

Legal Provisions for the Night Circumstance of the Crime of Theft

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1. Introduction:

There is no doubt that theft¹ stands to be of the natural crimes for which no criminal law applicable at any state of the world has denied its criminalization. Further, theft has been punished not only in the current era but has been criminalized on all the old legislations for which it has been a punished crime in all the places and at all the times. In fact, the Jordanian legislator approached the provisions of the theft crime through the first chapter titled (Grabbing the Property of Others) in the eleventh section (the Crimes Committed on Properties) of the second part (Crimes) of the Penal Code No. 16, 1960 when articles 399-413 have been dedicated for the crime of theft. Actually, and by looking through the said provisions, we find that the Jordanian legislator has not designed one punishment for the crime of theft which differs according to the circumstances associated with the said crime. In fact, the circumstances that have an impact on the punishment of the theft crime and its severity perpetrating the crime at night while the circumstance of night has been stated in three locations: in the crime of article 400 of the Penal Code in which the night is considered of the circumstances provided by the legislator to apply the provision. Further, and in article 402 Penal, yet the night stands to be of the circumstances that stress the penalty of robbing at the public road. In addition, and in article 406, yet the circumstance of the night stands solely to be a cause for applying it by which the punishment of theft shall become sentencing to jail from one to three years. Actually, stressing the punishment of theft committed at night is not a new issue as the old laws (e.g. the Romanian Law) used to consider it as a stressed circumstance for the crime and that the penalty of the theft perpetrator committed at night may reach execution². In fact, this paper has been dedicated for stating at the legal provisions concerned with the night circumstance and its applications at the judiciary by stating at the definition of this circumstance, its impact, cause, nature and manner of proving it.

2. Definition of night:

In terms of language, the language dictionaries indicate that the term (night) means (the end of the daylight starting from the sunset)³. As for Al-Muheit Dictionary, then the same defines (night: as being starting from the sunset till the sunrise)⁴ while the current Arab Language dictionaries define the night as being (the dark which comes after the daylight which starts as from the sunset till the sunrise)⁵.

In legal terms, we find that some of the comparative laws - e.g. the French and Egyptian penal codes – have not included a definition for the term (night) for which allowed for a jurisprudential dispute in determining it. In fact, the said dispute firstly emanated when the jurisprudence were divided to two parties in determining the night as some them deemed it unnecessary to determine it as long as the law has not determined it while the said opinion considered that the issue of appreciating the existence of night or its non-existence as being a objective issue (factual) that is left to the discretion of the subject matter court⁶. In fact, this opinion confused between the issue of (reality) and the issue of (law) since if proving the occurrence of the act at a specific time is a objective issue that is referred to the subject matter judge, then determining the meaning of the night and applying the same to the time proved to have the crime been occurred at shall fall within the core intention of the legislator and its application, i.e. (an issue of law)⁷.

Further, leaving determining the meaning of night for the discretion of the judge shall result in inequality as it mostly shall result in stressing the penalty on some for having committed theft at a specific time while it shall not be stressed on others though they committed theft at the same time based on the different opinion adopted by the subject matter judges regarding the same time and whether it falls within the scope of night or beyond it⁸. Hence, the other party of the jurisprudence tended to believe in the necessity to include a definition for the night but yet, the supporters of this opinion have not agreed on one meaning for night but divided to two trends:

The first trend: it adopted the astronomical meaning of the night, i.e. they defined (the night) as being the period from the sunset and the sunrise which is the same meaning in terms of language.

¹ The Jordanian legislator defined the theft in article 399 of the Penal Code as being (taken the movable property of others coercively)

² Subject matter considered: Dr. Fayez Mohammad Hussein, the Circumstances Affecting the Theft Punishment According to the Old legislations, Arab Renaissance House, Cairo, 2002, P. 170 and thereafter and P. 179 and thereafter.

³ The night is the opposite of day, Ibn-Manzour, Lisan Al-Arab, Vo. 12, 378.

⁴ Al-Fairouz Abadi, Al-Muheit Dictionary, Al-Risalah Est., Beirut, P. 1055.

⁵ Ahmad Mukhtar Omar, Contemporary Arabic Dictionary, Third Volume, Books World, Cairo 2008, P. 2055.

⁶ Renee Garaux, translated by Leen Matar, Public and Private Penal Code Encyclopedia, Vol. 8, Al-Halabi Law Publications, Beirut 2003, P. 129.

⁷ Dr. Abdel Mohaymen Baker, Crimes of Assaulting Persons and Properties According to the Egyptian Penal Code, Global Press, Cairo 1966, P. 353.

⁸ Dr. Ramsis Bahnam, Penal Code, Special Section Crimes, Education Institution, Alexandria, undated, P. 1136.

The second trend: it adopted the customary meaning for the night and considered the night as being the dark period only which starts from dusk till dawn. In fact, dusk is the time after twilight in which light is spreading after the sunset while the dawn is the period from which light starts to emerge before the sunrise by which the periods of dusk and dawn go beyond the scope of night. In fact, this trend links the meaning of the night with the cause for which the legislator decided to stress the punishment in the fact that the perpetrator takes advantage of the quietness chance prevailing during the dark to benefit from the easiness of committing the crime while the dark does not spread completely whereby the perpetration of the crime shall be easy except between dusk and dawn. As for the period succeeding the sunset immediately and preceding the sunrise immediately, then the same does not achieve the cause of stressing as light spread during them while the people start their day¹.

In fact, the difference between the two trends is obvious since night, and according to the second trend, is shorter as the time that follows the sunset immediately is excluded but the light remains spreading during it even if being dim and that most people continue their activities and roads continue to be crowded in addition to excluding a similar time that precede the sunrise also².

Actually, some of the jurisprudential and judicial opinion in France adopted the first trend related to the meaning of night which also has been adopted by the Egyptian Cassation Court in some of its orders while it believed in the second trend in other orders³.

Actually, the first trend should be supported being of more determination and closer to achieving justice in addition to being the prevailing opinion in the French jurisprudence and judiciary⁴.

As for the Jordanian legislator, then it has settled this dispute as a whole as it adopted the first trend explicitly when it included a definition for the night in the second article of the Penal Code in which it provided that: (the terms (the night) or (at night) mean the period between the sunset and the sunrise).

In fact, this denoted by the matter adopted by the Jordanian Cassation Court when it ordered as follows: (... we find that the second article of the Penal Code defined the terms of night and at night as being meaning the period that falls between the sunset and the sunrise. Actually, and as it has been proved through the confession of the challenger and out of the evidences heard that the crime occurred after the sunset, then having the order of the court considered the theft as having occurred at night stands to be according to the provisions of the law)⁵.

3. Impact of night circumstance on the theft

It is established that the penalty of the ordinary theft has been stated in article 407 of the Penal Code, i.e. (sentencing to jail from six months up to two years) which is in the ordinary circumstances)

However, and if the theft shall occur at night, then the penalty shall be stressed by which it shall become (sentencing to jail from one up to three years) as stated by article 406 of the Penal Code.

In fact, the punishment shall be stressed more if the circumstance of night was accompanied with other circumstances. Hence, and according to article 400 of the Penal Code (he who shall commit a theft combining between the following file cases shall be punished by the permanent or temporary works for a term that shall be not less fifteen years:

- 1- That the theft shall occur at night.
- 2- The participation of two or more persons.
- 3- That all the thieves or one of them shall be armed whether the weapon hidden or not.
- 4- Entering a place set for the living of people or its supplements or otherwise a matter including this place and supplements – according to the definition shown in the second article – demolishing the wall, climbing the wall, breaking the door, opening the locks using replicated keys or special tools or otherwise by impersonating an employee, wearing his uniform and badges or otherwise pretending having an order from the authority.
- 5- That all or one of the thieves shall threaten by arms or practice violence against persons either to prepare for the crime or to facilitate it or otherwise to secure the escape of the perpetrators to take possession of the stolen matter). Further, the circumstance of night is stressed (if it was accompanied with other circumstances) to be the punishment of robbery (theft on public road) as stated by article 402/2 of the Penalties Code that punishes the perpetrator of robbery on public road by subjecting them for temporary for a term that shall not be less than ten years if the act of robbery shall occur at night by two or more of persons using violence or if they were all or one of them has been armed.

Accordingly, it has been shown that the circumstance of night results in stressing the penalty of theft for which it is a stressed circumstance in all of its cases⁶.

¹ The approach of this trend is considered: Fawzeyeh Abdel Sattar, Annotation of the Penal Code, Special Section, third edition, Arab Renaissance House, Cairo, 2012, P. 774.

² Dr. Mahmoud Najeeb Hussni, Crimes of Assaulting Properties According to the Lebanese Penal Code, Vol. 1, third edition, Al-Halabi Law Publications, Beirut, 1998, 243.

³ Dr. Ahmad Fathi Sorour, Al-Waseet in Penal Code, Special Section, Fifth Edition, Arab Renaissance House, Cairo 2013, P. 1132.

⁴ Dr. Fawzeyeh Abdel Sattar, previous reference, P. 776.

⁵ Criminal cassation order 47/1958 dated 28/8/1957 Qastas Publications.

⁶ The stressing is not limited to the crime of theft only but there are other crimes in which the legislator stresses the punishment if perpetrated

4. The cause of stressing

Though the legislator did not disclose the cause aimed for stressing the punishment of the theft committed at night, yet the jurisprudence sought to derive it for which it has been said to be lying in:

A- The ease to commit the crime: as committing the theft during night while the people are quite taking rest may facilitate the perpetrator's committing the crime and escaping after the perpetration¹.

B- The weak resistance of the victim: the victim –at night- shall be incapable to protect his property as he mostly gets rest and is a sleep at such time while even if he shall be wake up², yet night reduces the resistance of the victim out of its horror³.

C- Difficulty of procrastination: the demand of the victim at night shall be difficult particularly at remote areas as the others are usually asleep and even if some shall hear voice of relief through the dark, yet he shall hesitate getting out to help the seeker for relief since the same forms a risk other than the fears of a mysterious and critical situation for which he would stay at his place for his safety and would not expose himself to danger to save the victim⁴.

D- Difficulty to catch the perpetrator: he who perpetrates his crime at night makes it difficult for the police to catch him as he commits the crime taking the night as a curtain to cover his crime away from the eyes of the policemen⁵.

5. The nature of the night circumstance and how to prove it:

It should be pointed out that the circumstance of night stresses the punishment on the thief not out of the risky of the perpetrator, but also for the severity of the crime as the crime at this circumstance stands to be of more severity from the objective aspect for which this circumstance stands to be of the aggravating material circumstance⁶.

In fact, and as the circumstance of night is of the material circumstances related to the material pillar of the crime, then the same applies to all those contributing the crime whether being of a knowledge or not⁷. Actually, the same has been stated by article 79/1 of the Penal Code as it states that: (The effects of the material that may cause tightening the punishment, reducing or its exclusion apply to all the partners in the crime, those interfering with it and the instigators to perpetrate it).

In fact, and as we mentioned, proving the existence of the night circumstance or the absence of it is deemed an objective issue that is subject to the rules of the criminal proving provided that the order shall be consistence with the reason and logic while the judge shall establish the availability of the said circumstance at his order in addition to stating at the way of inducing it.

In fact, and in applying of the same, the Jordanian Court of Cassation ordered as follows: (As for the night circumstance, then the Penal Code determined the night as being the period from the sunset and the sunrise while the evidence proved that the accident occurred at approx. 9:00 pm for which the said condition is met)⁸. Further, and according to another order: (As the theft occurred at 9:00 pm on 27/11/1984, then the court is right in having considered the theft as having occurred at night)⁹.

Yet another question remained: is it a condition for arriving at the availability of this circumstance to have the crime occurred completely at night?

Actually, and to consider the theft as having been committed at night, then the theft shall be performed during the period of night which means that some of the acts set for commencing the execution shall occur during the period of night when the theft shall stand to be committed at night as it shall not be necessary that commencing the execution shall be concurrent with the start of the nightfall, Further, the theft stands to be committed at night once the perpetrator shall start executing it during the period of night even if the same shall take part of the day as the law provides for committing the theft at night but has not provided the necessity to finish committing it at night¹⁰.

Hence, the order here is concerned with the occurrence of any amount of the materiality of the crime at night for which it shall be sufficient to have the commencement alone at night or to complete the crime without the commencement in order to achieve the said circumstance¹¹.

In fact, the same is according to the provision of the third article of the Jordanian Penal Code stating that (...

at night, e.g. the crime of breaching the sanctity of dwelling place listed in article 347 of the Penal Code.

¹ Dr. Fawzyeh Abdel Sattar, previous reference, P. 774.

² Dr. Adel Al-Ani, Crimes of Assaulting Properties According to the Penal Code, second edition, Culture House, Amman 1997, P. 74.

³ Dr. Abdel Fattah Al-Saifi, the Lebanese Penal Code (Crimes of Assaulting the State Security and Properties), Arab Renaissance House, Beirut 1972, P. 288.

⁴ Dr. Mohammad Said Nammour, Crimes Committed Against Properties, Culture House, Amman 2002, P. 99.

⁵ Dr. Ibrahim Tantawi, Criminal Liability Emanated from the Crimes of Theft and Associated Crimes, Arab Renaissance House, Cairo 1998, P. 34.

⁶ Dr. Adel Azar, the General Theory of the Crime Circumstances, Global Press, Cairo 1967, P.169.

⁷ Dr. Abdel Qader Al-Qahwaji, Penal Code, Special Section, Al-Halabi Law Publications, Beirut 2002, P. 745.

⁸ Criminal cassation order 53/1992 dated 18/3/1992 Qastas Publications.

⁹ Criminal cassation order 203/1985 dated 17/11/1985 Qastas Publications.

¹⁰ Dr. Ibrahim Tantawi, previous reference, P. 38.

¹¹ Dr. Abdel Mohaymen Baker, P. 355.

the crime stands to be complete if the acts of its execution shall be completed regardless of the time of achieving the result).

6. Conclusion

Through this research paper, we approached the legal provisions of the night circumstance and its impact on the theft crime as it has been shown that the night circumstance stands to be of the aggravating material causes for which it leads to stressing the punishment of the theft crime.

Actually, the Jordanian legislator settled the jurisprudential and judicial dispute occurred at other countries regarding determining the meaning of the night as it adopted the astrological meaning for the night and included a definition for the same in article 2 of the Penal Code as being the period as from the sunset and the sunrise.

In fact, stressing the punishment of the crime of theft if committed at night is a good matter as the severity of the crime in this case is of more severity if occurred during the day for which we beg the legislator to keep this circumstance as being aggravating.

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