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An Expository Discourse on Discretionary Punishment and its Application in Theft Cases Under the Islamic Law

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Introduction

Islam has conferred and granted the right of security of ownership of property and emphasized on respect therein to take good care of every item owned by someone.
It is further recognized by the *Shari'ah* that it is the duty of every rich Muslim to pay out a certain amount from his/her wealth as charity to the poor and needy Muslims. Likewise Islam gives the latitude of acquiring the use of one's property through mutual consultation and agreement by (borrowing or loan) and the rich Muslims should not deny their brother Muslims from benefitting from his wealth or properties. Thus, these are the rights that Islam gives to Muslim brothers among themselves, but these right could not be misused by taking things of another without his/her consent, if so, it amounts to theft. In view of the above, it is my humble opinion that if all the Muslim community and the government have fulfilled their obligation towards their brother Muslims, and went ahead to take someone's property, it amounts to theft under *Shari'ah* Law.

Therefore, Muslims are enjoined to keep aloof from such actions and alike, the Holy Qur'an in Surat al-Baqarah verse 188 provides as follows:
"And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property".

As to the above quotation, Muslims are enjoyed to move away from committing the offence of theft, for it is a great offence under Islamic Law. One should not by all means apply or attempt eating up someone's wealth wrongfully. Thus, robberies, embezzlement, using someone's property to corrupt others directly or indirectly amount to atrocity and abominable tasks prohibited by Allah. These also apply to public properties under the control and management of the rulers to take good care in order to avoid converting them into their personal use.

Therefore, one can realize that the prohibition of this offence through the sever punishment prescribed for it, (i.e. amputation of the theft's hand) would not allow a man of piety to engage in such an evil deed.

2. Definition of Theft (Sariqah)

According to Ibn Rushd, theft which warrant their *hadd* penalty is:
"The taking away of property belonging to another, stealthily and without permission."

This definition is what appears to Ibn Rushd to be the generally accepted definition of the term Sariqah. Professor Abdul-QadirZubair also gave a similar definition to that of Ibn Rushd in his book Al-Hudud, Book One, as:-*"taking away of protected property secretly."* It should be noted that this is a general statement which will be broken down in the course of the paper. The jurists have divergent views over the essential elements of the offence of sariqah, but before then let us highlight the verse dealing with the punishment of the offence of theft (*as-Sariqah*). The Glorious Qur'an provides that:
"[As for] the thief, the male and the female, amputate their hands in recompense for what they committed as a deterrent [punishment] from Allah. And Allah is Exalted in Might and Wise."

Majority of the jurists agreed that the following are the major essential elements of the offence. They further agreed that only where all the essential elements are established that hadd punishment shall be applied otherwise *ta'azir*penalty is adopted. The essential elements are:

(i) The act must have been done stealthily,
(ii) The property taken must belong to someone other than the thief, and
(iii) The property taken away must be worth the minimum standard required (*Nisab*),
(iv) The property stolen must be valuable,
(v) Property stolen must be from a place of custody (*Hirz*).

These elements are unanimously agreed by all the jurists. There are several other elements, depending upon the legal theories of particular schools, which must be established before the *hadd* penalty may be meted out. Therefore, where anyone of these fails to be established the *ta'zir* penalty will have to be resorted to. Most of these cases are discussed below:

3. Where the Theft is not done Stealthily

The *Shari*'ah Law requires that where the property is taken openly, either by force or usurpation, the penalty of *ta'zir* will be enforced. The reason for this distinction is that theft done secretly signify that he appropriator has no intention whatsoever of returning the property which is not the case as in borrowing or seizing of property done openly. Secondly, there is apparent lack of consent and approval of the true owner. Where one is entrusted with some property, there is undeniable presence of some type of approval that the appropriator is given if this is incomplete. This element is what qualifies *shubhah* or doubt to apply under this heading. This is the opinion of almost all the jurists. In fact, according to Ibn Rushd, in his *Bidayah*, only a few, such as IyasbnMuawiyah opposed this view. According to him, the borrower who subsequently denies receiving the property is also qualified for the *hadd* penalty just as the BanuMakhzum lady, Fatimah Bint Aswad Al-Makhzumiyyah was.

The majority of the jurists, according to Ibn Rushd, reject the famous Makhzumiyyah tradition said to be narrated by A'isha (RA) because it runs contrary to legal principles (*usul*). It is clear that the borrower does take the property with the consent of the owner and by that very even, the condition *hirz* or custody is lost and the *hadd* should not apply in that case. Moreover, Ibn Rushd claims that there is a missing link within the text of the report. This is that the Makhumiyyah lady is guilty of both conversion (*ikhtilas*) and theft (*sariqah*) because the Prophet (SAW) had said *"what destroyed people before you was that if (a noble one stole they used to leave him…"*). Laith bin Sa'ad had also reported a version of the tradition in this way: *"verily the woman from Makhzumiyyah stole."*
From the above discussion, the view of the majority is the sounder and more preponderant.

4. The Article Stolen is Valuable Property

The jurists agreed that for an article to be 'stolen' it must be inviolable: i.e. valuable and corporeal. Ibn Rushd has added that the jurists agreed that any article that is subject to ownership, disposition and consideration (*iwad*) may be stolen except humans. The Maliki and Zahiri jurists presuppose that children are

subject to theft just like other articles that may be lifeless.

There is also difference of opinion over perishables and objects that are basically lawful for everyone. The majority of the jurists hold that all articles that are subject of ownership and transaction may be subject matter of theft. Abu Hanifah also goes further to exempt things such as musical instruments, copies of the Qur'an, books of hadith, grammar and poetry. His reason for this opinion is that such books are kept for meditation, study and recitation only and not as property. However, Abu Yusuf holds that theft of books of hadith, grammar and poetry are subject to the *hadd* penalty and not *ta'zir*, if they value up to the *nisab*. However, there is no difference among the Hanafis that theft of books of other import such as books of accounts sand bank sheets are subject to the amputation if they value up to the *Nisab*. Imam Hanafi further brings crops on the field before harvest under the exemption. Surprisingly, Abu Hanifah considers the theft of harmful objects such as poison, chess sets made of gold or silver and crosses to fall under the rule. He opined that there is the *shubhah* that the thief took them to destroy them because of their unlawfulness. He also includes the theft of birds.

The majority of the jurists have not provided exceptions to the *hadd* penalty of theft as does by Abu Hanifah. Imams Malik, Shafi'i and Abu Yusuf are of the opinion that the *hadd* will be applied for the theft of musical instruments, bound books and vessels of wine fi their ornamentation amounts to the *nisab*.

Majority of the jurists rely upon the general import and significance of the texts that cover theft. They also rely upon the various authorities that specify the minimum value of stolen articles (*nisab)*. The argument of the majority is that if a minimum value can be made a condition for stolen articles before the *hadd* may be applied, the other consideration of *shubhah* advanced by Abu Hanifah are not relevant.

Consequently, Imam Abu Hanifah relies upon strings of authorities such as mentioned below:

(i) That the Prophet (SAW) had said: "there shall be no amputation for fruits and pith or cerebrum (kathar) of palm trees."According to Imam Abu Hanifah this tradition is a proof that theft of what lies abundantly and what is paltry, or of trifling value, is an exception to the law of amputation;

(ii) That the Prophet (SAW) said: "there is no amputation for the theft of birds"; and

(iii) That A'isha (RA) is reported to have said: "during the lifetime of the Holy Prophet (SAW), the hand was not cut off for trifles."

The position taken by Hanafi above is not entirely exclusive to them. It seems that the principle of *shubhah* is extremely vast and that our writers of contemporary world seem to mention only general and block issues. This approach is not correct because investigation into the opinions of the non-Hanafi jurists proves that they also gave the doctrine of *shubhah* prominence especially in the cases of theft. For instance, Imam Shafi'i, in his book titled *Kitab al-Umm*, clearly stated that the theft of musical instruments will not attract the *hadd* penalty for theft.

It can clearly be seen from the works of Malikis that they give recognition to the doctrine of *shubhah*. In the *Muwatta* of Imam Malik, a case is mention of Marwan bin al-Hakam being reminded of the tradition "*la qat'a fi Thamar wa la kathar*" by Rafi bin Khadij (RA) and, based on the exception, Marwan let the thief go. It is also mentioned in the *Hashiya of al-Dasuki* that the theft of some types of birds will not draw liability for amputation.

From the above discussion, it is safe supposition to conclude that the concept of *shubhah* is a very much connected with practical cases of doubt, uncertainty and circumstances which are reasonable enough to spend the *hudud* and, in its place, impose the *ta'zir*. Perhaps this is why the jurists appear at times to contradict themselves. But it is logical that what it may qualify as *shubhah* in one case may not be in another.

5. The stolen property must belong to some other person other than the thief

Under this heading we shall see, among others that the father is not to be subjected to the amputation if he steals something belonging to the descendants. This is because he has some constructive rights in the property of his offspring. The position is similar where the property stolen does not belong to anyone or where the thief actually owns an interest in the subject matter.

5.1 The case of a father stealing from his offspring

The majority of the jurists including Abu Hanifah, Malik, Ash-Shafi'i, Ahmad, Sufyan al-Thawriy and Ishaq hold the opinion that the amputation shall not apply and only the *ta'zir* penalty shall be given. According to Ibn Rushd, these scholars rely upon a tradition of the Prophet (SAW) which says:-*"anta wa maluka li abik".* They also hold the view that the spirit of the Qur'an reveals this trend. For example Qur'an Chapter 17 verse 23 provides, thus:

"And your Lord has decreed that you not worship except Him, and to parents, good treatment. Whether one or both of them reach old age [while] with you, say not to them [so much as], "uff" and do not repel them but speak to them a noble word."

But Zahiris reject this argument and maintain that there is no concession available to relations whether or not they are parents. Ibn Hazim, a disciple of Zahirischool, in his *Muhalla*, supposes that the position of the majority is apparently correct but that the verse quoted above do not actually reflect their arguments. Furthermore, he argues that the verses do not exempt the father from *hadd* if he copulates with a slave maid of his son, nor does it avoid the *hadd* of *qadhaf* if a father defames his son. As to the verse *"wa bil walidayniihsana"*, Allah (SWT) also exhorts the doing of good to relatives, orphans, the poor, the wayfarer and neigbours. Why not, says Ibn Hazim, does the exemption/concession not apply to the others? He goes on to write that Allah (SWT) has instructed us to stand firm in the doing of justice even if it is against ourselves or our parents.

As to the tradition of the Prophet (SAW), *"anta wa maluka li abik,* Ibn Hazim asserts that this tradition has been abrogated and, therefore, the Hanafis, Malikis and Shafi'is do not have justification for their propositions.

It appears that Zahiri jurists, such as Ibn Hazm depends on, it is still clear that there is a sort of 'ownership' or possessiveness that the father enjoys over not only the property of the descendant but also over the latter's person. The child bears the father's name, culture, traits genes and features. All these considerations tend to create *shubhah* which should be weighty enough to avoid, not only punishments but the maximum penalty.

5.2 Theft by Descendants

In this case, Hanafi, Shafi'i and Hanbali jurists are of the opinion that the *ta'zir* will apply where a descendant steals from an ascendant. Maliki, however, allow the application of *hadd*.

5.3 Theft by Relatives

According to the Hanafi School, a person who steal from close relatives (*muharrim)* are not to be subjected to the *hadd* penalty because they have a presumed license of ingress and egress. They also stress that the application of the *hadd* penalty will lead to the cutting off of the family ties (*qat' al-rahim*).

But those who steal from distant relatives do not fall under the exception because there is no clear-cut license to entry as is presumed in the case of close relatives.

On the other hand, Imam Maliki, Shafi'i and Ahmad are of the view that all relatives who are not ascendants or descendants of the victim of the theft are subject to the amputation. The opinion of the majority seems a little out of place. In spite of the fact that the relative who are not direct ascendants appear to be distant, they are, nonetheless, relatives who will, in most cases, be allowed free access to homes and rooms of the relatives. This freedom is especially true of people of West Africa and particularly Nigerian society. By this access, and *shubhah*, they should not be condemned to the amputation even under the principles and

standards of majority. Therefore, this view must only be received with due emphasis and regard to local circumstances, attitudes and behaviour. To insist on the majority view in full access will be to cut off family ties, thereby, breaking up on the entire social fabrics of our people, which go against the *maqasid al-Shari'ah*, the ultimate purpose of the law. Allah (SWT) knows best.

5.4 Theft between Spouses

In case one of the spouse steal from the other, Imam Malik hold that the amputation will apply if the thief steals from a place where he/she is not allowed access. This is regardless of whether the place is within or outside the matrimonial home and must be protected under lock and key and not by mere verbal prohibitions. The Malikis are in consensus as regards theft committed outside the matrimonial home. However, as regards the position of theft committed within the home, there are differences of opinion. Al-Dasuki is of the view that avoiding the *hadd*, where the locking up is meant for others and not the spouse, is a better option.

Abu Hanifah holds that theft of property belong to a spouse should not draw the *hadd* penalty whether or not the theft is done in the matrimonial home.

Among the Shafi'i School, there are three opinions which are prominent. One group follow the views of Imam Malik, and is the most predominant; the second group follows that of the Hanafi, and the third, which is held by the disciples of Shafi'i, is that the husband is subject to the amputation if he steals from his wife's property from which he has been barred. To this group the wife, however, is not subjected to the amputation if she steals from her husband's property which is under lock and key. They rely upon the fact that there is a right of the wife to maintenance in the property of the husband and the husband did not enjoy this advantage.

Under the Hanbali School there are two views. One group follow that of Maliki and the other follow that of Abu Hanifah.

The Zahiri jurists hold that in whatever case the amputation will apply because of their refusal to recognise the concept of *shubhah*.

Among the various views put forward, the views of the Hanafi are more convincing. Spouses are supposed to be sources of peace and security for each other. The Qur'an even addresses spouses as '*libas*', which may mean protection, covering or security. Wives have been instructed to guard the home of the husband when he is not around. It is also a common knowledge that marriage is a means to enjoy, in a constructive and reasonable way, the property of the spouse. The Prophet (SAW) is reported to have permitted Hind, the wife of Abu Sufyan, to take, even without the consent of the husband, foodstuff sufficient for herself and her children. The jurists of Malikis even give the husband the right to veto any disposition of the wife that exceeds one third of her wealth. In the *Mukhtasar*of *Khalil*, the husband is allowed to use the wife's bed and even use clothing of the wife that is unisex. All these circumstances mentioned above are serious points of *shubhah* that cannot be overlookded.

6. Property Stolen must be from a Place of Safe Keeping (*Hirz*)

The majority of the jurists recognise the concept of *hirz*. That means the stolen article must have been taken from a place that is secure. Where this condition is not satisfied, the *ta'azir* penalty will be inflicted. The only opponents of this view are the Zahiris and the group that Ibn Rushd refers to as '*ahl al-Hadith*'.

The majority of the jurists rely on the Prophetic tradition narrated by Amr bin Shu'aib which says that the Prophet (SAW) was asked concerning fruits hanging on trees and he said:
"Whoever is wronged (suffers theft) by one in dire need and who removes it without being stealthy will not be punished. But whoever takes anything out will be penalized by being fined twice the price of the fruits and he shall be chastised. And whoever steals anything after it has undergone harvestation and the amount stolen values up to the price of a shield he shall suffer the amputation."

Majority of the jurists rely on the word *jarrayn*, used by the Prophet (SAW) in the above hadith, which implies a store for crops harvested. This, then, proves that the *hirz* is a condition necessary for the penalty of amputation. Other conclusions drawn by the majority of the jurists

are that taking away property secretly is a condition for the execution of the *hadd* penalty. Stealing from an open place cannot be said to be done "stealthily".

6.1 Types of Custody or Safe Keeping (*Hirz*)

All the jurists who make *hirz* as a condition unanimously agree that there are two types of *hirz*, that is, *hirz* by virtue of the place of custody; and *hirz* by virtue of a guard.

6.1.1 Safe Keeping (*Hirz*) by Virtue of the Place of Custody

Imam Abu Hanifah, is of the view that, this type of *hirz* is any place that is traditionally understood as a place for safe keeping and which is not accessible to the public except by permission. Therefore, houses, tents stores, huts etc. may constitute a *hirz*according to Abu Hanifah. It is also a condition under Hanafi School that the *hirz* must be an erected structure, but it is not a condition that it be possessed of doors, or that it be locked up.

Imam Malik does not insist that the place be locked up, he considers *hirz* to be any place reserved for keeping wealth and other valuables. According to Ibn Rushd, the determination of what is *hirz* depends on local custom and convention.

Imams Shafi'i and Hanbali considers this type of *hirz* to be a place that is known and reserved as a place of custody and should also be under lock and key. However, these two jurists attached certain conditions to the *hirz*:

(i) It must be within inhabited place. A farm is not a safe place for custody to them; and

(ii) That the *hirz* must be fully locked-up or fully sealed.

6.1.2 Safe Keeping (*Hirz*) by Virtue of Guard

According to Abu Hanifah, it is not a place which is not a *hirz* by itself, because it is a place accessible to the public such as mosques, roads or halls. The place, therefore, becomes *hirz* by virtue of presence of a guard. This opinion implies that in modern times, if someone were to leave his vehicle parked along the roadside, theft of the vehicle will not draw the penalty of amputation and the state will have to resort to the *ta'zir* unless it is locked up. However, if the owner hadd left a guard over the vehicle the thief will be subjected to the amputation. This opinion is based on the reason that roads are not places meant for safe keeping or custody. The position is the same if someone leaves his property in the mosque.

Ibn Rushd, in his exposition about the *hirz*, does not seem to differentiate between the two types of *hirz*, except that he refers to Maliki's opinion that one who steals property in the possession of a child will not be subjected to the *hadd* penalty except where the child is accompanied by a grown up. He also said that if someone steals in the mosque, he will escape the amputation except if the theft is done during the night. But this opinion, even within the Maliki School, is subject of debate.

It is further agreed among all the jurists who insist on the *hirz* that whoever can be said to remove property worth the *nisab*is to suffer amputation. This is regardless of whether he does it from within or outside the house.

In case the offence of theft is committed by two or more persons, some are within, while others are outside collecting the stolen items from outside. Some Maliki jurists hold that amputation will apply against the one outside, while some others are of the opinion that ta'zir will be applicable to all involved. Some of the jurists further said that amputation will be executed to those who hands down/out the goods from inside. According to Ibn Rushd, this difference of opinion is based upon whether the actors can be referred to as removers of property from the *hirz* or not.

7. The Value of the Property stolen must reach *Nisab*

The overwhelming majority of jurists stress that where a thief steals property that does not amount to the minimum value *nisab*, the *hadd* penalty shall not be applied. The *ta'azir* will apply instead. They rely upon several traditions

reported in the books of *hadith* that indicate the fact.
Ibn Umar reported that the Prophet (SAW) amputated (someone's hand) for the theft of a shield that was valued for three dirhams.
A'isha (RA) reported that the Prophet (SAW) use to amputate the hand of thief for (property) worth a quarter of a dinar or more.
It is also reported that "the Prophet (SAW) applied the amputation for (property worth) a quarter of a dinar".
It is also reported that the Prophet (SAW) ordered: "Amputate for one quarter of a dinar and avoid the amputation in cases where the article is worth lesser than that."The narrator also added that 'a quarter of a dinar at that time is equivalent to three dirhams and one dinar was worth twelve dirhams'.
The Prophet (SAW) is also reported to have said:
"Do not amputate the hand of a thief for property lesser than the value of a shield."
"Aisha (RA) was asked, what is the value of a shield? And she answered: a quarter of a dinar."

On the other hand, Hassan al-Basariy, Dawud, and the Khawarij insist on carrying out the execution of the penalty of amputation for all property whether of little or great value. They rely upon the fact that the verse of amputation does not make any exception. It simply says:
"Now, as for the man who steals, and the woman who steals, cut off the hand of either of them in requital for what they have wrought, as a deterrent ordained by God…"I
They also rely on the tradition narrated by Abu Hurairah which says:
"*May Allah curse the thief who steals an egg and get his hand cut off, or who steals a rope and gets his hand cut off."*

The majority of the jurists reply that the verse of amputation has been specified by the various traditions of the Prophet (SAW) that mention the *nisab* as a necessary condition.
Despite the fact that the majority of the jurists have accepted the *nisab* as a condition necessary for application of the *hadd* of amputation, they have differed over what constitutes the *nisab*. According to Ibn Rushd, in his *Bidayah*, the difference of opinion have been drawn along the line of the jurists of *Hijaz* comprise of Malik, Shafi'i and others on the one hand, and the Iraqi jurists on the other.

Hijaz jurists fix the *nisab* at three *dirhams* (silver coins) and a quarter of a *dinar* (gold coins). But they differ between themselves when the stolen property cannot be valued in gold or silver. Among the two views of *Hijazis*, that of Imam Malik should be preferred because the Prophet (SAW) did not identify either of the two standards of gold and silver as stronger. The two were used interchangeably.
The general opinion of the Iraqis is that the minimum amount is ten *dirhams*. According to Ibn Rushd, some of them, such as Ibn Abi Layla, and Ibn Shubrimah hold that it is five *dirhams.* Some hold four *dirhams* and Uthman al-Battiy holds for two *dirhams*.

8. Theft from the Public Treasury

According to majority of the jurists such as Abu Hanifah, Shafi'i , and Ahmad Hanbal, only the *ta'zir*will be enforced where the thief takes anything from the public treasury. The justification for this, according to the Hanafi jurists is that the thief shares, in a way, ownership of the public. This constitutes the *shubhah* and the *hadd* penalty should not be applied.
According to majority of the jurists such as Abu Hanifah, Shafi'i , and Ahmad Hanbal, only the *ta'zir* will be enforced where the thief takes anything from the public treasury. .the justification for this, according to the Hanafi jurists is that the thief shares, in a way, ownership of the public wealth. This constitutes the *shubhah* and the *hadd* penalty should not be applied.
According to Imam Malik, however, such a thief is subject to the *hadd* penalty because the right of the thief to receive from the public purse is dependent upon his becoming entitled to the grant.
The opinion of Imam Malik seems to be inferior in this particular case because of the presence of *shubhah*. Many are tempted to follow the views of Hanafi, especially; that the property in the public purse belongs to the Muslims and the thief is a Muslim. He does enjoy a kind of

interest in the property. One cannot be said to steal from his own his property and therefore the *shubhah* is not only present but significant.

9. Conclusion

A general test of *shubhah, i.e.* doubt or uncertainty as regards the subject matter or proof of the offence, may be presumed and wherever anyone of the two raises *shubhah* considerations, many of the jurists will put off the *hudud.*

It appears that he Hanafi jurists are most disposed to apply the notion of *shubhah*, which require the enforcement of the *ta'azir*. But on a general note, it seems that most jurists recognise the matter as necessary part of legal reasoning under the matter of *istihsan*. This display the overall presence of concession and mercy which is predominant and ever present in the Islamic Criminal Justice System so that only those who are brazen and wicked get to suffer the maimum penalty; and at the same time, the judge finds a way of giving out a lesser penalty to culprits and thereby ensuring due requital.

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