible with the customary understanding of being hidden.

4. Being hidden in the thief's opinion. This interpretation, in addition to not matching the customary meaning of being hidden, considers this condition as a description of mentality - not action - and makes it very difficult to prove the crime.

5. Being hidden in the opinion of the thief or the victim (sufficing with either). This view is a combination of the two previous views (second and fourth meanings), and the problems that apply to each of them are also relevant to this view.

6. Referring to custom (*'urf*). In criticizing this view, it should be said that merely stating that the

reference for determining the meaning of *khufyah* is custom does not solve any problem, and the ambiguity about this word should be eliminated, as is the case with other words.

7. Being fraudulent. The main problem with the seventh view is that the word "fraudulent" has a specific meaning in legal science, which is completely different from being hidden, and there is no overlap between these two concepts.

8. The thief's attempt at concealment. From the authors' perspective, this should be considered the most defensible interpretation of the meaning of *khufyah*, for the Sharia has not created a technical term for this word, and customarily, custom should be considered the reference for determining its meaning. Custom considers theft that is carried out with the thief's effort and preparations for concealment as hidden and accepts the application of "taking something secretly" *(akhdh al-shay' khufyatan)* to it, while each of the aforementioned meanings had counterexamples or other problems and therefore were not acceptable. Of course, in many thefts that actually occur, different meanings stated for *khufyah* may be realized simultaneously. This interpretation of *khufyah* - explicitly - is not found in the statements of Imamiyyah and Sunni jurists. However, there is evidence that some jurists had this meaning in mind for *khufyah*.