

# A Crime of the Owner Stealing his Money (Comparison Study)

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## **Summary:**

*The theft only occurs from one individual to another (not the owner), but we find the legislator criminalizes the embezzlement which occurs by the owner and considers it as a theft when these monies are confiscated. In reality, this is considered as an exception from the general origin because the theft doesn't occur by the owner over his monies because the right of ownership gives him all the authorities over this money. For this crime to be achieved, it is conditioned that the criminal is the owner himself and that these monies are either confiscated judicially or administrative or allocated to the other right. This was pointed at clearly in the second paragraph from Article (439) Iraqi penalties and Article (323 & 323) repeated from the Egyptian Penalties Law.*

**Keywords:** Owner Stealing Money, Comparison Study

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## **Introduction:**

1) **The Subject Importance:** The stealing crime only occurs by another person (not the owner) because the right of ownership permits the owner to do anything he wants with his monies. But there are cases which may occur or behaviors issued by the owner and which cause harms to the others which is similar to the harm caused by the theft from the others. Therefore, the legislator incriminated these behaviors using a clear text which is Article (439) which considered this covered by the theft rule even if the doer is the owner of the money to protect the interest of another person or another authority. The legislator considered the individual's use of his monies when one of the cases stated in Article (439) penalties on the rule of theft is achieved. Here, rises the importance of the subject when the actor in this case gathers between the two characters (Criminal & Money Owner) which is an exceptional case. The importance of the subject comes from than sometimes the fulfillment of the debt needs certain procedures which can be judicial or administrative to force the debtor to fulfill his debt and sell his monies and fulfilling the debt from him when he refuses to pay back. If the confiscation was done to sell the confiscated items and the owner acted with the confiscated money, then this behavior obstructs the selling procedures and delays the execution of the general authority orders. It also includes causing harms to the confiscated creditor and to guarantee the rights of the mortgager. Therefore, the legislator intervened and incriminated these cases which are caused by the owner and considered them exceptions to the origin.

## 2) **Reason for Selecting this Subject:**

The reason for selecting the subject is because this case is an exception to the norm. The exception, as a general rule, can't be expanded and must be committed to its limits and conditions and getting out of it especially that the name of the crime is (The Owner's stealing of his monies) which may sound surprising because the owner has the right to use his all monies unless he causes harms to others. Therefore, the reason for selecting the subject is because if the owner used his confiscated or mortgaged money, this is not covered under any penalty text according to the general rules because the owner is not considered stealing when he embezzles his money. Here, the element of money ownership for the non-embezzler is no longer valid even in case of stealing for the others who agrees with the owner in embezzling his monies because that took place with the approval of the owner. He may not have the intention of possessing (for the others) if he only meant from his action just to hide the money temporarily to help his friend. This result shows that the action of the owner under any punitive text doesn't involve the intervention of the legislator where there is a special paragraph in Article (439) penalties considering this as a theft considering the general interest and the rules of justice. Therefore, we attempted to clarify this matter to enable the concerned parties to understand and implement it correctly and accurately and which conforms to the aim of the incrimination which was meant by the legislator and to inform some who suffer

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from the harms due to the harmful effect of the behavior of the owner which is harmful in this protection to their rights. They can motivate a complaint done by the owner concerning a theft crime even if this was the owner as in the ordinary theft.

3) The Research Problem:

There are many problems related to this subject, which they need to be answered through defining and showing the conditions of implementing this exception within the limits drawn for it and in the form which achieves the legislator's aim where the actor gathers between two characters simultaneously i.e. for being a thief and owner of the stolen money in this crime. Is the sentence valid on the cases which were shown by the law in the text or in other similar cases; and is it measure in it or not; and what are the limitations of these cases where their specification is defined by the court or does the legislator specify it in the text if he tries to search for its answer.

4) The Research Methodology:

The Analytical Methodology will be followed for the texts through studying it accurately and concluding its contents or targets and then knowing its conditions and restrictions considering the comparative methodology through the comparison between the Iraqi Legislation and the other comparable legislations.

**Topic One**

**What is the Crime !**

Topic Three defines the entity of the crime through dividing it into two branches. The First Branch explains the concept of the crime whereas the Second Topic covers the Legal Basis and the Legal Nature of the Crime as follows:

Branch One

The Concept of the Crime

This Branch defines the crime and shows the problem of the incrimination and showing the identity where to each is allocated an independent section as follows:

1) Definition of the Crime:

The Iraqi and Egyptian legislators pointed at this crime but didn't give a definition for it. The justice didn't introduce a definition for this crime in the limits of the available decisions. But the doctrine did this task and placed several definitions for it where it was defined as the individual embezzlement of the money he owns if it was own by another person where this money has the right from the rights according to the agreement or the law. Or it is the crime which is occurred to everybody who embezzled from another person something where the embezzler has more right to own it compared to the person he embezzled from even if the embezzler was the owner of the thing<sup>2</sup>. There are those who defined the crime of embezzlement of the owner to his confiscated monies as any crime which occurs by any action which obstructs the execution actions on his money. As for the crime of the mortgaged money, it is the crime which occurs in any action which touches the rights of the mortgaged creditor<sup>3</sup>. The researcher defined it as the owner's embezzlement of his legally mortgaged monies which is full of the others right to prohibit executing it or to prevent the creditor from getting his rights.

2) The Reason for Incrimination:

The incrimination doesn't take place arbitrarily to provide a protection for a legal interest because the function of the criminal law is protecting the legal interests of the society.<sup>4</sup> The interest is linked to the right where it is the need to

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<sup>2</sup> Dr Maher Abd Shoesh, Explanation of the Law of Punishments / Private Section, Institute of Dar Al-Kotob for Printing & Publication, Mosul, 1988.

<sup>3</sup> Dr Mahmoud Naguib Hosny, Explanation of the Penalties Law, Dar Al-Nahda Al-Arabia, Cairo, 1992, Pages: 942 & 950.

<sup>4</sup> Dr Yosr Anwar Ali, Explanation of the Penalties Law / General Theories, First Book, Dar Al-Nahda Al-Arabia, Cairo, 1987 Page: 26.

protect the right from assault or the benefit which must be gained from protecting the right from being assaulted.<sup>5</sup> Every incrimination for an action is for a certain problem because the origin in the actions is un-confidentiality and the exception is the incrimination so when an action is incriminated, then a text must exist to incriminate this action<sup>6</sup>. This is because the incrimination is the exception from the origin and every exception needs to be stated frankly because the crimes are possible unless the work is permit able and according to the general origin. Therefore, within the framework of this crime we find the legislator incriminates the action of embezzlement if it occurred by the owner considering a certain problem which the legislator wish to achieve and that the legislator stated on this case and considered it in the rule of theft because it is not a theft because it lacks some elements. But it gets nearer to the theft because the accused ignores the victim's desire where this is the point of getting near to the theft and keeping away from deceit because in the theft, the thief ignores the desire of the victim whereas there is a role to the victim's desire in deceit. This role appears through giving the money to the criminal and these cases contain assaulting on the money which is paid to him in the intension of enriching<sup>7</sup>. Therefore, the legislator considering the general problem in incriminating the actions done by these crimes because of the unavailability of the corners of the theft in them together with his realization of the danger of these actions and the necessity to punish on them and therefore they were referred to the frank incrimination. When the legislator incriminates an action, he wants to achieves a certain problem, then the incrimination problem in this crime is represented by respecting the orders issued by the general authority which introduced the confiscation<sup>8</sup>. On the other hand, the confiscation includes a guarantee of the rights which the confiscation guarantees it and the law imposes the respect of the confiscation as long as it stands where no ruling was issued to halt it. The legislator incriminated the embezzlement of the confiscated things because there are not sufficient texts covering the theft to provide the protection in this considering that the theft doesn't take place by the owner. This is in addition that the embezzlement in this crime can delays the procedures and must not be resulted in obstructing the execution. In this case, the embezzlement results in causing harms to the rights of the creditors in addition to defecting the orders of the general authority. Therefore, we find the legislator expanded the scope of the stealing crime which covered the owner if he was embezzling the money where the embezzlement must take place with no intention of possession but to obstruct the execution on the confiscated money to serve the indebted owner and for the sake of covering with the incrimination problem which be covered in details as follows:

First: Embezzlement the Confiscated Items:

The Legislator is frank in his attitude where he considered it in the rule of stealing to be distinct from the ordinary theft which occurs without the money where he wants to give it confidentiality. Perhaps tis pushed him to consider it covered by the stealing for the sake of introducing the same penalty used for stealing by the criminal even if he was the owner of the confiscated money. Therefore, the problem of incrimination shows that the embezzlement causes harm to the rights of the lender in addition to obstructing the orders from the General Authority<sup>9</sup>, with the signature of the confiscated and including the maintenance of the rights which the confiscation occurred to guarantee it<sup>10</sup>. This explains why the legislator incriminates this case considering that texts covering the theft can't be applied on this case because the character of the owner and the embezzler represent one individual<sup>11</sup>. The confiscation in the law language means that the confiscated item

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<sup>5</sup> Dr Abd Al-Moneim Al-Sharkawy, The Interest Theory in the Lawsuit, Print One, Abd Allah Wahba Library. Abdein, Cairo, Egypt, 1974 Page: 53.

<sup>6</sup> Dr Ali Hussein Al-Khalaf, The General Principles in the Penalties Law, The Legal Library, Baghdad, 2001, Page: 130.

<sup>7</sup> Dr Mahmmoud Nageib Hosny, Previous Reference, Page: 936.

<sup>8</sup> Dr Hassan Al-Marsfawy, Al-Marsfawy in the Private Penalties Law, Manshat Al-Maaref in Alexandria, 1978, Page: 549

<sup>9</sup> Dr Fakhry Al-Hadeithy, Explanation of the Penalty Law, Al-Zaman Print, Baghdad 1996, Page: 342.

<sup>10</sup> Dr Mamoud NAguib, Previous Reference, Page: 937.

<sup>11</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 342.

remains in its current status and preventing its change because this violates the purpose of the confiscation<sup>12</sup>. Therefore, the wisdom from the incrimination and deciding the punishment is to respect the orders from the general authorities which are committed to consider the people's rights and to guarantee the individuals utilizing their rights. This usage of the confiscated money will obstruct the execution on the confiscated money and hence this obstruction results in wasting the rights of those whose rights were suspended by that confiscated money. The Law imposes respecting the confiscation rule as it is considered as an order issued from a general authority because the embezzlement of the confiscated money is an assault on the public authority which introduced this confiscation and the penalty on the embezzlement here is for the sake of imposing a respect of the orders of that authority<sup>13</sup>. To confirm the respect of the order of confiscation, its confiscation doesn't affect because of its invalidity and we must punish those who embezzle the confiscated money. If he rightly thought that he is quit-claim from the debt for which the money is confiscated, then the owner will take his right by himself. And in his embezzlement to hiss money knowing that the confiscation involves a clear violation to the duty of respecting the public authority orders because the confiscation was decided upon by a specialized authority where this involves a clear assault on the authority which imposed the confiscation<sup>14</sup>.

#### Second: The Mortgager Embezzling the Mortgaged Item:

The Iraqi Legislator stated that this case in M/439 where (Is classified as a theft ..... also embezzling the money possessed and weighted with the right to benefit or with the right to imprison or related to the right of the others even if it was obtained from his owner). Here, the legislator wanted to protect the right of the mortgager whose importance comes from as it is insurance for the mortgaged creditor until he gets back his right in advance to the other ordinary creditors. He has the right to follow up the mortgaged money and has the right to follow up the mortgaged money from any possible hand. On the other hand, the mortgager has a social importance because it is a mean to spread the credit between the people and to spread the credit between the people which can have a large role in achieving the economic boom.<sup>15</sup>

#### 3) The Identity of the Crime:

The Legislator may protect the welfare with more than one text but from various angles. This could protect several interests with several texts and in the framework of the crime covered by the research subject where the text covering it stated in the Third Section (Crimes occurred on the money) in Chapter One of it (The Stealing Crime) in the Articles (439) and what follows it from the penalties law where it was considered attached to the stealing crime in the second paragraph from Article (439) penalties. Then, this crime shares with the ordinary stealing crime in many of its requirements but it differs from it in other requirements. Therefore, we shall cover the aspects of similarity between them in an independent paragraph. Therefore, we shall cover the aspects of similarity between them in a separate paragraph and leave the other paragraph to show the aspects of variations between them as follows:

#### First: Aspects of Similarity:

- a) In terms of the Legislative Treatment: Text on both crimes were stated in Article (439) penalties in Chapter One from Topic Three where both cover the monies crimes.
- b) In terms of the Assault Location: They occur on transferred money.
- c) Both crimes require the availability of the criminal intention for the criminal because they are intentional crimes.
- d) In terms of Size: Both are of type of criminal which is punished by imprisonment.
- e) In terms of Punishment: Both are punished by imprisonment unless achieved an intensification conditions.

#### Second: The Aspects of the Variation:

- a) In terms of the Protected Interest: The protected interest in the ordinary theft is represented by (Right of Ownership) whereas the protected interest in the crime covered by the research is represented in the necessity of respecting orders from top authorities and preserving the creditors' rights<sup>16</sup>.
- b) In terms of the Criminal Character: The ordinary theft occurs with another person other than the owner where Article (439) penalties conditioned this frankly when the theft was defined as: (Embezzlement transferred

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<sup>12</sup> Dr Hassan Al-Marsafawy, Previous Reference, Page: 548.

<sup>13</sup> Dr Mahmoud NAgeib Hosny, Previous Reference, Page: 937.

<sup>14</sup> Dr Hassan Al-Marsafawy, Previous Reference, Page: 549.

<sup>15</sup> Dr Mahmoud Nageib Hosny, Previous Source, page: 948.

<sup>16</sup> Dr Mahmoud Naguib Hosny, Previous Reference, Page: 951.

money owned by the non-criminal ...). Since this crime is committed by the owner of the assaulted money and therefore the crime here is a connection between the owner character and the embezzler of the money covered by the crime<sup>17</sup>.

c) In terms of the Special Intention:

The ordinary theft is represented by the intention of possession whereas in the crime covered by this research, is represented by (Obstrcting the execution of the orders of the general authorities or obstructing the execution on the monies for the creditors to get their rights or is represented by depriving the mortgager from his rights and obstructing getting his rights through the mortgaged money<sup>18</sup>.

Branch Two

The Basis & The Legal Nature for the Crime

This Branch covers the legal basis for the crime and covers its legal nature where a separate paragraph is allocated to each of them as follows:

1) The Legal Basis:

We are in the framework of the penalties law and committed to the principle of no crime no penalty where there must exist a text which incriminates the action otherwise the action is permit able because the origin in the allowable actions and the exception is the incrimination. The text must exist in the penalties law or in the special laws which complement it<sup>19</sup> because it is the legislator alone who defines the crimes and their related penalties<sup>20</sup>. Therefore, this case which the legislator found that it forms a risk and therefore it stated its incrimination in the Second Paragraph from Item (439) penalties where the law considered it as covered by the theft and therefore stated frankly that ( ... Is considered as theft, the embezzlement of the judicially or administratively confiscated monies or from another concerned authority and the money put under the justice even if the embezzlement took place by the money owner and the embezzlement money owned with a benefit right or with the right of imprisonment or related with the right of the other even if he was obtained from his owner). This way, the Iraqi Legislator attached it to the crime of theft where it was stated in Article (439) penalties where this Article defined the theft and specified its requirements because of the proximity between this crime and the ordinary theft despite the large difference between the two crimes. But there are meeting points between them either in terms of the place of crime (Transferred Money) and the legal nature even though there is a difference between them. Therefore, it became possible to question the owner about stealing his monies but under the condition that the monies are confiscated either judicially or administratively or from any concerned authority or has the right of the others. Here, the legislator wants to provide protection to the creditors' rights so that harms don't occur to them and therefore he incriminated the case of spending these monies even it took place by the owner then this is considered as the case of theft in terms of the rules and penalties in favor of the interest of the creditors or others over the interest of the owner in using his monies. We find that the Egyptian legislator frankly stated the incrimination of the actions of embezzlement or for the confiscated monies where this was covered by the text of Article (323) and Article (323) repeated from the Iraqi & Egyptian Penalties Law Number (58) for Year 1937 the amended. Notice that the Iraqi Law didn't contain a special text but made it a second paragraph for Article (439) penalties which defined the theft and showed the legal sample for the theft crime. As for the Egyptian Legislator, he introduced a special text to define the theft crime which is Article (311) penalties where Article (323) covered the embezzlement of the confiscated monies and Article (323) repeated covering the embezzlement of the transferred items from what he mortgaged for a debt imposed on him or others. He believed that the Egyptian Legislator in his report to the texts especially to overcome these cases was successful in this. Therefore, we call for the Iraqi Legislator to follow the same line as the Egyptian Legislator to allocate the texts especially those cases for giving confidentiality especially that crime and to become covered by those specialized in the law and under the

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<sup>17</sup> Dr GAMal Ibrahim Al-HAidery, Explanation of the Rules of the Special Department from the Iraqi Penalties Law, Part Two, Al-Sanhory Library, Baghdad, 2009, Page: 380.

<sup>18</sup> Dr Mahmoud Nageib Hosny, Previous Reference, Page: 951.

<sup>19</sup> Dr Ali Hussein Al-Khalaf, Previous Reference, Page: 152.

<sup>20</sup> Dr DArey Khaleil Mahmoud, The Simple in Explanation of the Penalties Law, The General Section, First Print, Baghdad, 2002, Page: 15.

review of the individuals who are covered by the penalties law but not to become a paragraph attached to an Article from the law articles and he believed that the majority of people don't know the existence of that paragraph in the penalties law.

2) The Legal Nature of a Crime:

Looking into the legal nature needs to be looked at from more than one angle where from the point of view of the crime, we find it among the monies crimes where it was stated in Third Book under the title "The Crimes imposed on the monies in Article (439) and hence its nature in terms of the place of assault doesn't differ from the site of the ordinary theft crime. It must be transferred money because the legislator defined the theft as an embezzlement of transferred money owned deliberately by the criminal. This crime was mentioned in the Second Paragraph from the above-quoted Article where the legislator stated (The judgment for the theft ...) and as long as this crime is in the judgment of theft and since the theft location can only be a transferred money, then the location of this crime is also transferred money. Therefore, its nature where the assault location is among the monies crimes where this is promoted as the legislator allocated the Third ??? for the crimes taking place on the monies which is the first legal Article in Chapter One from the Third B???? i.e. Article (439) penalties. Hence, this crime conforms with the ordinary theft crime in which the assault location is transferred monies but differs from it where the money is owned by the non-criminal in the ordinary theft i.e. it must be owned by the criminal himself.

As for the criminal behavior in them, the two crimes united that they are formed from the embezzlement action which means taking the money without the satisfaction of the owner. The action of embezzlement is a spontaneous action because it occurs and terminates in a certain time and therefore they are from the spontaneous crimes. Also, this crime is not among the negative crimes where it only occurs by a positive activity done by the criminal in order to reach the money and embezzle it<sup>21</sup>. The theft only occurs by an action or a material motion through which the thing is moved from its position but it can't occur with a negative activity<sup>22</sup>. As for the criminal consequence, it is considered as among the arms crimes because of the harms which will occur to the victims as the consequence of embezzling his monies without his acceptance because of what results from the action of embezzling from depriving the victim from using his authority on his monies which gives him the right of ownership because the criminal's intention covers possessing the money covered by the assault<sup>23</sup>. The harms in it in reality is hypothetical where from the moral aspect, they are among the intentional crimes which necessitates the criminal intention by the criminal. This type of crime can't occur unintentionally where it is a deliberate crime and the criminal intention in it is not completed by the general intention but needs a special intention<sup>24</sup>. But even if this crime matches with the ordinary theft but both need the criminal intention whether it is the general intention or the private intention but certainly the knowledge factor because it is an element of the general intention elements. In both, the condition is its availability for the criminal but the nature of the science element varies with the variation of the crimes. In this crime, the criminal must know that these confiscated monies or loaded with the right of mortgage and that it is owned by him and that the consequence of his action is prohibiting the execution of the procedures required to sell the confiscated monies and that the management must be free and it must moves towards the violation of the law and performing the action. But the private intention here differs because the structure of the criminal is represented in the obstruction of the execution procedures on these confiscated monies or halting those who have the right on these monies from utilizing from these monies.

As for the significance of the crime, the standard of the significance of the crime is done through the amount and type of the penalty to the crime<sup>25</sup>. The more severe the penalty, the crime is more significant and therefore the penalty if it was the execution or the imprisonment then it is an offence. As for the imprisonment, it is an offence or a violation where the penalty in the ordinary crime is the imprisonment which is an offence. Since this crime is considered as covered by the theft, then the penalty in it will be the imprisonment and therefore it is also an offence unless it is accompanied by cases or conditions which necessitate intensifying the penalty to become of the offence type.

Second Requirement: The Crimes Fundamentals & Its Penalty:

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<sup>21</sup> Dr GAmal Ibrahim Al-Heidary, Previous Reference, Page: 388.

<sup>22</sup> Dr Amaal Abd Al-Rahim Othman, Previous Reference, Page: 434.

<sup>23</sup> Dr GAmal Ibrahim Al-Heidary, Previous Reference, Page: 369.

<sup>24</sup> Dr Mahmoud NAguib Hosny, Previous Reference, Page: 944.

<sup>25</sup> Dr Ali Hussein Al-Khalaf, Previous Reference, Page: 287.

This crime shares with the ordinary theft crime in terms of the elements and fundamentals which form it where it needs a material and moral corner and to a special owner which is the location of the crime which must be transferred money owned by the criminal. Here, we see the variations between this crime and other theft crimes where we shall allocate an independent branch for each of them in addition to allocating another branch to penalty used for this crime as follows:

Branch One: The Location of Embezzlement:

The theft crime is among the monies crimes and therefore this crime must be a transferred money owned by the others and this is the origin. As for this crime, it must also involve transferred money and hence it conforms to the other theft crimes but differs from them in that the criminal must be the owner of the embezzled money. This subject will be discussed in this Branch:

1) It must be Money: The things to be stolen must be monies because not all the things are monies where the theft crime is an assault on the ownership<sup>26</sup>. The thing is not described as money unless it doesn't get out of its nature from dealing with and has a value. Therefore, instead of it there must be money but if the thing didn't describe the money then the crime doesn't take place. Referring to the Civilian Law Article (61) which states: (Everything which is out of the dealing or with the law judgment, can become a location for the financial rights) and Article (65) states that (The Money is every right which has a material value) therefore can't be proud of possessing it. Also, the things which are out of dealing with through the law judge where these things are not permitted to be a place for the financial rights. Hence, the money is everything which is useful for the (Right of Ownership). The Origin is everything which is useful for the human being and satisfies a need for him and is good enough for some people to setup rights on it. Therefore, it is considered as money and the law doesn't impose the illegibility in the victim's possessing of the money covered by the theft and therefore theft occurs regardless whether the victim's possession of the money is legal or not<sup>27</sup>. But the money must be good for possession and has a value in itself regardless of how small this value is. Hence, everything which can be possessed and has a value by itself and regardless of whether possessing it is legal or not or whether it was obtained in illegal or illegal way, then whoever embezzles it will be accused of the theft crime. Hence, the money is illegible for theft considering that another individual can possess such money. Hence, the person who embezzles money obtained from a theft or a deceit is considered as a theft. It is not sufficient that the thing is money but there must exist another thing which is it must has a value. As for the things which have no value, the feature of money moves away from it then it is not considered as legible for theft where it is sufficient that they have a small or big material or moral value. But it had no value then it is not considered as a theft<sup>28</sup>. The meaning of the steadiness or elimination of the value for the thing is based on the estimation of the money-owner and must be of material nature where the material item is that item which belongs to the world of tangibles where it can touched directly or exploiting it in a way which achieves a utility for its owner. In other words, the material item is everything which is related to the material authorities on which the ownership is based regardless whether the items were solid or liquid or gaseous. But in case of abstraction from the material nature such as the thoughts, utilities and rights they are not classified as theft<sup>29</sup> but the fixed securities are considered as transferrable and then their embezzlement can be considered as a theft crime.

2) It is Transferrable:

According to Article (2/26) Civil (M / 1 / 82 Egyptian Civil), the transferrable money is everything which can be transferred without being damaged. As for the penalties law, in defining the transferred money, it adopts an easier idea where he considers as transferrable of every money which we can change its position through lifting it from its position and placing it in another location regardless where it was damaged or not. This doesn't prohibit whether the money is transferrable if it was part from a property and its separation from the property is achieved regardless of the reason and

<sup>26</sup> Dr GAmal Ibrahim Al-Haidery, Previous Reference, Page: 271.

<sup>27</sup> Dr Halaly AbdAlah Ahmed, Explanation of the Penalties Law, Print One, Dar Al-Nahda Al-Arabia, Cairo, 1988, Page: 511

<sup>28</sup> Dr Wathba Dawoud Al-Sadey, The Penalties Law, Baghdad University assisted in printing it (1988-1989).

<sup>29</sup> Dr Amaal Abd Al-Rahman Othman, Explanation of the Penalties Law, Dar Al-Nahda Al-Arabia, Cairo, 2011.

hence it became movable and transferrable from one location to another. If the land was a property then it can't be classified as eligible to be stolen but the sand, metals, stone & sand which are extracted from the earth are considered as transferrable and are classified as candidates for the theft crime. The Plants are medicines by nature as long their roots are fixed in the earth but if the plant can be separated from the earth such as fruits, then it is considered as transferable regardless of the reason for its separation such as by a theft or due to tornados etc. This way, according to the criminal law, the implication of the transferrable refers only to the fixed money in its location and it is not possible to lift it from its location such as a piece of land or the buildings in general. The conclusion is that the transferred has a wider meaning compared to the civil law where it includes that any transferrable money is illegible for theft.

3) The Money Owned by the Criminal: The law made a condition that the money is owned by the non-criminal in the theft where the origin is that no theft from the owner provided that the money ownership is definitely his. The text in Article (439) penalties stated that the theft is the embezzlement of transferrable money owned deliberately by the criminal but this condition is only achievable if the money was possess able and owned by the other and therefore this condition assumes the following:

The money has to have an owner and that the money is owned by another individual other than the criminal. According to the rule which states that if the money which is pretended to be stolen, is owned by an individual (not the criminal) then it is confirmed the assault on the ownership which is imposed by the theft crime<sup>30</sup>. There is no condition that the owner of the money is identified where he can be un-known but if the money was owned by the individual who stole it, then there is no theft even if the executor is of poor intention at the time of stealing the money for example he thought that the money was owned by others because the individual doesn't steal himself<sup>31</sup> where the theft crime doesn't take place if the individual embezzled his money even if he thought he is assaulting the money owned by the other where he thinks that he is using his possession. If this was the origin, then there is an exception to the origin where any exception needs a text which justifies it and therefore we find the legislator stated on this exception in Article (349) which stated ( ... It is considered as a theft any embezzlement of the transferred judicially or administratively embezzlement or from any other specialized authority and the money located under the hand of the justice in any way even if the embezzlement took place by the money owner. Also, embezzling transferred money with the right of benefit or with the right of imprisonment or related to the other right even if this happened by his owner ). When the exception is decided with a text, then we must be committed to it and not allowing the expansion with it because it violates the origin starting from the permission for the exception which includes the following two cases:

Embezzlement of the transferred or the confiscated judicially or administratively or from the concerned authority and the money placed under the hand of the justice in any possible form. This case is conditioned that introduction of judicial or a confiscation which completes all its legal conditions and must be issued by a specialized authority and that the owner must know of the confiscation and then returns to take on part of this money on which confiscation is placed. This case is limited only to the case of the confiscated monies where if the owner had other un-confiscated monies then his behaviors towards them are correct but if he embezzled the confiscated monies totally or partially even if he was the owner of this thing and then he is considered as a thief<sup>32</sup>.

The embezzlement of transferred money loaded by the right of utilization or with an imprisonment right or related to it the right of the other. The Iraqi Legislator considered the embezzlement as achieving the crime of theft even if the embezzler was the owner and therefore it is conditioned that it is related to the transferred money with the right of benefit or right to imprisonment or related to the right for the other. This must be according to correct legal procedures and that the owner knows of this right. This is outside the scope of this incrimination which is an exception from the origin where we mustn't expand it or make it limited to the most important cases included in the incrimination and penalty. The owner is considered as the thief if he embezzled his own possessed monies if being possessed for another individual resulted from that money the right from the rights according to the law or the agreement. If the landlord embezzled money from the tenant despite his desire and without any reason and before the end of the renting period; and so is the mortgager who retrieves the mortgaged person without his desire and without a reason before the end of the documented debt. Then, in all these cases, if the owner retrieved the thing from the person who possess it then this is considered as a theft crime. This is also used in the English Law where the transferred monies which is considered as the theft crime even if the actor is its owner are: The confiscated items where what is meant by the confiscating the monies is placing it under the hand of

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<sup>30</sup> Dr Mohamed Naguib Hosny, Previous Reference, Page: 824.

<sup>31</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 297.

<sup>32</sup> Dr Maher Abd Showeish, Previous Reference, Page: 284.

the justice or any concerned authority with the intention of preventing his owner from spending it which harms the rights those creditors<sup>33</sup> who did the confiscation on. The item is considered as confiscated if it is placed under the hand of the justice or the concerned authority or the money is placed owned by an individual who is assigned to preserve it called the (Guard) and that the confiscation resulted in prohibiting the owner from behaving to give the right to the confiscator and confiscating the monies which is an action done by the general authority. Therefore, it is assumed that it is signed by a general concerned employee provided the money which is to be confiscated must be specified. For the confiscation to be effective the confiscated person must be informed about imposing the confiscation to make him stop using his money<sup>34</sup>. To impose this crime, the confiscation must be signed and it is not conditioned that the confiscation is correct because the crime doesn't occur unless the confiscation exists. But it exists if even if the confiscation is null where the crime doesn't take place if was selected one of the elements of the confiscation but the crime is valid even one of the conditions selected the validity of the confiscation and the fundamentals required to setup the confiscation which is represented by placing something specified by self under the hand of the justice or the concerned authority and be signed by a general employee and the confiscated monies must be specified and the confiscation must has a legal reason where the confiscated person must be informed. Also, defining the confiscated items is done through organizing proceeding for it where there is no confiscation without a proceeding where the items which are not listed in the confiscation proceeding, are not included by the confiscation and that informing the confiscated person by the confiscation occurs by the methods specified by the law or to be known about using any mean<sup>35</sup>. But the allocations of the guard for the confiscated money isn't among the principles and therefore if became available all principles of confiscation, then its crime becomes available. The invalid confiscation is considered as a work done by the general authority and which must be respected until it becomes invalid. Even if the confiscation is considered invalid, this ruling doesn't cancel the crime because the validity of the confiscation isn't among the fundamentals of the crime where the confiscation doesn't influence its existence because it is a confiscation which must be respected until it becomes invalid. Otherwise, there is the abundance of the conflicts where many of the accused escaped from the penalties and the prestige of the justice of legislations. The justice imposed the respect of the confiscation unless a ruling is issued for its invalidation because the legislator intended the punishment on this crime because he sees that it includes an assault on the general authority which imposed the confiscation judicially or administratively and that the purpose from the penalty is respecting the general authority orders (The Appeal 7/4/1975 The Appeal Rules S26K / 75). Attention is given that if the confiscation ended before the occurrence of the crime, then the crime doesn't take place because this means that the action occurred on non-confiscated monies. There are direct and indirect reasons for the completion of the confiscation which means the confiscation is imposed to it and hence the confiscation ends as if the confiscated money was sold to fulfill the right of the confiscated because he has the right to concede the confiscation. As for the indirect reasons which are exposed to the right then they terminate the confiscation where the most important is the transfer the money from one location to another to preserve it<sup>36</sup>. Or the individual who has been confiscated has paid back the debt before committing the crime where there is no use of paying back the debt after the occurrence of the embezzlement. If the money is confiscated, it becomes a subject under the hand of the general authority and acquired the prohibition which can't be touched until the confiscation is lifted by the authority which imposed it or he conceding it because of it is of his interest.

The Second Branch: The Embezzlement:

The criminal behavior of the crime is specified by the legislator in its legal sample where its subject is settled by the text which incriminates the action. This means that the legislator gives a name to the criminal behavior with which every crime occurs and based on what we stated above we find that the legislator defined the criminal behavior in the crime because is considered as a crime (Embezzlement) which means the possession of something without the satisfaction of its

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<sup>33</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 343.

<sup>34</sup> Dr Mahmoud Naguib Hosny, Previous Reference, Page: 940.

<sup>35</sup> The Consultant Majmad Ahmed Hassan, The Penalties Law in the light of the rules of appeal, Volume Two, Print Two, 2003. Page: 172.

<sup>36</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 334.

owner<sup>37</sup>. It can also be defined as a material activity issued by the criminal and with which the assault on the thing is achieved through taking it from its owner or transferring it to the criminal with the satisfaction of the victim. Others define embezzlement as taking the possession of something without the satisfaction of his owner<sup>38</sup>. The Jurist (Garson) defined the possession as the actual case which allows the individual to control the material control on the thing so that he has the authority to use or transfer or destroy it. The embezzlement in this crime is represented by any action which can obstruct the execution procedures on the money or the loss of the creditor's right<sup>39</sup>. This was what the doctrine and the justice agreed upon<sup>40</sup>. The embezzlement here differs from the embezzlement in the ordinary theft crime because the embezzlement in the ordinary theft takes the form of controlling the complete possession of the transferred money which owned by the other without his satisfaction i.e. the money is possessed by the other as for this crime, the complete possession of the money is for the owner when he is the embezzler and that whose money is confiscated continues to be the owner of the thing until it is sold. But the embezzlement has a special meaning here where it doesn't mean the possession of the thing secretly because the possession and the ownership are associated to the embezzler before and still continuous until the item is sold. What is meant by the embezzlement here is that the owner removes the character of confiscation of his property. The embezzlement covers all forms of the behavior which results in not executing the confiscation or selling the transferrable on the specified day for this. Examples of these are the money confiscated by selling or by consuming it if it was consumable or hiding the money through make it far away from the location of confiscation. As for the destruction the money in the place of confiscation, the juristic differ about it where there are those who say that this doesn't achieve the fundamental of the embezzlement because it doesn't obstruct the implementation. Another opinion states that the embezzlement can be done by destroying the money which represents an assault on the general authority orders concerning the confiscation and the loss of the right for the confiscated creditor. We put our opinion to support the last opinion where the use of money isn't considered as embezzlement unless this use won't prevent the execution in its specified time or obstructs it such as riding the animals provided it is offered for selling in the day specified for it. Also, the transfer of the money from the confiscated location to another location because of a project and it is not meant obstructing the execution in which the embezzlement condition is not achieved provided informing the creditor for this transfer. As for embezzlement of transferred money loaded with the right of utility or with the right of imprisonment or related to the right of the other, then this case covers any action which results in controlling the safeguard of the creditor or wasting it. The embezzlement occurs on the money transferred which was mortgaged by the criminal to the mortgaged creditor according to a mortgage contract. In this case, the owner is considered as a thief if he embezzled the money owned by him if it was possessed by another individual who has some of the rights decided by the law and the embezzlement is considered as achievable even if the mortgage contract covered by invalidity. The landlord who embezzles the money from the tenant without his permission and without a reason and before the end of the renting period or the debt security from the mortgager despite his desire and without a reason and before the termination of the documented debt, is considered as a thief based on Paragraph Two from Article 439 Penalties. For the embezzlement to be achieved here, the money must be possessed another individual as if the mortgaged money was owned by the mortgager because the theft is considered as an assault on the possession before it is an assault on the ownership. The assault on the possession includes a theft when the actor is the owner. This way, we can't imagine that the crime occurs for the non-existence of the embezzlement only occurs if the money is owned by the other. Hence, the embezzlement means extracting the thing from the possession of the others<sup>41</sup>. This means that the money is possessed by the other either confiscated or loaded for the other which means it is out of the possession of his owner where this crime is achieved when the embezzled money is possessed by the other.

Based on what was stated above, the embezzlement occurs for the confiscated action which obstructs the execution procedures such as hiding the confiscate money or not submitting it when requested to do so or signing a virtual confiscation. But if this doesn't obstruct the executing, then this prevents the embezzlement such as the transfer of the money from one location to another to preserve it. Also, the embezzlement is achieved in case of the money is

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<sup>37</sup> Dr Helaly Abd Allah Ahmed, Explanation of the Penalties Law, Private Department, Print One, Dar Al-Nahda Al-Arabia, 1988, Page: 495.

<sup>38</sup> Dr Maher Abd Showish, Previous Reference, Page: 272.

<sup>39</sup> Dr Mahmoud Nageib Hosny, Previous Reference, Page: 942.

<sup>40</sup> Dr Hassan Sadik Al-Marsafawy, Previous Reference, Page: 553.

<sup>41</sup> Dr Gamal Al-Hodeiry, Previous Reference, Page: 281.

confiscated or loaded with the right of utilization which is achieved with every action which possessing the creditor's insurance. The embezzlement here conforms to the embezzlement in the confiscated money but it occurs on the transferred money which was mortgaged by the criminal to the mortgaged creditor according to a possessive mortgage or the transferred loaded with the right of utilizing and the embezzlement is considered as achieved even if the mortgage contract is covered by the invalidation<sup>42</sup>.

#### Branch Three: The Criminal Intention

The crime of the owner stealing his monies is a deliberate crime which necessitates the availability of the general and private criminal intention where the general intention is achieved by the availability of its elements which are the knowledge and the administration which must be available for the availability of the general intention. The General Intention is required in all the deliberate crimes which are achieved with the knowledge of the criminal with the crimes' elements and legally expressed will whereas he is only present in some crimes whereas in other crimes he needs the availability of special intension as a theft crime and therefore it necessitates the availability of the following two elements:

First: The Knowledge: This means that the criminal knows all the realities of the crime where in the framework of the crime which is the subject of the research then the knowledge must be available by the criminal that this money is confiscated. He also knows that his monies are related to the general authority right and the right of the creditor where he has no right to do something which touches this right. The knowledge is non-existent if the confiscation was ignored and the non-existence of a restriction on his authority where the knowledge here doesn't hypothesize and therefore it must be a definite knowledge and isn't sufficient that he can know it or must acknowledge it<sup>43</sup>. The evidence must be established that the criminal knows this and even when the accused is declared of the confiscation doesn't necessarily mean that he knew it but the accused can prove that he didn't know of the confiscation despite that declaration as if he thought when he used the confiscated items by the removal of the confiscations after the cancellation the order according to which the confiscation was signed. If it is proved that the criminal didn't know about the confiscation, the intension and the crime became non-existent because of the non-existent of its moral fundamental. As for the element of knowledge in case of embezzlement the mortgaged things or the loaded with the right of the other, then the criminal must know that the money is mortgaged or related to the right for the other and must know the risk of his action over the right of the mortgagees.

#### Second: The Will

The element of the knowledge isn't sufficient by itself to setup the general intention in building the idea of the deliberate because the knowledge is a stagnated mental case which doesn't explain the direction of the intention for the individual where he is a must element but not sufficient. The knowledge must be available together with the availability of the intention until said that the intention became available<sup>44</sup>. The will is a psychological activity directed to achieve a certain purpose through a certain mean. This psychological feature is a force utilized by the individual to influence what he is surrounded by and which must issue originated by awareness<sup>45</sup>. The will here must be directed to perform the action that is the will of action and the will of the consequence where the will must be free and realized. This free and realized will must perform the action which is represented by embezzlement of the confiscated money or the loaded with the right for the other.

#### Second: The Private Intention:

In some crimes, the moral fundamental isn't complete unless the availability of the (Private Intention) in addition to the (Public Intention). The (Private Intention) is not a replacement but it complements the (Public Intention) where the crime which needs the private intention, its existence is only complete by the presence of the private and public intention.

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<sup>42</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 346.

<sup>43</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 344.

<sup>44</sup> Dr Galal Tharwat, The Theory of the Multi-intention Crime, Al-Halaby AL-Hekokia Publications, Beirut, Lebanon, 2003, Page: 183.

<sup>45</sup> Dr Mahmoud Naguib Hosny, The General Theory for the Criminal Intention, Dar Al-Nahda Al-Arabia, Cairo, 19178, Page: 200.

This is the case with the theft crime where it needs a private intention where here is represented the structure of the accused does the intention in this crime differ from the accused intention in the ordinary crime which is the (Intention of Possession). This is because the intention of possession of the embezzled or the mortgaged money is not imaginable. This is because the criminal is the owner of this money as for the private intention in this crime and in case if the money was confiscated judicially or administratively then the criminal intention is represented by (Intention of obstructing the execution) or (Intention to Prohibit the Execution) then there is who can define it as the intention to obstruct the execution. Each action done by any individual, who is resulted in the obstruction of the execution on the confiscated money, makes the criminal intention available<sup>46</sup>. Here, the accused aims at introducing the obstacles and the difficulties in the path of the confiscator to justify his right through the confiscation procedures. But if he controlled the money without having tis intention as if he just wanted to use the thing and then returns it or if he wants to transfer it to another place to preserve it from a danger which threatens it, then this intention becomes non-existent and the moral fundamental for the crime becomes non-existent and then the crime becomes non-existent accordingly. As for the Private Intention in case of the mortgaged things or what is related to it by the right of the other, then the private intention takes the form of the accused depriving the mortgager from his rights and obstructing getting his right through the mortgaged money which means wasting the insurance of the mortgaged creditor. The intention becomes non-existent if he thought that the mortgage or the debt have finished. Also, the intention becomes non-existent if the intention of depriving the mortgager from his rights as if he wanted to perform maintenance repairing of the mortgaged money and returning it to mortgager and enabling him to satisfy his rights. As for the case of the money loaded with the right to benefit, then the intention for the deceit must be available by the criminal and which takes the form of attempting hard not utilizing from suspending his right with this money<sup>47</sup>. The sender can take revenge from the mortgagee or to prefer a creditor on another or the need for money because the sender is not deliberately an element. The Egyptian Court of Appeal stated that the crime isn't one of its fundamentals especially the Appeal dated 26/4/1957 as a group of Legal Rules (C 4-77, 69) but shows its influence in estimating the penalty as a subject which can't be ignored<sup>48</sup>. It can be considered as among the sympathy used by the judge in estimating the penalty. The problem of the availability of the intention is a matter which concerns the judge's subject and there is no monitoring to the distinction court because he extracts it from the lawsuit's facts and from the evidences available for him. The Court must show in its ruling by condemnation with the availability of the intention for the criminal but its ruling has a defect where the ruling doesn't has to speak the independence of the intention. But the event which was proved by the court confirms that the criminal had the intention of stealing and the harm is assumed in this crime where it is achieved once these things are hidden. There is no need for the text in the ruling on its availability where we should make sure that the criminal intention exists at the moment when the criminal commits the action which forms the crime. This is considered as among the main principles and a must condition for the setup of the criminal responsibility<sup>49</sup>.

#### **Branch Four: The Crime's Penalty**

The Legislator frankly pointed out the theft ruling is only proven if the individual embezzles his confiscated monies or which related to the right of the other. Consequently, he is punished with the same penalty allocated to the ordinary theft crime. This is not only limited to only the simple theft penalty but it is a comprehensive appending for all the rules which are covered by the crime penalty<sup>50</sup>. If the fundamentals of the crime of embezzlement of the transferred judicially or administratively confiscated monies or loaded with the right of benefit or the right to imprisonment; then the criminal deserves the penalty decided for the ordinary theft which is stated by the legislator in Article (439) which stated (Considered in the Theft Ruling ...). Hence, the criminal can be penalized with decided upon penalty for the crime of simple theft which is the imprisonment based on Article (446) penalties and look at (Text of Article 318 Egyptian

<sup>46</sup> Dr Hassan Al-Marsafawy, Previous Reference, Page: 559.

<sup>47</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 347.

<sup>48</sup> Dr Hatem Hassan Mosa, The Judge Criminal Authority in Estimating the Penalty and the Precautionary Actions, Manshaa Al-Maaref in Alexandria, 2002, Page: 434.

<sup>49</sup> Samir Al-Ameen, The Offense of the Theft, Fourth Print, The National Center for the Legal Issues, 2003, Page: 68.

<sup>50</sup> Dr Mahmoud Naguib Hosny, Previous Reference, Page: 946.

Penalties). The upper limit of the imprisonment penalty is five years and therefore it is an offence where the criminal must be punished even if he returns the money covered by the crime and pays back all the debt as long as fulfilling the debt took place after the occurrence of the embezzlement. Since the crime occurs once its fundamentals are completed and no assault takes place later on after its occurrence and therefore doesn't deny the intension of the embezzlement by the criminal<sup>51</sup>. If the crime occurred perfect that he deserves the agreed upon penalty for the crime, but the activity of the criminal may stop after starting executing it for reasons outside his control or there is no influence of his control over it and then he can be asked about commencing a crime where starting is visualized in this crime in a way similar to the normal theft. Commencing in the reality is an incomplete crime which lacks the result and a perfect crime for the commencing itself but if the criminal consequence isn't achieved as the consequence of the criminal activity after he started its execution where he will ask about commencing in this crime in terms of the commencing rules on the ordinary crime. The criminal is penalized by relying on (M/31/D) penalties (Look at Text Article 321 Egyptian Penalties) and since the decided penalty for the simple ordinary theft is the imprisonment, then the penalty of committing the penalty is imprisonment for a period which doesn't exceed half the maximum limit for the imprisonment penalty. Since the maximum imprisonment penalty is five years then the penalty of commencing is by a period which doesn't exceed two and half years. The penalty of starting for the same decided upon rules in the other paragraphs of Article (31) when the crime is associated with severe conditions.

But if its compared with a condition or more of the intensifying conditions, then the penalty changes and reaches the life or temporary imprisonment according to Articles (440 – 445) penalties according to being associated with a case or more of the intensifying cases, so that the penalty increases whenever the association of the crime takes place in more than one case. Remember that the theft crime is among the crimes with which is associated many strict conditions and consequently, the same cases of restrictions are applied in Articles (440-445) penalties (Look at text Articles 313 – 317 Egyptian Penalties) on this crime with the exception of those cases which don't conform to the nature of the crime such as validating the identity of the criminal i.e. whether he is a server, employee or a worker. Also, are those features related to the victim or the conditions related to the feature to the money as if it was a public money because these public monies are allocated to the general utility and can't be confiscated because they are not special monies but this crime occurs on the private monies owned to the same criminal where this is the confidentiality in this crime. The court can change the imposed penalty in the simple theft crime to the fine which doesn't exceeds twenty Dinars if the value of the stolen money doesn't exceed two Dinars but this type of money doesn't currently exist. Currently, the least transacted currency is of 250 Dinar category which needs to re-consider in the text (M/446) penalties and amending this sum of money to make it conform with the economic situation for the country. Therefore, we call the legislator to amend this money and make it for example not more than one hundred thousand Dinar where this subject can only be performed by the legislative authority.

### **Epilogue:**

#### **First: The Conclusions:**

The Iraqi & Egyptian Legislators just pointed at this crime without defining it; but the doctrine attempted to define it by placing several definitions were the researcher defined it as is the owner's embezzlement his legally confiscated money or loaded by the right for the others for the sake of prohibiting executing it or obstructing the creditor from getting his rights.

- 1) We found out that this crime is confidential where this confidentiality is represented that it occurs between the owner on the one hand and on judicially or administrable or loaded by the right for the others. This means that if the owner used his other monies, then they are not supervened to the incrimination.
- 2) The problem in the incrimination in this crime is represented in halting the criminal from halting the execution on his confiscated monies and dis-obeying the top authority orders or prohibiting the criminal from halting the creditor from getting back his right.
- 3) The Private Intension in this crime isn't represented in (Intention to Possess) because the criminal is the original owner but is represented in the criminal intention in obstructing the execution procedures and in not fulfilling the creditor's rights.
- 4) This crime is considered as a theft and therefore it shares with the ordinary theft in many common factors such as the crime's location, embezzlement, criminal intention and the penalty. Even though there is some specialties for this crime in some of its factors which were shown in this research.

#### **Second: The Recommendations**

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<sup>51</sup> Dr Fakhry Al-Hadeithy, Previous Reference, Page: 347.

- 1) We call the Iraqi Legislator to follow the Egyptian Legislator and give this crime a special text to be included in the penalties law because of the these risky behaviors and the size of harms which can arise from it to sow the risk of this crime and to inform those concerned and to bring to their attention the existence of a text where accordingly the law punish for such behaviors.
- 2) We recommend for the legislator to amend the value of the stolen money. The legislator gave permission to the court to change the penalty imposed for simple theft to a fine instead of imprisonment if its value didn't exceed two Dinars due to the very little value of this sum and because of the non-existence of a money category with this money where currently the least money category is (250) Dinars and making this money doesn't exceed 100,000 Dollars.
- 3) The necessity for a frank text concerning the availability of the intentional cheat by the criminal when embezzling his confiscated monies or loaded with the other right.

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