

# LARCENY OFFENSES IN ISLAMIC LAW

Hisham M. Ramadan\*

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## I. INTRODUCTION

Islamic law distinguishes between three categories of crimes: *Hudud*,<sup>1</sup> *Qusas*<sup>2</sup> and *Tazeer*.<sup>3</sup> Crimes of *Hudud* and *Qusas* are well defined and their punishments are fixed. In contrast, *Tazeer* crimes were not defined exclusively in Islamic law and were left to the Islamic legislature, in a given era, to define according to the social needs.

Offenses categorization is closely relevant to the nature of the harm caused by norm violation. The zone of harm created by *Qusas* offenses covers social interests as well as individuals' interests. However, the individuals' interest which is violated, in this class of offenses, greatly outweighs any social interest violation. On the contrary, *Hudud* crimes may harm individual(s) and impinge upon the social interests, causing the greatest harm to the society. Of all classes of offenses, the social interests violated by *Hudud* crimes greatly outweigh the individual victim's interest which is violated.

Simple theft and forcible robbery, *is a* particular class or category of *Hudud* crimes which causes a great negative impact on the social and economic life of a community. The impact is much greater than mere loss of property. It creates feelings of insecurity, guardedness and a general state of alarm in an individual. To a degree, this general state of alarm is due to crimes typically associated with larceny such as homicide

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\* Visiting Professor, Michigan State University College of Law. LL.B Ain Shams University (Cairo/Egypt), LL.M Auckland University (Auckland, New Zealand), LL.M (Criminal Law) State University of New York at Buffalo, S.J.D The University of Wisconsin. Thanks to Nichole Jongsma Derks for wonderful research assistance.

<sup>1</sup> *Hudud* means a specific punishment prescribed by God for crimes which transgress upon God/social rights. *Hudud* crimes are: Slander, *Zena* (fornication or adultery), Apostasy, *Baghee* (unlawful rebellious acts), Voluntary Intoxication, *Hiraba* (major crimes against public order and safety typically exemplified in terms of armed highway robbery), and Theft. The crime of Apostasy is debatable; See MOHAMMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW 53-6 (Plainfield: American Trust Publications, 2000).

<sup>2</sup> *Qusas* means just and proportionate retribution. *Qusas* crimes encompass homicide and bodily injury offenses.

<sup>3</sup> *Tazeer* means discretionary punishment. *Tazeer* crimes are the largest category of crimes which includes any crimes that are not listed as *Hudud* or *Qusas*.

and assault.<sup>4</sup> In this context, the punishment ought to be proportionate to the harm that has occurred, both just and severe. The rationale underlying the severity of the punishment is straightforward: when a legislature is confronted with the option of either lessening the punishment for the offense, which may increase the incidents of larceny and generate a general state of alarm on one hand, or increasing the severity of the punishment for larceny, which sacrifices the interest of the offender in obtaining a lesser, more moderate punishment but at the same time generates a peaceful healthy economic environment, the legislature ought to impose the severe punishment option.

However, the proportionality doctrine remains the controlling factor in determining liability. Simple theft ought not to be punished as armed robbery because of the greater harmful impact of the latter. Nor should theft be punished as petty theft in which the offender's harmful conduct is minimal in comparison to theft.

Part II of this article explains the standard of proof in larcenies offenses and standing in criminal trials. Part III discusses simple theft offense that encompasses the general requirements of larceny offenses. Parts IV, V and VI will discuss the distinctive features of other larceny offenses. The purpose of this article is not limited to educating the reader of the law of larceny in Islamic law, but also gives the western world a taste of in depth analysis of Islamic jurisprudence.

Finally, it should be noted that this article is guided by the opinions of the four prominent Islamic jurisprudence scholars, Abu Hanifa, Malek, Ahmed Ibn Hanbel and Shafee.

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<sup>4</sup> MOHAMMED ABU ZAHRA, *Al Akoba* [The Punishment] 66 (Cairo, 1950).

## II. PRIMARY PROCEDURAL MATTERS

### A. Standing in Criminal Trials

Standing is dependant on the nature of the crime committed. For crimes that violate social rights (e.g. voluntary intoxication),<sup>5</sup> it is up to any individual to report it to the proper authorities. In contrast, in case of crimes that infringe upon individuals' right (e.g. homicide, willful physical harm), only the victim(s) or his heirs (in case of the victim's death) have the power to trigger the criminal charges against the offender(s).

In a number of offenses, the harm caused infringes upon both social and individual rights. In such cases, standing is given to the most harmed right. Accordingly, because larceny offenses infringe upon social as well as individuals' right but the most harmed are the individual victims, the majority of scholars concede that the individual victim(s) has the sole right to report the offense to the authorities to trigger criminal charges. Once it is reported, the crime becomes a matter of public affair; thereupon the victim cannot withdraw the charge.

It should be noted that it is strongly encouraged for the victim to forgive and not to report the offense to the authorities.<sup>6</sup>

### B. Standard of Proof in Larceny Offenses.

The standard of proof in *Hudud* crimes, including theft and forcible theft, is that all the elements of the offense must be proven beyond *all* doubts.<sup>7</sup> Furthermore, defenses

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<sup>5</sup>Providing that the number of the witnesses requested is present.

<sup>6</sup> See Qur'an 2:237.

<sup>7</sup> See Hadith "doubt precludes applying *Hudud* punishments." See also Hadith "avoid inflicting the fixed punishment of *Hadd* on Muslims as much as you can; for it is better for the judge to make a mistake in releasing 'an offender' rather than committing a mistake 'in convicting an innocent.'" SUNAN AL-TIRMIDHI, Book of Al-Hudud. ; See also IBN MAJAH, Book of AL-Hudud "avoid inflecting the punishments of *Hudud* if you can find justification for such avoidance".

have to be negated beyond all doubt.<sup>8</sup> No lesser standard of proof is acceptable in *Hudud* offenses. Proving a larceny offense under a lesser standard of proof (e.g. beyond reasonable doubt) may result in a conviction of a lesser included larceny offense. These offenses were left to the Islamic legislature to adopt according to the social and economical needs providing that the punishment must be less than the one prescribed for *Hudud* theft offenses (i.e. hand amputation, capital punishment...etc).

### **III. SIMPLE THEFT**

Simple theft can be defined as trespassory taking a property of another secretly with intent to own it.<sup>9</sup> Trespassory taking of property secretly by non-possessor is the distinctive characteristic of simple theft that distinguishes it from other larceny offenses. If the taking occurred in the presence of the owner, against his will and without using force, the crime committed is embezzlement rather than theft. If the taking occurred in the presence of the owner, against his will and with force or threat of force, the crime committed is armed robbery.

#### **A. The Elements of Simple Theft**

##### **1. The Mental Element**

##### **A. In General: Introductory Remarks**

Perhaps the cornerstone of Islamic criminal law is knowledge.<sup>10</sup> No punishment is given for committing a prohibited act unless the actor is aware of the prohibition, the

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<sup>8</sup> *Id.*

<sup>9</sup> IBN ROSHED EL-KORTOBY , 2 *BEDAYAT AL- MOGTAHED WA-NAHYAT AL-MOKTASED* 662.

<sup>10</sup> Several verses in the Holy Qur'an had repeatedly emphasis the necessity of knowledge as a basis for a punishment. *See* Qur'an 17:15. "Who receives guidance, receives it for his own benefit: who goes astray doth so to his own loss: no bearer of burdens can bear the burden of another: nor would We visit with Our Wrath until We had sent a Messenger (to give warning)." *See also* Qur'an 35:24. "Verily We have sent thee in Truth, as a bearer of glad tidings, and as a Warner: and there never was a people, without a Warner having lived among them (in the past)." *See also* Qur'an 28:59. "Nor was thy Lord the one to destroy a population until He had sent to its centre a Messenger, rehearsing to them Our Signs: nor are We going to

nature of his conduct, the consequences (including possible consequences) and any circumstances that may effect the definition of the crime. In contrast to common law, one could not find in Islamic jurisprudence a trace of the irrebuttable presumptions of knowledge that typically exist in common law negligence offenses. The contrast between Islamic law and common law arises from the weight that is given to the moral dimension of the punishment. The punishment is justified and warranted under Islamic law only if the actor has knowledge of his conduct, the prohibition that has been violated, the consequences of his conduct, and the circumstances are not impaired. Common law recognizes the same principle, but for a lesser degree. There is a wide range of common law negligence offenses that presume the existence of knowledge. Additionally, the number of strict liability offenses is constantly increasing which require no state of mind whatsoever.

Sole intention that is not accompanied by an overt action that constitutes a prohibited conduct is neither an offense nor punishable. It follows that law enforcement agencies are prohibited from investigating or drawing conclusions about an individual's intentions so long as it was not manifested by prohibited overt conduct. Moreover, law enforcement agencies are prohibited from spying or invading individuals' expected zone of privacy to investigate crimes. Accordingly, law enforcement is restricted to explicit criminal behaviors only *and* within the expected limits of individuals' privacy.<sup>11</sup>

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destroy a population except when its members practice iniquity." *See also* Qur'an 4:164-5. "Of some Messenger We have already told thee the story; of others We have not, and to Musa Allah spoke direct. Messengers who gave good news as well as warning, that mankind, after (the coming) of the Messengers, should have no plea against Allah: for Allah is Exalted in Power, Wise."

<sup>11</sup> *See* Qur'an 49:12. "O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it...But fear Allah: For Allah is Oft-Returning, Most Merciful."

Intention may take several forms. The actor may intend not only the act but also a specific result. The actor may intend the act but no specific result (such as shooting at a person not intending to kill or even to hurt). The actor may intend the act and a specific result with awareness that another result might occur (shooting to harm with an awareness that death might result). In this context, so long as the intention to harm is accompanied by an overt act, the conduct is a culpable one.<sup>12</sup> However, the degree and nature of the culpable intention has been subject to interpretation. Some scholars concede that the offender's intention to do the act with knowledge of its natural consequences or that the natural consequences are, objectively measured, possible, the offender is liable for the complete offense. The Malkee Scholars suggested that the cornerstone in criminal liability is the intent to harm, not intended the result. Therefore, the foreseeability of causing a result, whether objectively or subjectively measured, is irrelevant to criminal responsibility. The majority of scholars suggest that intention to cause the prohibited consequences is the determining factor for culpability. However, because such intent is difficult to know we should rely upon the circumstances to infer such intent.

### **B. The Mental Element of Theft**

Two mental states must be present: intent and knowledge. They are satisfied when an actor:

- I. Intended to deprive the owner of his property,
- II. Intended to own the property,
- III. Knew that his acts constituted a crime,
- IV. Knew that the property was owned by another, and
- V. Knew that he was not permitted to own the property.

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<sup>12</sup> MOHAMMED ABU ZAHRA, *AL-GARIMAH* [The Crime] 288-9 (Cairo, 1950).



## **I & II Intention: The Intent to Deprive and the Intent to Own.**

If the actor's intent is not malicious, believing that the property is abandoned or that the owner gave up the ownership or he intended to only use it though unauthorized, he is not liable for theft.

Furthermore, in a number of incidents an actor may intend to deprive an owner of his property but nevertheless is not culpable of theft because he lacks the intention to own the property or to *absorb* its value. This may occur by destroying the property or consuming it. The actor, in this case, is liable for unauthorized destruction of property rather than a theft. Similarly, the owner of a share who sells the entire shared property is not liable for theft if he did not intend to deprive the remaining owners of the value of their share. Equally, the agent who exceeds his duties by selling the property subject of the agency is also not liable for theft so long as he did not intend to deprive the owner from the value of his property.

The initial step of intending to own a stolen property involves intentional transfer of possession of the stolen property from its legal possessor to the actor. However, the issue of transferring possession of the stolen property raises a number of controversies. The prominent scholar Abu Hanifa suggested that if the actor's possession of the stolen property was interrupted by intervening factors, simple theft offense requirements, punishable by *Hadd*<sup>13</sup>, are not satisfied. This proposition is an application of the "obstructing hand theory" which suggests that intervening circumstances beyond the actor's control that prevent the actor from continuing to take possession of the stolen property diminishes the actor's culpability. For example, an actor removes a motor

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<sup>13</sup> The term *Hadd* denotes the original punishment for *Hudud* offenses. The original punishment for simple theft offense is cutting the right hand. The punishment for simple theft offense will be elaborated in detail in subsequent pages.

vehicle from the owner's garage but shortly before taking full possession, another actor steals the vehicle. In this case, the intervening hand of the later actor who took possession of the stolen property diminishes the former actor's liability exempting him from the original punishment of simple theft by *Hadd*. However, the former actor remains liable for a criminal offense punishable by discretionary punishment *Tazeer*. In contrast, the renowned scholars, Malek, Shafee and Ahmed suggested that the stolen property enters the actor's possession once the lawful possessor has lost possession of the property. Accordingly, if an actor stole a motor vehicle whereby another thief stole it from him, the property effectively entered possession of the first actor which renders him liable for simple theft offense punishable by *Hadd*.

**III, IV & V Knowledge: Knowledge that His Act Constitutes a Crime, Knowledge That the Property is Owned by Another and Knowledge That He is Not Permitted/Authorized to Own The Property.**

The main sources of Islamic law - Quran and Sunna - unequivocally affirm that knowledge of the prohibition, a universal doctrine which dominates Islamic jurisprudence, is a punishment justification prerequisite.<sup>14</sup> Other forms of the knowledge element in crimes are equally important. The actor, who takes the property of another mistakenly believing that it is his own, or honestly but mistakenly believing that the rightful owner has transferred ownership to him, is not culpable for larceny because the

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<sup>14</sup> See Qur'an 17:15, (Who receives guidance, receives it for his own benefit: who goes astray doth so to his own loss: no bearer of burdens can bear the burden of another: nor would We visit with Our Wrath until We had sent a Messenger (to give warning).) See Qur'an 28:59, (Nor was thy Lord the one to destroy a population until He had sent to its centre a Messenger, rehearsing to them Our Signs: nor are We going to destroy a population except when its members practice iniquity). See Qur'an 4:165 (Messengers who gave good news as well as warning, that mankind, after (the coming) of the Messengers, should have no plea against Allah: for Allah is Exalted in Power, Wise.) Furthermore, the prophet Mohammed never punished for a prohibited conduct until the Holy Qur'an specified the offense and its penalty. See AHMED FATAHEY BAHNASI, *AL-SYASAH AL-GANAAEYAH FE AL SHARIA AL-ISLAMIAH* [THE PENAL POLICY IN ISLAMIC LAW] 357 (1988). See also IBN HAZEM, 12 *AL-MOHALA BA-ALATHAR* 107.

intention to steal is lacking. The classical example of imperfect knowledge that precludes liability is taking a property that is subject to multiple claims of ownership by one of the claimers providing that the claimer who took the property honestly believes that he is the rightful owner. On the other hand, because the knowledge element in crime is the cornerstone of liability under Islamic law, it was suggested that an actor who takes his own property, one that he owns by inheritance or otherwise, but honestly though mistakenly believes it is owned by another, is guilty of a crime.<sup>15</sup> This proposal may raise the issue of liability on impossible crime under Islamic law. However, this issue extends far beyond the scope of this paper.

## **2. Physical Element**

### **A. Taking Secretly Element**

Taking secretly is the indispensable element in simple theft offense that distinguishes it from other larcenous acts including embezzlement, fraudulent larceny, and debtor / pledge refusal to return the pledge/ debt.<sup>16</sup> The ‘taking secretly’ element is a straightforward one. It obviously means the actor took the stolen property without the knowledge of the legal possessor. Accordingly, if a delivery of the property occurred knowingly and willingly the element of taking secretly required in simple larceny is absent, and the failure to return the property to its legal possessor might constitute embezzlement, forced robbery, fraudulent larceny or otherwise as the case might be.

The element of ‘taking secretly’ is of two kinds: direct taking which occurs by the actor intentionally and physically taking possession of the stolen property; and indirect taking which occurs by an indirect act that results in transferring possession of the

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<sup>15</sup>See MOHAMMED ABU ZAHRA, *supra* note 12, 280. See also IBN HAZEM, 4 *AL-HOKOM FE-ASOOL AL-AHKAM* 117.

<sup>16</sup> IBN KODAMAH AL-MAKDISI, 10 *AL MOGHNEE WA-AL SHARAH AL KABEER* 236-7.

property from the lawful possessor to the actor.<sup>17</sup> Using a device that captures property and delivers it to the actor, or cutting a hole in a bag so that money would fall from it are instances of indirect taking.

Because the majority of scholarly opinions suggest that a theft offense requires the actor to take full possession of the stolen property, the distinction between direct and indirect taking of a possession is useful in determining the timing of the actor's taking full possession of the stolen property and, therefore, establishes the actor's liability.<sup>18</sup> If the offender is caught while taking possession of the property (e.g. in the process of taking possession by an indirect act), the offense committed is an attempt and, therefore, the original punishment for theft is precluded.

The 'taking secretly' element is of extraordinary importance with respect to the definition of the offense and the appropriate punishment thereof. We have already noted in the introduction that the severity of the punishment in *Hudud* offenses, including simple theft and forcible robbery or *Hiraba*, correspond to the harm which has occurred. The harm generated by forcible robbery or simple theft is of a magnitude much higher than the one generated by petty theft or embezzlement. The zone of harm in embezzlement is limited between the parties (victim(s) and offender(s)). It is limited to the creation of a sphere of mistrust between the victim(s) and the offender in addition to the value of the property stolen. Similarly, the harm is limited in the petty theft offense because the value of the property is trivial. In contrast, forcible robbery or simple theft results in a zone of harm which extends far beyond the value of the property stolen and

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<sup>17</sup> See AHMED FATAHEY BAHNASI, AL AKOUBAH FE AL-FEKAH AL-ISLAMI[THE PUNISHMENT IN ISLAMIC LAW], 105 (1983).

<sup>18</sup> Only the scholars of the Zahree school of thought suggest that the mere attempt to taking possession satisfies the complete offense of theft requirements.

the relationship between the parties. It negatively affects the entire sphere of social peace and order. Furthermore, stealing the property by means of secret taking or under the threat of force, if it became common, would promote an environment of guardedness and suspicion which would deter everyday activities, causing financial losses. On this basis, larceny that encompasses secret taking or threat of force deserves a more severe punishment than embezzlement or petty theft.

### ***Altering the condition of a property***

The majority of prominent scholars including Malek, Shafee, Ahmed, Mohamed and Abu Hanifa, suggest that altering the condition of property by consumption, damage or otherwise does not constitute theft but rather criminal damage. However, this proposal presumes that the actor only damages a property owned by another before taking full possession. If an actor obtains full possession of a property and then damages it, the actor is culpable of theft.

The interesting case of an actor swallowing property before taking full possession requires drawing a distinction between consumable and non-consumable property. If the property is consumable (e.g. food, drink) the offense committed is criminal damage rather than theft. If the property is non-consumable (e.g. jewelry, money) the scholars presented a number of propositions as follows: A) swallowing property is considered a consumption, therefore, the crime committed is criminal damage. The merit of this proposal appears in cases where the swallowed property was not retrieved safely. B) The second proposition is that swallowing property is considered “taking secretly,” therefore, the actor is liable for simple theft given that the other elements of the crime are present. The merit of this opinion appears in the case of retrieving the property safely. C) The

third proposition considered retrieving the property safely after swallowing is the touchstone for offense classification. If the property is retrieved safely, the actor has committed theft. If not, then the offense committed is criminal damage.

## **B. Conditions Related to the Property Stolen**

There are a number of conditions required of the property stolen. 1) The property must be moveable property; 2) The property must be a protected property; 3) The property stolen must have monetary value under Islamic law; 4) The value of the property stolen must equal or exceed a certain amount; and 5) The property must be owned by another.

### **1. The Property Must be Moveable Property**

This condition is both logical and fundamental. It is logical because a theft offense is not committed unless the actor removes the protected property from its place and takes full possession. Accordingly, immovable property cannot be subject to removal. This is fundamental because it explains the limits of the theft offense. An individual cannot steal land, but if he extracts minerals from this land and thereby takes possession and assumes ownership of the property, he is culpable of theft.

### **2. Impermissible Taking of a *Protected Property***

The cardinal distinguishing factor between theft and embezzlement is that the actor in the theft offense took a protected property.<sup>19</sup> The distinction between theft and embezzlement is not a theoretical or inconsequential one; rather it has ample impact on the appropriate punishment. The punishment for theft is much more severe than embezzlement given that theft represents a greater threat to public safety and welfare. In this context, theft punishment is *Hadd*, which means amputating the hand of the thief. Alternatively, the punishment for embezzlement is a discretionary punishment, *Tazeer*, which could vary from mere blame to any other punishment less than *Hadd*.<sup>20</sup> The vast majority of scholars required this condition according to a number of authenticated Hadith.<sup>21</sup> The protection occurs either by placing the property in a protected place, or by protecting the property by association.

A) Protecting property by placing it in a protected place.

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<sup>19</sup> TAKEE AL-DEEN IBN TAYMIA, AL-SAYSAH AL- SHARIA FE ESLAH AL-RAEE WA-AL-RAYA 107[hereinafter IBN TAYMIA].

<sup>20</sup> SUNAN AL BAYHAQE Hadith # 18075. "Whoever punishes with the punishment of a *Hadd* offense without committing that *Hadd* is an aggressor."

<sup>21</sup> See this Hadith:

(Narrated by Rafi' ibn Khadij: Muhammad ibn Yahya ibn Hibban said: A slave stole a plant of a palm-tree from the orchard of a man and planted it in the orchard of his master. The owner of the plant went out in search of the plant and he found it. He solicited help against the slave from Marwan ibn al-Hakam who was the Governor of Medina at that time. Marwan confined the slave and intended to cut off his hand. The slave's master went to Rafi' ibn Khadij and asked him about it. He told him that he had heard the Apostle of Allah (peace\_be\_upon\_him) say: The hand is not to be cut off for taking fruit or the pith of the palm-tree. The man then said: Marwan has seized my slave and wants to cut off his hand. I wish you to go with me to him and tell him that which you have heard from the Apostle of Allah (peace\_be\_upon\_him). So Rafi' ibn Khadij went with him and came to Marwan ibn al-Hakam. Rafi' said to him: I heard the Apostle of Allah (peace\_be\_upon\_him) say: The hand is not to be cut off for taking fruit or the pith of the palm-tree. So Marwan gave orders to release the slave and then he was released.) SUNAN ABU-DAWUD (*KITAB AL-HUDUD*) [BOOK OF AL HUDUD) HADITH # 4375.

See also this Hadith (Narrated by Abdullah ibn Amr ibn al-'As: The Apostle of Allah (peace\_be\_upon\_him) was asked about fruit which was bung up and said: If a needy person takes some with his mouth and does not take a supply away in his garment, there is nothing on him, but he who carries any of it is to be fined twice the value and punished, and he who steals any of it after it has been put in the place where dates are dried to have his hand cut off if their value reaches the value of a shield. If he steals a thing less in value than it, he is to be find twice the value and punished. SUNAN ABU-DAWUD (*KITAB AL-HUDUD*) [BOOK OF AL HUDUD) HADITH # 4377.

Generally, a protected place is any place that was constructed to protect the property. Examples of protected places are dwellings, stores, warehouses and barns. Abu Hanifa suggests that the protected place is any place constructed that is not open to the public but with authorization, immaterial to whether the place has a door or not..<sup>22</sup> Malek suggests that any place prepared to protect property suffices to satisfy the definition of protected place. In contrast, the jurists Shafee and Ahmed suggest that to satisfy the definition of protected place, it should be located in a metropolitan area, prepared to protect a property, and it should be closed or sealed.

A property is considered no longer protected for the purpose of the theft offense if the place where the property is located is unveiled. This may occur if a protected place is breached, is not protected adequately, or if the actor is authorized to enter the protected place where the stolen property is located.

Regarding the authorization to enter a dwelling, the majority of scholars, including Abu Hanifa, suggest that an implicit or explicit authorization to enter a dwelling suffices to unveil it as a protecting place. Consequently, servants in dwellings, individuals authorized to enter a dwelling to make necessary repairs, leasees and the like are not subject to theft's original punishment, *Hadd*, but rather a discretionary punishment, *Tazeer*, if they committed a theft. As a general rule, theft committed between relatives is not punishable by *Hadd*, but by *Tazeer* providing the actor was implicitly or explicitly authorized to enter. Therefore, according to Abu Hanifa, adult children who steal from their parents, and theft committed between the siblings who live in the same home is not punishable by *Hadd*. Shafee and Ahmed reached a similar

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<sup>22</sup> IBN AL-HOMAM, 4 *SHARAH FATAH AL-QUDEER* 240-6, ALAA' AL-DEEN AL KASSANY, 7 *BADA' AL SANA' FE- TAKREEB AL- SHARA'* 73.



conclusion suggesting that theft committed between linear relatives (e.g. parents, grandparents, great-grandparents and their children) is not punishable by *Hadd*. Malek, on the other hand, suggested that parents, grandparents, great-grandparents who steal from their children are subject to *Hadd* punishment.<sup>23</sup> Theft committed by children is also punishable by *Hadd*. Malek also suggested, contrary to Abu Hanifa's opinion, that theft committed between spouses is punishable by *Hadd* only if the property stolen was in a protected place. Others suggest that theft committed by a husband is punishable by *Hadd* and not vice versa because the husband is responsible for the wife's support.

Since the authorization to enter is an essential factor in determining an actor's liability, one should realize that an owner of a place may not be authorized to enter it unless permission from the lawful possessor is granted. For instance, the leaser may not enter a dwelling he owns unless he has permission from the lessee. If a leaser enters a dwelling he owns without permission from the lessee and thereby committed a theft, he is subject to *Hadd* punishment unless he is legally justified to enter the dwelling (i.e. with an eviction order).

Practical difficulties may arise in determining whether a protected place in which the stolen property is located is unveiled. Generally, if the actor is permitted to enter a dwelling in which the stolen property is located or if the actor has legal possession of the stolen property, the property is not protected with respect to that actor. However, if the door of the dwelling is open or the dwelling is partly demolished to allow individuals to enter without effort, there are a number of proposals. Shafee and Ahmed suggest that the dwelling does not fulfill the definition of protected place, therefore, when larceny occurs it is best defined as embezzlement rather than theft. Abu Hanifa and Malek disagree,

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<sup>23</sup> See Hadith "you and your wealth for your father", MOSNAD AHMED Hadith # 6863.

suggesting the opposite conclusion. Thus, according to Shafee and Ahmed, if an actor breaches a dwelling or opens its door, and did not steal any property, and thereafter another person entered and stole a property neither of them committed a theft. The first did not take any property, thus, his liability is limited to the damages incurred. The second actor also did not commit theft because he did not take property from a protected place, therefore, he is liable only for embezzlement punishable by discretionary punishment *Tazeer*. Malek and Abu Hanifa suggest otherwise, that the person who entered the dwelling and took a property is guilty of theft regardless of the partial demolition of the dwelling or that the door was open.

The Islamic law scholars explained that the acts that constitute theft must occur concurrently. Accordingly, in the Hanbalee school of thought, if an actor breached a dwelling by striking down a wall or damaging the door and the owner learned of that breach, yet nevertheless ignored it, and thereafter the actor entered the dwelling and took a property, he is guilty of embezzlement rather than theft. The actor in the first instance is culpable of damaging the dwelling only since he did not take any property. The actor in the second instance is guilty of embezzlement because the taking protected property requirement is absent.<sup>24</sup> It should be noted that the breach of the dwelling does not have any legal effect unless the owner of the dwelling is aware of the breach.

Regarding a series of thefts committed in the same place, it was suggested that an actor is culpable only of petty theft that is punishable by the discretionary punishment *Tazeer* if he stole property that equals or exceeds the minimum amount required in theft offense providing that the larceny occurred on more than one occasion separated by a period of time and each time the actor stole property valued less than the minimum

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<sup>24</sup> The Shafee school of thought scholars reached similar conclusion.

amount required in theft offense. Malek suggested that the touchstone of liability is the actor's mental state in a series of thefts in which the property stolen in each event is less than the required amount or in the case of breaching the protected place of the property and stealing property thereafter. Accordingly, the actor who intended to steal property valued at equal or more than the required value in theft, or who breached the protected place one night and stole a property the next night is culpable of theft punishable by *Hadd*. Abu Hanifa suggested that a judge must aggregate the value of the property stolen in a series of thefts in which the property stolen in each event is less than the required amount. If the aggregated value equals or exceeds the required amount, the actor is guilty of theft punishable by *Hadd*. The merit of Abu Hanifa's and Malek's opinions appear in cases of actors who attempt to escape *Hadd* punishment if they get caught by committing a series of petty thefts.

Taking property from its protected place is a factual inquiry subject to the nature of the property, the protected place, the circumstances and the custom.<sup>25</sup> Property does not satisfy the requirements of "taken secretly" if it was taken from a room located in an apartment until the actor removes the property outside the apartment. Similarly, a property does not satisfy the requirements of taking secretly until it leaves the entire store. However, taking a property located in a safe box in an airport or a hotel satisfies the requirement of "taking secretly" once it has been removed from the safe box rather than from the airport or the hotel. In cases of theft of crops, fruits and other perishable items, the original punishment for simple theft offense is precluded and replaced by a discretionary punishment *Tazeer*.<sup>26</sup>

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<sup>25</sup> See MOHAMMED S. EL-AWA, *supra* note 1, 7.

<sup>26</sup> IBN KODAMAH AL-MAKDISI, *supra* note 16, 244-5.

A more difficult inquiry is the theft committed between husband and wife. Unanimously scholars suggest that if the property stolen was not protected, the original punishment of *Hadd* should not apply.<sup>27</sup> However, scholars disagreed upon whether the property located in the family residence is considered protected as to the husband and wife. Abu Hanifa suggested that the property is not protected from the husband and wife because the stolen property is a sort of common property.<sup>28</sup> Malek and Ahmed suggest that the opposite view, implying that though the husband and wife live in the same residency, each one has independent ownership. Therefore, stealing from the other constitutes a theft punishable by *Hadd*, providing that the property stolen was in safe place and meant to be protected.<sup>29</sup>

Taking the protected property requires neither a direct act nor a specific method for removing the property. An actor may remove the property directly or by using an instrument or device to enable him to successfully remove the property from its protected place to his full possession.

The requirement of taking protected property requires taking full possession of the property, without consent of the owner and assuming ownership of the property.<sup>30</sup> When an owner transfers property possession to an individual as collateral in a pledge contract, or as a subject of a rental contract, or delivers it according to an act of sale where the price of the property was not paid and thereby that individual assumes ownership by an explicit act, the crime committed is embezzlement rather than theft. In this context, transferring property possession by the owner to an actor negates the

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<sup>27</sup>MOHAMMED ABU ZAHRA, *supra* note 4, 99.

<sup>28</sup> IBN HAZEM, *supra* note 14, inquiry # 2283 at 340.

<sup>29</sup> *Id.*

<sup>30</sup> ABD AL-QADER ODAH, 2 AL TASHRI' AL-GANAI' AL-ISLAMI [ISLAMIC CRIMINAL LEGISLATION] 537(1977) [hereinafter ODAH].

possibility of theft; nevertheless, the actor might be liable for other crimes. If in transferring property possession was made by force, the actor might be liable for forcible theft.

It is also required that the actor does not own the property fully or partially. If the property stolen is shared by a number of individuals, and the actor owns a share whereby he assumes full ownership of the property by an explicit action, the actor is not culpable of theft.

Transferring property possession by the lawful owner who does not possess the capacity to form a contract (i.e. mentally handicapped or under the minimum age of discretion) may also negate the element of “taking secretly” required in theft offense. This is because the individual who lacks the contractual capacity may or may not have sufficient knowledge or understanding that he is giving up property possession. If the person who lacks the contractual capacity is incapable of understanding that he is giving up the possession of the property, the original punishment of theft is precluded and replaced by discretionary punishment, *Tazeer*, since the delivery of the property, albeit by an individual who lacks the contractual capacity, raises suspicion in the applicability of the “taking secretly” element sufficient to preclude *Hadd* punishment.<sup>31</sup>

#### B) Property protected by association

The property protected by association is a property that is not located in a protected place, but because of a certain association (e.g. an individual possesses custody of it or is guarding it) it became protected. For instance the movable property in places of

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<sup>31</sup> See the Hadith “doubt precludes applying *Hudud* punishments.” See also Hadith “avoid inflicting the fixed punishment of *Hadd* on Muslims as much as you can; for it is better for the judge to make a mistake in releasing ‘an offender’ rather than committing a mistake ‘in convicting an innocent.’” SUNAN AL-TIRMIDHI (Book of Al Hudud).

worship that is not a fixture is not a protected property unless an individual guards it or it was attended by a lawful possessor. A vehicle that is broken down in the street is not a protected property unless it is attended by an individual. One should be reminded that the lack of the protected property requirement does not justify larceny; rather it precludes the original punishment of theft (i.e. *Hadd*).

Abu Hanifa suggested that if property is located in a protected place, it is irrelevant whether it is also protected by association. Accordingly, if an actor stole a property located in a dwelling, it is irrelevant whether the property was attended or in the custody of another, or if the door of the dwelling was open or nonexistent. On the contrary, the majority of scholars including Malek, Ahmed Ibn Hanbel and Shafee suggested that property might be protected by association and placed in a protected place simultaneously. Therefore, if the place where the property is located is no longer protected, however, the property is protected by association (i.e. attended by a lawful custodian), an actor who steals the property is liable for theft punishable by *Hadd*.

Various opinions presented explain the nature of the association required to protect a property. Malek and Abu Hanifa require that the person who assumes protection of a property must be at a visual distance from the property. Whether that person is asleep or awake is irrelevant so long as his close proximity to the property was intended to protect the property. Shafee required that the person who assumes protection of a property must be watchful and capable of protecting the property whether physically or by requesting external aid. Accordingly, if that person is in a remote place where no help is available if he is attacked, the property is not considered protected. The jurist Ahmed adopted a moderate approach suggesting that a person who assumes the protection of the

property need not be physically capable of protecting the property so long as he is watchful of the property.

The question arises, whether the fixture of a place (e.g. dwelling) that was prepared to protect a property can be subject to theft? Abu Hanifa suggested that it cannot be subject to theft punishable by *Hadd* because theft requires taking possession of the property by removing it from its protected place. Therefore removing part of the protected place (i.e. door or window of a dwelling) cannot be subject to theft punishable by *Hadd*. In contrast, the majority of the scholars including Malek, Ahmed Ibn Hanbel and Shafee suggest that by constructing a place to protect a property, the place including its fixtures and contents become a protected property. Therefore, dwelling fixtures can be subject to theft since the dwelling is normally prepared to protect its contents.

It should be noted that any property attached to or carried by a person is a protected property subject to theft punishable by *Hadd*, providing that the theft occurs without the knowledge of the lawful possessor and without his consent. If a property is stolen with the knowledge of the lawful possessor and without his consent, the offense committed is embezzlement rather than theft providing that no force or threat of force is used. If a property was taken with the use of force or threat of force, without the consent of the lawful possessor and with his knowledge, the actor is liable for forcible theft.

### ***Perfect invasion of the protected place theory***

The prominent scholar Abu Hanifa suggested that the “taking secretly” element requires not only taking a protected property from its place but also requires perfect invasion of the protected place in which a property is located. Perfect invasion requires taking full physical possession of the stolen property while invading the protected place

in which a property is located. An illustrative example is the actor who intends to steal a property from a dwelling by inserting an instrument that removes the property from the dwelling is not culpable of theft because the insertion of the instrument does not constitute perfect invasion of the dwelling. In contrast, if the property that the actor intends to steal is not in a dwelling, but rather in a box accessible to the public, the invasion of the box would occur by the actor's hand entering into the box and gaining possession of the property. It should be noted that the majority of the scholars do not support the perfect invasion theory.

### ***The impact of perfect invasion theory on multiple offenders' cases***

When larceny is committed by more than one offender there are a number of possibilities. The first is that all offenders committed the same act(s). In this case, the culpability of all offenders is identical unless the personal characteristics of an offender excuse him from liability (i.e. infancy, insanity). The second possibility occurs when more than one offender participates in theft in which one offender enters a dwelling and hands over stolen property to another offender waiting outside the dwelling. Abu Hanifa suggested that neither of them has committed a theft since both actors have not perfectly invaded the protected place (the dwelling) in which the property is located. The offender who entered the dwelling did not have possession of the property. The other, who waited outside, although he briefly took possession of the property, did not transfer the possession from the owner to himself. The majority of scholars including Shafee, Malek, Ahmed Ibn Hanbel disagree with Abu Hanifa regarding the offender who enters the dwelling and takes possession of the property because by entering the dwelling and taking full possession of the property the element of "taking secretly," in their opinion, is



satisfied. However, the majority of scholars agree with Abu Hanifa regarding the offender who waited outside the dwelling because he did not take a property from a *protected place* since the property was delivered to him outside the dwelling.

The third possibility is that an actor enters a dwelling while another waits outside. After the first offender locates the property to be stolen and removes it from its place, the other actor enters his hand inside the dwelling and takes possession of the property. In Abu Hanifa's opinion, contrary to the view of the majority of the scholars, neither of the actors would have committed theft because the first actor did not remove the protected property from its place and the other did not invade the protected property place perfectly.

The fourth possibility occurs when an actor inside a dwelling removes the protected property from its place simultaneously with an actor who remains outside the dwelling and takes possession of the property. In the opinion of Malek, Ahmed and Abu Yousef, the element of "taking secretly" is satisfied for both actors. Shafee suggested that the element of "taking secretly" is not satisfied for either actor because the inside actor did not remove the protected property from its place and the outside actor did not take the property from the protected place. Abu Hanifa suggests that neither of them committed theft because the outsider did not invade the protected place perfectly and the insider did not remove the property from its protected place.

The fifth possibility occurs when an actor ties the property to a rope then another actor pulls the rope along with the property. Shafee, Ahmed and Abu Yousef suggested that the element of "taking secretly" is satisfied for the outsider who pulled the rope but not for the insider. Abu Hanifa suggested that the element of "taking secretly" is not

satisfied for either of them because the outsider who pulled the rope did not invade the property protected place perfectly and the insider did not take possession of the property.

The sixth possibility occurs when two actors enter a dwelling and the first actor waits on the roof while the second collects the property and ties it to a rope and the first actor pulls the rope and the property outside the dwelling. Malek, Abu Hanifa and Ahmed suggested that the element of “taking secretly” is satisfied for both of them. However, Shafee suggested that the element is satisfied only for the actor who removes the property completely from its protected place.

### **3. The property stolen must have monetary value under Islamic law**

The discretionary punishment, *Tazeer*, is the only appropriate punishment if the property stolen either has monetary value only for non-Muslims (i.e. pork, alcoholic drinks) or, according to Abu Hanifa, it has a trivial value.<sup>32</sup> The original punishment *Hadd* is precluded in case of theft of property that has monetary value only for non-Muslims because such property bears only relative value since non-Muslims valued that property while Muslims do not. Since any doubt precludes the original punishment *Hadd*, the relativity of the value of the property induces a doubt sufficient to preclude the original punishment, *Hadd*.<sup>33</sup>

Abu Hanifa suggests that custom is the criteria in determining the triviality of a property. Dirt normally does not bear monetary value but if it was collected in large quantum it might have monetary value. Equally, if it was transformed into bricks, it will bear monetary value. Remarkably, Abu Hanifa includes non-savable perishable items

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<sup>32</sup> IBN HAZEM, *supra* note 14, 352.

<sup>33</sup> See the Hadith “doubt precludes applying *Hudud* punishments.” See also Hadith “avoid inflicting the fixed punishment of *Hadd* on Muslims as much as you can; for it is better for the judge to make a mistake in releasing ‘an offender’ rather than committing a mistake ‘in convicting an innocent.’” SUNAN AL-TIRMIDHI (Book of Al Hudud).

such as fruit, meat, and fish into the trivial property category in contrast to the opinions of Abu Yusef,

Because of the overlap between Abu Hanifa triviality's requirement and the requirement of minimum value of the property stolen, the majority of the scholars dispute Abu Hanifa's view suggesting that any property that meets the minimum value required in theft offense is punishable by the original punishment *Hadd*.

#### **4. The Value of the Property Stolen Must Equal or Exceed a Certain Amount**

Although there is undisputed authority in Islamic law that requires a minimum value of the property stolen to punish an offender by the original punishment of theft *Hadd*, the scholars disputed that minimum value requisite.<sup>34</sup> According to Shafee, the minimum value is a quarter Dinar<sup>35</sup> or its equivalent.<sup>36</sup> Malek suggested that the minimum value is either a quarter Dinar or three Darahims<sup>37</sup> or the equivalence of value of either of them.<sup>38</sup> Abu Hanifa raised the bar suggesting that the minimum value required is ten Darahims.<sup>39</sup>

The element of minimum value requirement must be understood in the context of the other requirements. Therefore, an actor is subject to *Hadd* punishment if he steals a protected property and the value of that property equals or exceeds a minimum amount. Accordingly, in a case of multiple thefts, if the value of the property stolen from each crime scene is below the minimum amount required in theft offense the actor is liable for

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<sup>34</sup> See IBN KODAMAH AL-MAKDISI, *supra* note 16, 237-238.

<sup>35</sup> Dinar is a Gold Currency. See Hadith "A'isha reported that Allah's Messenger (the Prophet Mohammed may peace be upon him) cut off the hand of a thief for a quarter of a Dinar rid upwards." SAHIH MUSLIM Hadith # 4175 (Book of Al Hudud).

<sup>36</sup> AL SHAFEE AL SAGHER, 7 *Nahyet Al-Mohtag Ela Sharah Al-Menhag* 419 AL-SHERAZEE, 2 *Al-Mohazab* 294.

<sup>37</sup> Darahim is a silver currency. See Hadith "Ibn 'Umar reported that Allah's Messenger (may peace upon him) cut off the hand of a thief (in case of the theft) of a shield the price of which was three Darahims." SAHIH MUSLIM Hadith # 4183 (book of Al Hudud).

<sup>38</sup> *Id.*

<sup>39</sup> ALAA' AL-DEEN AL KASSANY, *supra* note 22, 77.

discretionary punishment, *Tazeer*, rather than the original punishment *Hadd*. However, if the actor stole a property owned by a number of people and the aggregated value of the property equals or exceeds the minimum amount required in *Hadd* punishment, the actor is liable for *Hadd*.

Regarding appreciating or depreciating the value of the stolen property, the criterion is always at the time of committing the offense. Decreases in the property's value after it has been stolen, as a result of partial or full destruction or depreciation of the market value or otherwise, does not change the definition of either the offense or the applicable punishment.<sup>40</sup> However, depreciation of the market value of the property is a considerable factor in Abu Hanifa's view that the value of the property should be measured at the execution phase *only if* the property value depreciated. The majority of scholars suggest that the value of a property must be measured only at the time of taking possession of the protected property.<sup>41</sup> Similarly, taking ownership of a property after theft, either by act of sale or as a gift or otherwise, does not change the definition of the offense. However, if the offender gained ownership of the stolen property (e.g. by an act of sale, by inheritance) before reporting the crime to the proper authorities or demanding the return of the stolen property, it may preclude the punishment in some opinions.<sup>42</sup> Islamic law scholars presented a number of opinions regarding the actor's knowledge of the value of property stolen. Shafee adopted an objective liability approach suggesting that subjective intent to steal suffices to establish liability. The actor's belief of the property's value is irrelevant to liability.<sup>43</sup> In contrast, Ahmed Ibn Hanbel maintains that

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<sup>40</sup>IBN KODAMAH AL-MAKDISI, *supra* note 16, 248. AL-SHERAZEE, *supra* note 36, 300.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> AL SHAFEE AL SAGHER, *supra* note 36, 420.

the subjective liability is the cornerstones of culpability in criminal law. Accordingly, to hold an actor liable for theft punished by *Hadd*, the actor has to be aware that value of the stolen property equals or exceeds the minimum monetary value required in theft offense punishable by *Hadd*.<sup>44</sup>

### **5. Property Owned by Another**

Although this element might seem logical, it may raise a number of considerations in particular situations. Generally, the majority opinion holds that this element means that the actor is not the owner of the property at the time of committing the offense. The scholars presented a number of theories to determine the timing of the commission of the offense. Malek concluded that the complete crime of theft punishable by *Hadd* is committed by acquiring a protected property with intent to deprive the owner of his property. The question of reporting the theft to the appropriate authority and requesting the return of the stolen property from the actor is irrelevant to liability so long as the victim is aware of the theft.<sup>45</sup> On the other hand, Shafee and Ahmed maintained that the victim must request the stolen property from the actor, and report the theft to the appropriate authority to apply *Hadd* punishment. Accordingly, if the actor unknowingly owned the property, by inheritance or otherwise, before reporting the theft to the authorities, the punishment of *Hadd* is precluded but may be substituted by discretionary punishment *Tazeer*. In a very liberal approach, Abu Hanifa suggests that acquiring the ownership of the property before executing the punishment precludes *Hadd* punishment.

Moreover, this element excludes from the scope of theft the property that is not owned by a specific individual (e.g. fish in the sea, wild deer). Once a fish is caught or a

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<sup>44</sup> ALAA' AL-DEEN AL KASSANY, *supra* note 22, 80-97.

<sup>45</sup> ODAH, *supra* note 30, 589.

deer is hunted and stored in a protected place, the “taking secretly” of such property establishes liability.

Malek suggests that if the stolen property is normally owned by an individual(s) or entity, however, the lawful owner is unknown, the actor who stole this property is liable for theft punishable by *Hadd*. Shafee, Abu Hanifa and Ahmed suggested that theft original punishment *Hadd* is excluded since they require reporting the offense to the authorities and demanding return of the stolen property by the owner. Abu Yousef adopted a moderate view suggesting that the punishment of *Hadd* is excluded unless the actor confessed of the theft.

As an application of Islamic law doctrine that concedes that any doubt precludes any *Hadd* punishment, theft committed by a father might be punishable by discretionary punishment *Tazeer* only, rather than the original punishment *Hadd*, since a father has a legal right in the ownership of property owned by his children.<sup>46</sup> Similarly, according to Abu Hanifa, Ahmed and Shafee, the punishment of *Hadd* is precluded in theft committed by one of the owners of a shared property or if the property stolen is a publicly owned property. On the other hand, Malek suggests that an owner of shared property might be liable for theft punishable by *Hadd* if he took more than his share given that the property is a protected property. He made a distinction between unique and replaceable stolen property. He suggests that if the property stolen is unique, the punishment of *Hadd* is applicable if the value of the property stolen exceeds double the minimum value required in theft offense. The requirement of double value is based on the logic that the actor already owns one share of the value required in theft while the other share was owned by the other(s). If the property stolen is not unique and replaceable (i.e. money), the *Hadd*

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<sup>46</sup> See Hadith “you and your wealth for your father”, MOSAND AHMED Hadith # 6863.

punishment is applicable only if the actor stole more than half value of the shared property.

To apply *Hadd* punishment, Abu Hanifa and Ahmed require that the property be stolen from a lawful possessor. Accordingly, the actor who steals an already stolen property is liable for discretionary punishment *Tazeer* only.<sup>47</sup> In contrast, Malek and others do not demand such requirement in view of the fact that the actor is committing a theft of a property owned by another.<sup>48</sup> Additionally, Abu Hanifa suggests that the non-Muslim who is temporarily visiting an Islamic state is not liable for *Hadd* punishment but rather *Tazeer* punishment because, according to the general rule, any doubt precludes *Hadd* punishment. In this instance, there might be a suspicion (doubt) that the actor believes that taking property of another is justifiable. The prominent opinion in the Shafee school of thought suggests that such an actor is liable for *Hadd* punishment only if the actor was informed of the prohibitory norm of Islamic law and had agreed to observe it. The majority in the Ahmed Ibn Hanbel school of thought suggest that such an actor is liable for *Hadd* because *Hadd* punishment is designed to protect property that is subject to social and individual rights of an owner. Accordingly, suggesting otherwise would frustrate the purpose of *Hadd* punishment.<sup>49</sup>

### **B. Accomplice Liability**

Although Islamic law scholars agreed that the accomplice deserves punishment, they disagreed upon the degree of culpability and its elements. A number of scholars maintained that the accomplice is the one who physically aids the principal in removing the property from its protected place. Accordingly, the actor who breaks the dwelling

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<sup>47</sup> ALAAI' AL-DEEN AL KASSANY, *supra* note 22, 80.

<sup>48</sup> See IBN KODAMAH AL-MAKDISI, *supra* note 16, 257.

<sup>49</sup> IBN KODAMAH AL-MAKDISI, *supra* note 16, 276.

door, watches the way or opens a dwelling door does not satisfy the definition of accomplice that is punishable by *Hadd*.

Those scholars who require the physical act of removing the protected property suggest various criteria to establish the physical act requisite. Abu Hanifa suggests that the definition of complicity in a theft offense is not satisfied unless the accomplice physically entered the protected place. However, the physical removal of property from its protected place is irrelevant to liability since an accomplice might provide physical or logistic support.

In the Shafee school of thought, scholars suggest that the accomplice's liability is always less than the principal's liability, therefore, an accomplice is punishable by discretionary punishment, *Tazeer*, rather than *Hadd*. In their theory of accomplice liability, they required two conditions to be satisfied in order to punish an accomplice by the original punishment *Hadd*. First, an accomplice has not committed a theft offense unless he removed the property from its protected place. Second, if more than one accomplice removed the property from its protected place, the value of the property stolen must exceed the minimum value required in theft offense after the value is divided among the number of accomplices. If each individual accomplice removed a portion of the property, the value of each portion must exceed the minimum value required in theft offense.

### **C. Attempt**

An actor is guilty of attempt if he took the initial steps to achieve his purpose. Accordingly, the actor who inserting an instrument into the door lock trying to open it to



steal a property inside, and the actor who lays and waits for a security guard to be distracted to steal the protected property are guilty of attempt.

In this context, it is highly important to distinguish between the complete crime and a mere attempt. The Zahree school of thought suggests that a crime of theft is completed by taking possession of a property owned by another with intent to claim its ownership. Taking possession of the stolen property does not necessarily mean taking exclusive custody of the stolen property. The actor who entered a dwelling and took property intending to steal it is guilty of theft punishable by the original punishment *Hadd* even if the stolen property did not successfully exit the house. The position of the Zahree school of thought seems to suggest that the distinguishing factor between the complete offense and the attempt is the *initiation* of taking possession of the stolen property rather than taking full custody of the stolen property.

The majority of scholars, on the other hand, suggest that the crime of theft is not completed unless the actor takes full possession of a protected property and removes it from its protected sphere. For instance, the crime of theft of a property located in a dwelling is not completed unless the actor removes the property from the entire dwelling. Removing the property from one room to another in the same dwelling does not satisfy the theft requirements of taking full possession of a property. However, entering an apartment building that consists of multiple dwellings, and taking the stolen property from one apartment to another satisfies taking full possession theft requirements. Similarly, the crime of a theft of a bag located beside its owner is not completed unless the actor successfully removes the bag from its place.

Abu Hanifa suggested that the offender who is caught after the attempt of depriving the owner of the possession of the stolen property but before taking full possession is guilty of theft. However, the appropriate punishment is the discretionary punishment *Tazeer* rather than the original punishment *Hadd*. An example of this hypothesis is the actor who enters a dwelling intending to steal a property; instead of taking full possession of the property, he threw the property out of the window intending to pick it up after he left. If the offender was caught before picking up the property, he is guilty of theft, but the punishment is *Tazeer*.<sup>50</sup>

In sum, while the Zahree school of thought scholars draw a line of distinction between theft and attempted theft on the grounds of initiating taking full possession of the stolen property, the majority of the scholars require actual taking possession of the stolen property which requires removing the stolen property from its protected sphere. It seems that Abu Hanifa's position is similar to the majority opinion. Although he labels the attempt to deprive an owner of a property as a complete theft offense, the punishment he endorses in this scenario is the typical punishment for attempt, the discretionary punishment *Tazeer*.

#### **D. Punishment**

##### **1. The Original Punishment (*Hadd* Punishment)**

The original punishment for theft is *Hadd* which means the amputation of the right hand of the offender.<sup>51</sup> It is not permissible after proving the offense beyond all doubt to delay the execution of the punishment by imposing any other alternative

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<sup>50</sup> ODAH, *supra* note 30, 523-4.

<sup>51</sup> Qur'an 5:38-9. "As to the thief, male or female, cut off his or her hands: a punishment by way of example, from Allah, for their crime: and Allah is Exalted in Power. Full of Wisdom. But if the thief repent after his crime, and amend his conduct, Allah turneth to him in forgiveness; for Allah is Oft-Forgiving, Most Merciful."

punishment (e.g. financial penalty).<sup>52</sup> Authorities should not show leniency once the crime is proven.<sup>53</sup> The Islamic legislature aims to educate and rehabilitate the offender by imposing theft penalty, and show a great mercy to society by fighting the crime of theft aggressively.<sup>54</sup> The punishment might seem harsh and unnecessary, but it is likened to amputating the limb that suffers from cancer to save the entire body.<sup>55</sup> Although the punishment might be seen as evil in itself, it is necessary to achieve its purposes.<sup>56</sup>

However, the application of the original punishment *Hadd* is restricted to cases in which all elements of the theft offense is established beyond *all* doubt and:<sup>57</sup>

- I. The culpability of the offender is established beyond all doubt (e.g. the offender's age is equal or above the minimum age of discretion, no excuses available to the offender such as necessity, duress or insanity.)<sup>58</sup>
- II. Initiation of a complaint to the proper authority. The offense of theft cannot be prosecuted unless the victim formally complains to the proper authorities.

Remarkably, the spirit of Islamic law encourages tolerance and forgiveness of the offender so long as no formal complaint is filed.<sup>59</sup> The victim has the preferred and

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<sup>52</sup> IBN TAYMIA, *supra* note 19, 105.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> As I explained earlier, the standard of proof in Islamic criminal trials is that the offense should be proven beyond all doubt and the defenses should be negated beyond all doubt. *See* the Hadith “avoid inflicting the fixed punishment of *Hadd* on Muslims as much as you can; for it is better for the judge to make a mistake in releasing ‘an offender’ rather than committing a mistake ‘in convicting an innocent.’” SUNAN AL-TIRMIDHI (Book of Al-Hudud).

<sup>58</sup> It should be noted that with respect to the liability excusing conditions, Shafee and Malek concede that liability excuses are not extendable to other offenders because excuse is based upon the personal characteristics of an actor. If two actors committed a theft one of whom is inculpable because of insanity, infancy or otherwise only the inculpable person is excused and the other actor(s) remain fully liable for their actions. In contrast, Abu Hanifa suggested that if one actor is inculpable, the original punishment *Hadd* is precluded for all actors since all actors committed one offense and they share one common ground for culpability and innocence.

<sup>59</sup> Generally offenders' repentance is accepted if the offender has not been caught yet. Once he is caught, the repentance does not preclude the punishment. However, the prophet encourages tolerating the *Hudud*

encouraged option of forgiving the offender and thereby retrieving the property, or supporting the general and private deterrence punishment rationale by filing a complaint.

## 2. **Discretionary Punishment (*Tazeer*)**

Discretionary punishment is any punishment that is less severe than the original punishment.<sup>60</sup> Determination of the nature of the discretionary punishment and the method of execution is subject to the unrestricted assessment of the authorities in the Islamic state at any given time dependent on the circumstances, including the economic status of the state and social circumstances.

The discretionary punishment, *Tazeer*, might be appropriate when one of the essential elements of *Hadd* punishment is lacking (e.g. the property is not protected), or there is slight suspicion that the offense of theft was committed (e.g. suspicion that the ownership of the stolen property arises from joint ownership or the offender steals his child's property) or in the case of attempted theft.

It should be noted that discretionary punishment is broad to include many cases where the definition of theft is not satisfied so long as the actor knowingly and intentionally violated the Islamic moral norm, and the punishment would serve the public interests.

## **IV. PETTY THEFT**

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before its reporting to the authorities. The Prophet Mohammed said: "Forgive the infliction of prescribed penalties among yourselves, for any prescribed penalty of which I hear must be carried out." SUNAN ABU-DAWUD (Book of Al-Hudud) HADITH # 4363.

<sup>60</sup> "Whoever punishes with the punishment of a Hadd offense without committing that Hadd is an aggressor" SUNAN AL BAYHAQE Hadith # 18075.

Principally, petty theft is a theft offense. All the requirements of a theft offense listed above must be present. The only discrepancy between theft and petty theft is that the value of the stolen property is trivial, falling below the minimum value of the stolen property required in theft offense.<sup>61</sup> The punishment for petty theft offense is a discretionary punishment, *Tazeer*, in which the same rules of the discretionary punishment of theft apply.

## V. FORCIBLE THEFT “*HIRABA*”

### A. The Offense

Forcible theft is acquiring (or attempting to acquire) the property of another with the owner’s knowledge, against his will and with the use of force or threat of using force.<sup>62</sup> The gravity of this crime is manifested in the unlawful taking of a property openly by using force or threatening force which constitutes a serious threat of lawlessness and disorder. The core characteristics of forcible theft are obvious in the offenders’ rebellious acts against the government which are represented in the overt criminal acts that challenge governmental authority. In typical cases, forcible theft offenders conspire to commit prohibited acts of forcible theft, and trigger crimes such as assault, rape and homicide freely.<sup>63</sup>

The offense of forcible theft might be committed by:

1. Attempting to acquire property by force in which the actor(s) poses a threat to the public peace in a public place where neither a property is acquired nor death resulted from the attempt.

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<sup>61</sup>See Hadith “A’isha reported that Allah’s Messenger (the Prophet Mohammed may peace be upon him) cut off the hand of a thief for a quarter of a Dinar and upwards.” SAHIH MUSLIM Hadith # 4175 (book of Al Hudud).

<sup>62</sup>ODAH, *supra* note 30, 514-5.

<sup>63</sup>MOHAMMED ABU ZAHRA, *supra* note 4, 67.

2. Attempting to acquire property by force in which the actor(s) poses a threat to the public peace in a public place where a property is acquired, but no death resulted from the attempt.
3. Attempting to acquire property by force in which the actor(s) poses a threat to the public peace in a public place where a property is acquired, but death resulted from the attempt.
4. Attempting to acquire property by force in which the actor(s) poses a threat to the public peace in a public place where no property is acquired, but death resulted from the attempt.

The elements of forcible theft are almost identical to the elements of theft offense, e.g that the property stolen must be a protected property, with monetary value under Islamic law and the property must be owned by another. The additional element that distinguishes forcible theft is the use of force or the threat of force.

In calculating the minimum value of the property stolen required in theft offense, Abu Hanifa and Shafee concluded that to hold an actor(s) liable for forcible theft the value of the property stolen, if divided among the number of the actors, each actor's share should meet the minimum value required in theft offense.<sup>64</sup> Ahmed Ibn Hanbel disapproves this division methodology suggesting that all actors are liable for forcible theft if the aggregated value of the property stolen meets the minimum value required in theft

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<sup>64</sup> IBN KODAMAH AL-MAKDISI, *supra* note 16, 313. *See also* ALAA' AL-DEEN AL KASSANY, *supra* note 22, 92. *See also* AL-SHERAZEE, *supra* note 36, 302. *See also* MANSOOR AL BAHWATEE, 4 *Kashaf Al-Qnah' Ala- Moten Al-Eqnah* ' 91

offense.<sup>65</sup> Malek and a number of scholars did not require a minimum value of a property in forcible theft offense.<sup>66</sup>

The majority of scholars suggest that the culpability of a forcible theft offense is established only if the actor is a Muslim or non-Muslim resident in an Islamic state. Consequently, the non-Muslim and non-resident actor who committed acts that are deemed forcible theft is liable for theft, assault or homicide as the case might be.

Only a limited number of scholars including the Zahree school of thought scholars exclude the non-Muslim resident from this category by suggesting that the non-Muslim resident in an Islamic state only violates and voids the implied safety and security contract between him and the Islamic state by posing a threat to the public peace. It follows that if he commits a theft, assault and/or homicide, he is liable for these offenses only rather than forcible theft.<sup>67</sup>

Scholars presented various views regarding the force/threat of force requirement in forcible theft. Abu Hanifa and Ahmed Ibn Hanbel require using an instrument capable of causing genuine threat. The instrument might be a weapon or any other instrument capable of causing harm.<sup>68</sup> On the other hand, Shafee, Ibn Taymia and Zahree schools of thought scholars did not propose such a requirement suggesting that the physical force of the actor suffices to cause harm.<sup>69</sup> Malek expanded the scope of the forcible theft offense by including fraudulent acts as a substitute to using force or the threat of force.

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<sup>65</sup> *Id.*

<sup>66</sup> AL SHAFEE AL SAGHER, 8 *Nahyet Al-Mohtag Ela Sharah Al-Menhag* 5.

<sup>67</sup> IBN HAZEM, 11 *al Mohala Ba-Althar* 315 IBN KODAMAH AL-MAKDISI, *supra* note 16, 319.

<sup>68</sup> ALAA' AL-DEEN AL KASSANY, *supra* note 22, 90. IBN HAZEM, *supra* note 67, 109. IBN KODAMAH AL-MAKDISI, *supra* note 16, 304. MANSOOR AL-BAHWATEE, 4 *Kashaf Al-Qnah' Ala-Moten Al-Eqnah'* 89.

<sup>69</sup> IBN TAYMIA, *supra* note 19, 89.

A number of scholars including Malek and Shafee suggest that the crime of forcible theft may occur either in remote areas or in metropolitan areas.<sup>70</sup> Ibn Taymia explained that the more severe punishment of forcible theft, in comparison to theft, is proportional to the harm which occurred. Accordingly, the offenders of forcible theft crimes deserve the severe punishment of forcible theft, especially if the crime is committed in metropolitan areas because the residential area needs peace and security even more than the rural areas.<sup>71</sup>

### **B. Punishment**

Forcible theft is a crime with a twofold harmful effect. It harms the individual victim(s), but its greater negative impact is on society by causing disruption of social peacefulness and paralyzing commerce and every day activities if widespread. Because the harm of this crime is very broad in range and because it implies a challenge to the government and the entire social order, its punishment is the most severe of all punishment in Islamic law.

The punishment of forcible theft is stated in the Quran as follows:

“The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter”.<sup>72</sup>

Although the punishment is clearly stated, it was subject to interpretation. Ibn Taymia, supported by Ibn Abas’s interpretation, concluded that if the offender(s) kills

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<sup>70</sup> According to Ibn Taymia this is the opinion of Malek, Shafee, and most colleges of Mohamed (the Scholar, not the prophet) and some Hanfi Scholars. IBN TAYMIA, *supra* note 19, 89. *See also* AL SHAFEE AL SAGHER, *supra* note 66, 5. However, Abu Hanifa concludes that the crime of forcible theft may occur only in remote areas. ALAA’ AL-DEEN AL KASSANY, *supra* note 22, 92. IBN AL-HOMAM, *supra* note 22, 274.

<sup>71</sup> IBN TAYMIA, *supra* note 19, 89. *See also* IBN HAZEM, *supra* note 67, 308.

<sup>72</sup> Qur’an 5:33.



and takes the money, he should be killed and crucified.<sup>73</sup> If he kills and did not take the money, he should be killed.<sup>74</sup> If he took the money and did not kill, his hand and leg should be cut off from the opposite side (right hand and left leg or left hand and right leg).<sup>75</sup> If he poses a threat and did not take any money he must be exiled from the state.<sup>76</sup>

Malek suggested that a judge who hears a forcible theft trial that encompasses various prohibited acts such as theft, homicide and assault has the option of imposing either of the punishments listed in the verse of Qur'an including exile, execution, crucifying, or amputating a hand and a leg from opposite sides.<sup>77</sup> The judge in making such a determination should take into consideration the public interest and penal policy.<sup>78</sup> Accordingly, if the offender's influence is enormous that one fairly predicts that he will re-offend after the execution of a lenient punishment, the offender should to be killed or crucified because other punishment, such as hand amputation, will not prevent him from re-offending.

The other three major schools of thought have various proposals regarding the prohibited acts committed. Abu Hanifa and Ahmed Ibn Hanbel concluded that the offender who poses a threat to the public peace and did not kill, assault or steal property ought to be exiled from his state.<sup>79</sup> Shafee suggested that the judge has the option of exiling the offender(s) or imposing other discretionary punishment *Tazeer*.<sup>80</sup> Shafee, Ahmed Ibn Hanbel and Abu Hanifa suggested that if an offender steals property and

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<sup>73</sup> IBN TAYMIA, *supra* note 19, 82.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> IBN ROSHED EL-KORTOBY, *supra* note 9, 380.

<sup>78</sup> *Id.*

<sup>79</sup> IBN KODAMAH AL-MAKDISI, *supra* note 16, 313. *See also* ALAA' AL-DEEN AL KASSANY, *supra* note 22, 93.

<sup>80</sup> *See Id.*

neither assaults nor kills, he ought to be punished by a hand and a foot amputation from the opposite sides. If an offender(s) has committed homicide and did not steal, Shafee and Abu Hanifa suggest that he should be killed for the homicide committed. Malek maintained that a judge has the option of imposing the death penalty, or the death penalty with crucifying the offender. Other scholars suggested that a judge has the option of imposing any punishment mentioned in the verse of Qu'ran.<sup>81</sup> If an offender has killed and stolen, Shafee and Ahmed Ibn Hanbel suggest that he should be killed and crucified. Abu Hanifa, on the other hand, suggested that a judge has the option of amputating the offender's hand and a leg from the opposite side and then be killed or crucified till death. Malek concluded that a judge has the option of killing or crucifying till death.

It should be noted that the mental element (i.e. intention to kill) of the homicide incidental to forcible theft was subject to interpretation. While Malek and Abu Hanifa do not require intentional or purposeful killing to apply the capital punishment, Shafee and a number of scholars insist on such a requirement.<sup>82</sup>

### **C. Liability Mitigation**

Balancing the desire to enforce the rule of law in the society and Islamic law's general favorable attitude of granting a pardon for the offenders, Islamic law opens the door for repentance.<sup>83</sup> In this context, surrendering to the appropriate authority *before capture* is the mitigating condition that precludes the penalties for forcible theft.<sup>84</sup>

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<sup>81</sup> IBN HAZEM, *supra* note 67, 317.

<sup>82</sup> See IBN KODAMAH AL-MAKDISI, *supra* note 16, 309. See also ALAA' AL-DEEN AL KASSANY, 4 *Bada' Al Sana' Fe- Tarteeb Al- Shara'* 89, MANSOR AL BAHWATEE, 4 *Kashaf Al-Qnah' Ala- Moten Al-Eqnah'* 89.

<sup>83</sup> MOHAMMED ABU ZAHRA, *supra* note 4, 68.

<sup>84</sup> Qur'an 5:34. "Except for those who repent before they fall into your power: in that case, know that Allah is Oft-Forgiving, Most Merciful." See also this Hadith( Narrated by Wa'il ibn Hujr:

When a woman went out in the time of the Prophet (peace\_be\_upon\_him) for prayer, a man attacked her and overpowered (raped) her. She shouted and he went off, and when a man came by,

However, the offender remains civilly and criminally liable for other prohibited acts committed in the course of forcible theft. For instance, the offender remains liable civilly for damages, paying back stolen money and returning the stolen property to its rightful owner. The offender is also criminally liable for crimes committed such as assault, battery and homicide. It should be noted that the requirement of surrender before capture should be narrowly construed. Once the authorities are about to capture the offender(s), and he is firmly surrounded by the police or otherwise, the offender's surrender becomes irrelevant to liability.

## **VI. EMBAZLEMENT/ FRAUDLUANT LARCENY**

Embezzlement can be defined as taking the property of another with his knowledge, against his will and without using force. In essence, it is very similar to theft offense and therefore the elements of theft offense apply to embezzlement. However, there are a number of basic differences between theft and embezzlement. Those differences are:

1. Secret taking is an indispensable requirement of theft offense. The very core theory of embezzlement necessitates disclosed taking.
2. In theft, the stolen property must a protected property. This is not a requirement in embezzlement.

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she said: That (man) did such and such to me. And when a company of the Emigrants came by, she said: That man did such and such to me. They went and seized the man whom they thought had had intercourse with her and brought him to her. She said: Yes, this is he. Then they brought him to the Apostle of Allah (peace\_be\_upon\_him).

When he (the Prophet) was about to pass sentence, the man who (actually) had assaulted her stood up and said: Apostle of Allah, I am the man who did it to her. He (the Prophet) said to her: Go away, for Allah has forgiven you. But he told the man some good words (Abu Dawud said: meaning the man who was seized), and of the man who had had intercourse with her, he said: Stone him to death. He also said: He has repented to such an extent that if the people of Medina had repented similarly, it would have been accepted from them) SUNAN ABU –DAWUD (Book of Al-Hudud) Hadith # 4366.

3. In theft, the stolen property must exceed a minimum required value (three Darahims or its equivalent). There is no minimum value requirement in embezzlement.

The punishment is a discretionary punishment *Tazeer* which means any punishment that is less than the original punishment for theft.<sup>85</sup>

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<sup>85</sup> See Hadith “ the punishment of cutting the thief’s hand is not appropriate for the offender who embezzled, misappropriated or mistrusted another.” SUNAN AL BAYHAQE Hadith # 17781.