

## **Investigating the possibility of committing crimes against property in common property by property partners**

**Erfan Mohadesi \***

Judicial intern and master's student in criminal law and criminology at the University of Judicial Sciences  
erfanmohadesijd@gmail.com

**Amin Mikayili**

Master's course of the University of Judicial Sciences and Administrative Services of Justice  
a.mickailii.9667@gmail.com

### **Abstract**

According to Article 30 of the Civil Law, anyone can take any possession they want in their property, which is based on the rule of possession; But it is obvious that the limits of these possessions are not absolute and will be effective to the extent that it does not harm another person. This article discusses the possibility of committing crimes against property in common property by a partner in property. The importance of the discussion here is that jurists and jurists have presented different opinions in this regard since long ago. The discussion about the possibility of crimes against property in common property is a subject that has different opinions about it. A group believes that since each partner has ownership rights in any part of the common property, it cannot be considered "other's property" and therefore, no crime has occurred. However, some others believe that even in common property, each partner has rights and responsibilities in proportion to his share and may be harmed, and therefore, there is a possibility of committing a crime in it. In this article, the resulting data are evaluated with the library-documentary method and using the analytical-descriptive method. The findings of this research show that according to the legislative process and the opinions of scholars and jurists, the possibility of committing crimes against property in the common property by the partner, other than the legally authorized cases, according to the principle of legality of crime and punishment, is contrary to the established principles. Criminal law and interpretation are narrow in cases of ambiguities and abstractions. The purpose of

this research is to examine different opinions and theories in this regard and to present the inferred results and to examine legal solutions to improve legal ambiguities and gaps.

**Keywords:** crimes against property, common property, property partner, theft in common property, betrayal of the trustee's trust, partner in property

### **Introduction**

Common property is a term used in real estate law and it means property that belongs to a group of people and each person has a common right to it. This can lead to legal issues, especially in cases where crimes are committed against these types of assets.

Common property is property that two or more people jointly own. The material possessions of each partner, even to the extent of his share, are subject to the permission of others and without it, he is a guarantor. On the other hand, all the legal possessions of the partner are valid for their share and do not require the permission of others. However, some possessions in the common property are subject to discussion; Because in order to conclude it, in addition to the agreement of the parties (as credit possession), property possession (as material possession) is necessary.

The purpose of predicting crimes against property in general is to protect the property and private property of individuals, and the common denominator of all crimes against property is "belonging to someone else's property", and this issue faces a problem in common property because in this property There is both a person's ownership of the property and the ownership of the partner in the property is fixed at the same time. Accordingly, in Iran's qualitative law system, there has always been a difference of opinion regarding the ownership of common property by individuals, and the judicial procedure in this regard, based on the views and opinions of doctrine and jurists, is ambiguous in the principle of whether or not crimes against property are crimes in Iran. Common property was owned by the partner.

Crimes against assets can include theft, vandalism, destruction or misuse of assets. In the case of common property, these crimes can be more complex because it must be decided who bears criminal responsibility and how damages should be divided.

To examine this issue, one should refer to some legal

issues related to joint ownership, criminal law and even legal philosophy. This can include reviewing laws and regulations related to joint ownership, criminal liability, and determining the amount of damages.

Overall, this issue warrants careful investigation and could lead to important advances in our understanding of property rights and property crimes.

### **1. History and concept**

Distribution is a concept of rights that is used in contrast to allocation, and it means that several people jointly share a property at the same time. The concept of common property is used in contrast to assumed property in the sense of property with absolute and complete ownership. The state of ownership is widely used in the science of law as a credit concept and it means the lack of completeness and completeness of ownership. In this way, the property of individuals is shared, so the authority that a person has over his property in an absolute manner is limited and bound by rules. Of course, this is a shared ownership in the world of credit where the owner is a partner in the property and has the right to exercise ownership over it. For example, when a person dies, his heirs have the right to exercise ownership in his estate, but not independently.

Dissemination in the word means 1. revealing, disclosing the news with its component 2. spreading, spreading, sprinkling (Ma'in, Dr. Mohammad, 2016: p. 118).

Partnership means the gathering of the rights of the owners in a single object in the manner of distribution, which translates as: "the gathering of the rights of the owner in the object, in the way of the owner". (Researcher Hali, 1403, p. 129)

The word "partnership" means to be a partner and join hands in something. (Moin, Dr. Mohammad, 1386, p. 123). And according to the jurists, it is used in the meaning of "He is the only one of the Latins, and he is Azid". (Hazrat Ayatollah Khomeini: Ruhollah, 1373, p. 583)

### **2. Theories about ownership in common property**

Regarding the ownership of common property by individuals, there have been serious

differences of opinion regarding this issue and the adoption of different procedures by high judicial authorities and the opinions of jurists in this regard. would do

In general, there are two views regarding common property:

First: The shared property belongs to the partner, so taking possession of the other partner in any way is considered a crime and is subject to the title of theft, betrayal of trust, fraud or intentional destruction, depending on the case. This opinion is supported by Article 581 of the Civil Law (Article 581 BC) and the Insistent Decision No. 32 dated 20/09/1369 of the General Board of the Supreme Court, which considered the seizure of common property without the permission of other partners to be legally invalid. (Essari case number 4987/19//25, row 46169)

Second: The common property belongs to the perpetrator, so any seizure of it is a seizure of his own property and his act will not be a crime. Of course, it is a civil guarantor.

Both opinions have the same strength and the only way they look at the crime is different. The second opinion looks at the matter from the perpetrator's point of view and states that due to the fact that the perpetrator is a partner in the common property, the condition of the property belonging to another has been removed in crimes against property, and from this point of view, his act is not a crime. In other words, the meaning of this group of the conditions for the realization of these crimes is "belonging to someone else" and not "non-belonging to the perpetrator". But the proponents of the first theory look at the issue from the perspective of other partners or the victims of the crime and considering that they are partners in the common property, they condemn the perpetrator to the punishment of committing crimes against property in the common property. In other words, the supporters of the first theory consider "non-ownership of the property to the perpetrator" as a condition for committing crimes against property. (Mir Mohammad Sadeghi, Hossein, 1403, pp. 163 and 164)

The reason for the difference between jurists and jurists in choosing one of the above theories is that if the issue is looked at from the point of view of fairness and justice, the first opinion appears to be justified because one of the partners has violated the rights of the other partners in an illegal and unjust manner. And for that he deserves to be punished. On the other hand, if the issue is looked at from a purely legal point of view, the second opinion is more justified because one of the conditions for the realization of crimes against property; The property belongs to another and this condition is not met in crimes against property in common property by the partner in the property, so the crime is not realized. In spite of the fact that it is necessary to interpret in favor of the accused, especially in cases of suspicion and doubt in the case, the acceptance of the second opinion will also be accepted because it also reduces the scope of these crimes.

Any of the above theories should be chosen as the criterion for action in all crimes against property, and one of these theories cannot be chosen separately in each of the crimes against property in common property. Currently, despite the existence of Article 674 of the Islamic Penal Code approved in 1392 (674 BC) regarding betrayal of trust, it has been determined that that issue is part of the discussion of betrayal of trust, and this approach of the legislator showed the willingness to accept the opinion First, it is possible to commit these crimes in the common property by a partner.

### **3. Case investigation of crimes against property**

In general, crimes against common property can be committed by a partner in all crimes that can be committed by an ordinary person. Regarding crimes such as embezzlement, since it is considered a part of betrayal of trust, and the property entrusted to the perpetrator is according to his duty and government property, and according to his character, who is a government

employee, this crime is realized, therefore, the state of partnership and distribution is realized. It is not possible except in special cases. In this speech, we mention the common cases in the realization of these crimes:

#### **1-3. Fraud on common property by a partner**

In the crime of fraud, as in other crimes against property, the stolen property belongs to another person and is one of the elements and conditions for the realization of the said crime. Therefore, a person who uses tricks and fraudulent maneuvers to get his property out of the possession of another, even if the possessor of the property is legitimate, does not commit the crime of fraud.

Therefore, a mortgagor who takes the mortgaged property out of the hands of the mortgagor by resorting to fraudulent means, or a lessor who takes the leased property out of the hands of the tenant by resorting to fraudulent maneuvers, considering that the said property belongs to himself, then the principle of non-ownership of the property has been taken. Otherwise, it is not one of the elements of the crime of fraud, and the said crime is not realized.

Of course, in French courts, according to Article 405 of the French Penal Code, which interprets fraud in a general way, they consider this case to be a crime of fraud. In the laws of England, there is also the opinion that the legitimate possession of the possessor creates ownership rights for him, so the above issue is considered fraud. (Mir Mohammad Sadeghi, Hossein, 1403, p. 81)

The sale of common property by one of the partners, who knowingly and intentionally sells it by pretending that it is his own, because it is to the detriment of the other partner, and the sale of the property of another, will be an example of fraud. ) Decree No. 144/74 dated 21/08/1374, Branch 11 of the Court of Appeals of Tehran province did not consider the sale of property when the defendant has a share in it as an example of fraud and subject to the law on intensifying the punishment of embezzlement and fraud perpetrators, and due to the lack of bad faith It is considered to be within

the rules of nosy transactions.

In this way, by accepting each of the ideas raised regarding the realization of crimes against property in common property and the contents and cases stated in the offense of breach of trust, it can be concluded that the commission of fraud and crimes considered as fraud in Common property is not impossible according to the condition of belonging to the stolen property and It is included in other titles such as prudish transaction.

### **2-3. Theft of common property by a partner**

One of the most common crimes against property is the crime of theft. If a property is jointly owned by all the partners and one partner takes an excess amount over his share or one of the heirs takes an excess amount over his share of the inheritance share from the common property, does this act fall under the title of theft?

In the beginning, it is said that the ownership of stolen property is not part of the crime of theft. Now, in response to the above question, according to the opinions expressed regarding the ownership of the partners over the common property, whether each part of the property belongs to all the partners, and according to the impossibility of considering it as someone else's property, according to this opinion, committing crimes against the property by one of the partners Partners in the common property are not conceivable because the abductor has seized the property by virtue of his ownership and no part of the common property can be called the real property of others. (Sabri, Noor Mohammad, 1378, p. 83). The Sixth Branch of the Supreme Court also stated in its decision No. 122 dated 25/07/1321: "The interference of one of the partners in the common property is not theft." »

According to the second opinion, which states that each of the partners is a partner in a part of the said property, so when one of the partners takes an action against the property of the other partners, because the property is considered to

belong to another, such an act is considered theft. According to this opinion, he does not consider the common property to be alienable, and for this reason, he considers it a crime for any partner to take possession of the common property in excess of his share.

In jurisprudence, just like the opinions expressed, jurists have different opinions regarding the ownership of common property. Some believe that due to the lack of notification of the steward that it is not permissible to divide the common property and to divide and take more than one's share, here due to the doubt in the ownership and also the solution and non-fulfillment of the clauses of Article 226 of the Islamic Penal Code, they believe that the limit is not being implemented. . (Habibzadeh, Mohammad Jafar, 1373, p. 36)

According to the opinion of some other jurists, such as Sheikh Tusi, Allameh Hali and Mohaghegh Hali, when the perpetrator takes more than his share from the common property and this excess amount reaches the quorum, the limit applies to him. (Ayatollah Mohammadi Gilani, Mohammad, 1362, p. 196)

Legislator regarding theft in common property in the past did not consider the taking of common property by a partner without the other's permission as theft. However, after the victory of the Islamic Revolution and the approval of the Islamic Penal Code, with the approval of recent jurists, it has been stated in Article 277: If a partner or right holder steals more than his share, and the excess of his share reaches the quorum, he is liable. is the limit (Shambiati, Hoshang 2017, pp. 49, 50, 51). Therefore, the theft of the common property by the other partner was considered as limited theft, and the jurists do not agree on this matter. Hazrat Imam Khomeini (may God bless him and grant him peace) also believes that in the crime of theft, considering the necessity of the absence of judicial and objective doubt in the extent of that crime, if one of the partners in the common property seizes it or takes it for himself, even though Exceeding the theft limit is not included in the cutoff limit. (Imam Khomeini,



Ruhollah, p. 283, the third problem)

Another point that can be mentioned in this regard is the issue of reciprocity. Reckoning means that when someone owes an amount to someone, if he steals the same amount from the debtor, does his act qualify as theft? Some Sunni scholars, such as Shafi'i and Malik Ibn Anas, believe that if a creditor takes more than his demand from the debtor's property due to the existence of suspicion, the punishment of theft does not apply to him. (Audeh, Abdul Qadir, Vol.2, p. 594) But it seems that due to the establishment of the principle of separation of powers and the lack of legal element and the need to preserve the rights of citizens, which requires that no one has the right to be his own judge and get his property through compensation. And due to the fact that the money that the creditor steals does not belong to him, therefore, it is subject to the crime of theft, and on the other hand, considering the possibility of filing a lawsuit and the rights of the creditor and the fact that he can obtain his rights through that, he considers the retribution as having no enforceable aspect. . (Walidi, Mohammad Saleh 1387, pp. 312 and 313)

Another opinion has been expressed in this regard that according to the decision number 10 of the General Board of the Supreme Court dated 21/07/1355 regarding destruction, it has been abolished as a characteristic and by generalization they consider theft as theft with the intention of harming If he is a partner in the property, the crime of theft has been committed, but if he is in possession of his own property, the theft has not occurred.

This theory, following the non-dominant view regarding the way the partners own the common property, states that because the partners are partners in a part of the property, this will conflict with the element of stealing another's property mentioned in the case of theft. (Goldozian, Iraj, 1387, p. 453) in response to which it is said that the abolition of character from the unanimous decision and its extension

to other crimes is against the legal standards and also that the dominant and accepted view regarding theft of common property in the legislative literature is also Especially after the victory of the Islamic revolution, the theory prevails and this selected theory is included in Theory of unpopular ideas theories in this field.

### **3-3. Betrayal of trust by the trustee of a partner in common property**

Belonging to the property is different from the constituent elements of the crime of betrayal of trust, and the meaning of this issue is that the property that is the subject of the crime of betrayal of trust does not belong to the trustee. (Walidi, Mohammad Saleh, 1387, p. 182) In the matter of trust, it is also possible that the property between the trustor and the trustee is joint and common, and one partner entrusted it to the other as a trust, and the trustee without the consent of the other partner and with the intention of causing harm. to him to possess, waste, lose or use it.

In order to investigate the possibility of the crime of betrayal of trust in common property by a financial partner, according to the assumption of the way of ownership of the common property, if the ownership of the partners is fixed in the part of the common property, the condition of property belonging to another will not exist in it, and as a result, all the possessions of the partners In it, it is considered as their property and therefore they are not described as criminal. The Fifth Branch of the Supreme Court in its decision No. 2044/2043 dated 07/18/1321 does not consider the breach of trust in the company's property as a reality. Also, in other opinions such as the decision No. 1849 dated 10/18/1325 of the Fifth Branch for No. 2043 dated 1321/11/7 of the Sixth Branch of the Supreme Court and other opinions, it is considered impossible to commit the crime of betrayal of trust by a common property partner.

Also, the Legal Department of the Judiciary also states in theory No. 7/6565 dated 24/09/1372 that "creating a building in the common property by

the owner equal to his share is not a crime and has no criminal aspect".

According to another assumption, which is also considered a part of the property belonging to the other partner, any attack on the common property is subject to its own criminal title. This opinion is also confirmed by Article 582 of the Civil Code regarding the seizure of joint property outside the limits of permission by the partner and his guarantee, as well as the decision No. 41 dated 18/4/1317 of the Supreme Court, which includes the seizure of joint property by a partner under the title of usurpation and His guarantee is known. Also, ruling No. 2629 dated 24/11/1317 of the second branch of the Supreme Court is one of the examples that considers the possession of a partner in the common property under any title as a criminal offense.

After the occurrence of these disputes and the need to create a single procedure for the branches regarding crimes against property in the common property by the partner, as well as the need of the society for security and the need to protect the rights of individuals, it finally led to the issuance of the unified decision No. 10 dated 21/7/1355 . Although this ruling is about the crime of destruction of common property, some authors have abolished the specificity of this ruling and extended it to all crimes against property, including betrayal of trust, for the sake of unity of criteria. (Habibzadeh, Mohammad Jafar, 1396, pp. 270 and 271). Despite all these differences, different procedures cannot be adopted regarding crimes against property and the same punishments should be issued for these crimes. According to Article 674 of the Islamic Penal Code (Article 674 of the Islamic Penal Code) and the theory of the Legal Department No. 7/5092 dated 5/9/1136, whenever a partner entrusts his share to his partner and the said partner does so without permission seizes it and appropriates it, the said act is considered a betrayal of trust, and his act is prohibited by Shari'ah and causes ta'zir. According to this case, the possessions made by the partners may

be theft, fraud or betrayal of trust or destruction. It should be noted that according to Article 582 of the Civil Code, under any circumstances, the civil liability and guarantee will remain for the possessor of the property who acted to the detriment of the other partner.

In the laws of Egypt and Lebanon, the trustee's actions in seizing the common property are considered a crime. (Najib Hosni, Mahmoud, p. 41 p. 33 and Abdul Malik, Jundi, p. 367, p. 145). In English law, the assumption of theft of common property, which betrayal of trust is also under the category of theft, has been accepted. In Section 5 of the Theft Law approved in 1968 of that country, the phrase "having in it any proprietary right or interest" means having any proprietary right or interest that confirms the same meaning.

#### **4-3. Destruction of common property by one of the partners**

The crime of destruction is also one of the crimes against property, which is considered a criminal offense if it occurs intentionally by the perpetrator. In the crime of intentional destruction, belonging to another person is one of the elements and conditions of the material element of the crime, so that in articles 675 to 679 of the Islamic Penal Code approved in 1392, the belonging of the property to another is considered a condition for the realization of the crime. (Articles 675 to 679 BC approved in 1392)

Although at the beginning there was a history of not criminalizing the destruction of common property by a partner in the property by the Supreme Court, but due to the need to establish mental security and protect the rights of individuals, the judicial procedure moved towards the acceptance of criminalizing the said act and by accepting the theory of sharing The perpetrator of the crime of destruction is part of the common property and accepts the impossibility of the crime of destruction in this regard only if the perpetrator deliberately destroys a property with the knowledge of the common property of another

person and is also aware of the property belonging to another person. And for this reason, if he intended to harm another person or obtain an unauthorized benefit due to the commission of this crime, the said act is a crime and is subject to punishment, except according to the principles stated in other crimes against the property of the said act due to the absence of the condition that the property belongs to The other has no criminal description or at least a title other than the intentional destruction of another's property.

According to Article 582 of the Civil Code, which states: "A partner who participates in property without permission or outside the limits of possession is a guarantor." The rights of intervention and possession in the common property by each of the partners are bound by the principles and limits that prevent arbitrary and arbitrary seizure of the common property, which if this seizure leads to the destruction of the common property, it will also be subject to the crime of intentional destruction under the prescribed conditions.

Unanimity Decision No. 10 dated 21/07/1355 of **conclusion**

Diffusion is a type of incomplete ownership of property and the possession of multiple owners in this property depends on the permission of the other partner. Legal possession of the entire common property will cause the legal action to be invalidated and the other partner will need to enforce it.

Regarding the crimes against property in the common property by the partner in the property in the Islamic Penal Code approved in 2013 regarding the crime of theft, if the partner's theft of the property reaches the quorum limit, it is subject to the limit and if it is equal to his share or less Picking up is subject to the title of theft. Regarding other crimes, it seems that the spread of these cases is not possible, because first of all, according to the principles and rules of the legality of the crime and punishment, as well as the narrow interpretation in the criminal law,

the General Board of the Supreme Court, which states: "So that the application and generality of Article 262 of the General Criminal Law is used to commit the acts mentioned in that article if it is reasonable to harm or attract Unauthorized benefits with bad faith can be prosecuted and punished, even if the ownership of the property subject to the crime is included in the above article in common and widespread" according to the doctrine, the content of this decision is not specific to the crime of destruction, and due to the unity of the criterion, it can be applied to the rest of the crimes against property. The sentence of betrayal of trust was also extended, although it may be said that what is binding on the courts regarding unanimity of opinion is the result of the decision on the matter in question and not the reasoning expressed in it. (Habibzadeh, Mohammad Jaafar, 2016, p. 270)

Therefore, the destruction of common property in an act with malicious intent and with the intention of obtaining an unauthorized benefit or harming others is a crime. (Golduzian, Iraj, 1387, pp. 532 and 533)

this is required, and also because this issue can have scope make the crime much less, which is in line with decriminalization policies, and regarding other crimes such as fraud and breach of trust, although the civil liability remains for the offending partner, it cannot be considered a crime for him and they have no criminal description.

In this regard, it is suggested that in order to solve the existing gaps and shortcomings, the legislator should make a distinction between different issues and cases. That is, in terms of guaranteeing citizenship rights and creating psychological security for citizens, and considering the multitude of cases of shared ownership of a property, which is called common property, the issue of criminalizing crimes against property in common property by a partner seems necessary. In this regard, the details of the legislator between the cases where

crimes against property occur in common property or in assumed property and whether the partner took more than his share of

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