Stealing more is better? Marginal Deterrence in Islamic Criminal Law of Theft

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Abstract

This study represents the very first attempt towards applying economic analysis on Islamic criminal law, in particularly that related to the crime of theft. The study investigates what the economic theory of deterrence can tell us about the deterrence effects of Islamic law. Islamic criminal law offers two main punishments regarding theft; *hadd*, a fixed penalty which requires the amputation of the offender's right hand under certain conditions and *ta'zir*, a punishment that is left to the discretion of the judge or ruler and is less severe than *hadd*. Deterrence is one of the main objectives for Islamic criminal law. Nevertheless, from the viewpoint of 'marginal deterrence' theory, lesser crimes with low social harm are punished severely in Islamic criminal law while crimes with high social harm are punished more leniently. Consequently, criminals would prefer to commit the latter type of crimes and economic cost of crime would significantly rise. The reason behind such an inefficient punishment setup is that the Islamic jurisprudence (*fiqh*) relating to the punishment of theft has been developed in archaic societies, where some crucial economic and legal concepts were not fully developed or taken into consideration by Muslim scholars in the 8th and 9th century A.D.. This study implies that if Islamic criminal law is introduced in Arab Spring countries in its current form, certain, socially very harmful, types of crimes are likely to become more frequent. A call for a modern reinterpretation and recoding of Islamic criminal law of theft is essential for any attempt to apply *Shari'a* in Islamic countries.

JEL classification: K14; Z12; P40; K00.

Keywords: Islamic Criminal Law, Marginal Deterrence, Hadd, Ta'zir, Shari'a, Economics of Crime.

1. Introduction

As democracy is bringing more political Islam into the scene in the countries of the Arab Spring, it becomes apparent that Islamists in Tunisia, Morocco and Egypt will play a significant role in the crucial upcoming phase dedicated to the development of new constitutions, significantly changing these countries' legal setup. Beaumont (2011) argues that political Islam is bound to dominate Arab spring countries, while Manthorpe (2011) notes that Arab spring looks more like an Islamic revolution. This is, to a certain extent, unsurprising as Islamic societies are believed to be very keen to follow the teachings of their religion. El-Bialy and Gouda (2011) develop a Religious Loyalty Index (RLI) to test the religiosity of different societies and find that Islamic societies are the most adherent to religion. The Economist (2011a) states that "Islam is bound to play a larger role in government in the Arab world than elsewhere. Most Muslims do not believe in the separation of religion and state, as America and France do, and have not lost their enthusiasm for religion, as many "Christian Democrats" in Europe have." In another article, the Economist (2011b) argues that "one of the dominant demands of these Islamic parties is the full implementation of Islamic Law (*shari'a*) in their respective societies." Schacht (1964) argues that law "remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western Ideas." Such demands started to materialize in Egypt as a member of parliament from the Salafi-oriented Nour Party proposed to apply Islamic criminal law for crimes of overt robbery, murder, and forcible taking of property with a weapon. In case this call made its way to the Egyptian legislation, punishments of these crimes will include crucifixion and cutting the hands and legs of offenders (Al-Masry Al-Youm, 2012). Such punishments may seem harsh from the viewpoint of international human rights standards. However, in a recent survey, Pew Research Center (2010, p. 14) finds that the majorities of Muslims in Egypt, Jordan, Pakistan and Nigeria say they would favor making harsh punishments such as stoning people who commit adultery; whippings and cutting off of hands for crimes like theft and robbery; and the death penalty for those who leave the Muslim religion the law in their country (Table 1).

Table 1: Views of Harsh Punishments

	% Favor		
	Stoning people who commit adultery	Whippings/cutting off of hands for theft and robbery	Death penalty for people who leave the Muslim religion
Turkey	16	13	5
Egypt	82	77	84
Jordan	70	58	86
Lebanon	23	13	6
Indonesia	42	36	30
Pakistan	82	82	76

Nigeria	56	65	51

Asked of Muslims only.
Source: Pew Research Center (2010), Question 108b-d

This study provides an economic analysis of Islamic criminal laws, a subset of *shari'a*, with regards to theft. economic analysis of crime was first introduced by Becker's (1968) seminal study, where the author argues that a prospective offender's decision to commit a certain offense is based on rational decision making. Therefore, such offender compares the benefits and the costs of committing a certain offence. This offence is committed only if the offender's expected benefit from crime exceeds the expected cost of crime. The two key components for increasing the size of the expected costs of committing a certain crime are the probability of apprehension (and conviction) and the size of the punishment imposed on the criminal upon successful conviction. Variations in either component will affect the offender's expected costs of committing the crime. developing such notion further, Ehrlich (1973) assumes that the offender's total time is fixed and is divided between legal and illegal activities. As a result, the more time the offender spends on legal activities, the less time is spent on illegal activities and vice versa.

The economic theory of crime proposes a deterrence theory based on the concept that, if the expected costs associated with committing a crime offset the expected benefit of the crime itself, the rational offender will be deterred from committing the crime. Deterrence theory resurged in recent decades among some criminologists who have chosen to espouse a new and more conservative outlook towards what should be done about crime (Eve, Segal, & and Stevens, 2008). Indeed, it can be said that deterrence theory both was and still is the "philosophical foundation for modern Western criminal law and criminal justice systems" (Akers, 2000, p. 17). As western legal institutions have been developed through a significantly different social, political and economic context than Islamic legal institutions, it can be of interest to examine the significance of deterrence theory in the Islamic legal context especially that related to the penal code of theft. This study is the first to apply concepts of economic analysis on Islamic criminal law. Most of the studies that tackled Islamic criminal law can be divided into two categories; that written by legal scholars and are aimed to analyze certain aspect(s) of this law from an entirely legal perspective, and that written by Muslim scholars and are aimed to provide a theological point of view for these laws. Suffice to state that Rupp (2008) conducts a comprehensive meta-analysis of law and economics literature dealing with crime and deterrence and, out of the 700 investigated studies, not a single one is conducted on Islamic law. To our best knowledge, law and economics literature, as well as new institutional economics (NIE) literature, did not deal with Islamic criminal law so far. Our study aims to make the first attempt to fill this gap in literature.

Islamic criminal law defines a certain set of conditions for a crime to be considered a theft. In case these conditions are fulfilled, then this theft falls under the category of severe crimes (*hadd*) -which is comparable to a felony under a western legal system - and a harsh punishment of amputation of the criminal's right hand is applied. If the crime does not meet the conditions set by Muslim scholars for a theft, it is considered a lesser crime (*ta'zir*), comparable to a

misdemeanor, and is generally punished in a more lenient way and under the discretion of the judge. Through our investigation, we can deduce that Islamic criminal law focuses on the aspect of deterrence in its legal rationale. Nevertheless, it mostly focuses on the particular concept of general deterrence where, given a certain risk of detection, any prospective offender is threatened by the severe punishment of committing a crime. Therefore, less crime would exist as the cost of committing a crime is higher than its benefit for a given offender in this society. However, Islamic penal law does not take into consideration the concept of marginal deterrence where an actor chooses to commit a certain crime from a set of available crimes.

Legal rationale suggests that punishment should be positively correlating with the crime, so that more serious crimes with a high social cost are punished more severely. However, we find that punishment negatively correlates with the severity of crime in Islamic criminal law of theft. For example, stealing a wallet from an individual is considered a *hadd* crime and is punished by the right hand amputation while stealing any amount of money from state treasury or embezzling from entrusted property are considered crimes that fall under the more lenient *ta'zir* category. *Ta'zir* penalty is left to the judge's own discretion, though it should not reach the severity of *hadd* punishment. Such legal setup would induce any rational criminal to commit more serious and lucrative crimes than petty crimes. The reason behind such an uncommon legal setup is that the Islamic criminal law was mainly developed in archaic times when private property was viewed as more important and worth more protection than public property. The study tries to call the attention of Muslim jurists and scholars to these fundamental problems before such legal system is applied in any contemporary society.

It is noticeable that, except for a few major studies such as that of El-Awa (1993) and Peters (2005), Islamic criminal law remains under-researched in western legal literature. As the first paper to offer economic analysis to Islamic criminal law, we present a outlook of Islamic criminal law, especially that related to theft, before we analyze these laws from a modern economic and legal perspective represented by the concept of 'marginal deterrence'. Arabic primary sources are used whenever possible and special attention is given to contemporary sources of Islamic criminal law. The reason for this act is straightforward; Muslim jurists generally argue that Islamic laws can be modified to suit the relevant time and place. As the body of Islamic law was mainly comprised through the duration between the 8^{th} to the 10^{th} century A.D., it is thus expected that Islamic law correspond to this specific era, making such legal system obsolete. Consequently, citing such archaic literature can be seen as a redundant task. According to Hallaq (1984), Muslim jurists have ongoing efforts to extrapolate new legal directives that harmonize Islamic law with existing social, legal, political and economic norms, internationally and locally. Therefore, it is assumed that modern literature of Islamic law, which we heavily depend upon through this study, reflects the state-of-the-art in Islamic criminal law.

The paper is divided into seven sections; where a brief overview of *shari'a* is presented in section two. Section three pays special attention to the kinds of punishments that Islam generally endorses, while section four presents the details and conditions for a crime to be considered a theft under the Islamic criminal law. Section five examines the general stance of Islamic criminal law from the theory of deterrence, a core principle of criminology and rational choice theories. The essence of this study is represented at section six where marginal

deterrence in Islamic criminal law of theft is investigated. For our purpose, several specific cases are put forward where the inefficiency of Islamic laws of theft, from the viewpoint of marginal deterrence theory, are shown more clearly. Finally, section seven provides concluding remarks and proposals for further research.

2. A brief look on Islamic Law (*Shari'a*)

The literal meaning of *shari'a* in Arabic is "the path to the source of water", the connotation of which is that it is the source of life for Muslims (Zakzouk, 2002, p. 89). *Shari'a* has come to mean the "divinely mandated path", the clear and truthful path that a Muslim must follow in life so as to be submitting to the will of God (Esposito, 1991). As such, *shari'a* is central to any Islamic society. Khadduri (1984) views *shari'a* as what Thomas Aquinas would term 'Eternal Law', since it derives mainly from revelation, and is in fact the quintessence of God's will and justice. IslamWeb (2002) defines *shari'a* as "the whole body of beliefs, rituals, transactions, policies and norms that Allah have ordered Muslims to abide by". Supporting this definition, Zidan (1969, p. 38) argues that "*Shari'a*" and "Religion" are synonymous for Muslims. Zidan (1969, p. 39) also states that *shari'a* is based on two essential sources: the *qur'an*, the holy book of Islam which contains God's word revealed to the prophet Muhammad over a period of 23 years, and the *sunna* - the practices and sayings of Muhammad - which became the source of Islamic ethics and norms for Muslim behavior.

As the Islamic faith attests that both *qur'an* and *sunna* were revealed by Allah, the supreme all-knowing creator, Muslims believe that provisions in both these sacred sources are impeccable and infallible, especially that provisions that have a specific and fixed meaning. Moreover, Muslims also believe that such provisions are universal, suitable for every time and place. The study and interpretation of *shari'a* through these primary sources is the essence of Islamic jurisprudence (*fiqh)* (Mutahhari, 1983). *Fiqh* adds to the body of Islamic *shari'a* laws by integrating different secondary sources in cases where the issue under investigation is not directly mentioned through the texts of *qur'an* and *sunna*. These secondary sources, also known as juristic principles, are: *Ijma*, or consensus of opinion among Islamic scholars, and *Qiyas* or process of analogical reasoning based on understanding of the principles of the *qur'an* or *sunna*.

Since the study deals with penal code of theft in *shari'a* and *fiqh*, it is essential at this stage to clarify the differences between both notions. IslamWeb (2004; 2002) and Al-Ashkar (2005, p. 43) offer such differentiation; first, as previously mentioned, Muslims believe that *shari'a* is infallible and is all right, while *fiqh,* since it is based on understandings of various Muslim scholars can sometimes be wrong. Second, *fiqh* deals exclusively with the practical side of Islam, which comprises transactions and rituals performed by Muslims through their daily life. Conversely, *shari'a* deals with this practical side as well as the spiritual aspects of Islam, which includes the beliefs and norms taught by prophet Muhammad. Therefore, *fiqh* is a subset of *shari'a* in terms of range of topics covered. Third, Muslims believe that *shari'a* is absolute while *fiqh* is the interpretation and opinions of Muslim scholars which can change through time and

place. Fourth, *shari'a* is universal and general while *fiqh*, in most cases, is specific. Finally, *shari'a* allows no room for extrapolating new rules (*Ijtihad)* in sacred provisions of fixed and specific meaning, while *fiqh* is fundamentally based on extrapolating new rules and decisions from provisions of multi-meaning to cope with changing circumstances. In other words, *shari'a* is associated more with static and direct provisions of Islam while *fiqh* adds the dynamic aspect of this religion through dealing with indirect provisions of sacred texts.

As Bälz (2008, p. 122) notes, the difference between divine ordinances, represented by *shari'a*¸ and their worldly interpretation, represented by *fiqh,* is a vital ingredient of Muslim legal thought and has played an important role in the shaping and development of the Islamic law. Even if there is one divine provision regarding a certain issue, Muslim scholars tend to disagree on how to implement this provision depending on the appropriate situation in hand. According to Islamic legal doctrine, the jurists may choose which opinion to follow where there is no consensus. *shari'a* does not sponsor a uniform and unequivocal formulation of the law since it bases its discourse on the constant interpretations of Muslim scholars of text of the *qur'an* and *sunna* as well as the consensus of the early generations of Muslim scholars. Since these scholars interpreted the sources in different ways, various valid opinions with regard to one legal issue are considered normal by Muslims. Throughout the history of Islamic states, the jurists usually have tended to choose the legal verdict that would suit both the ruler's demands and, more important, the circumstances prevailing at this time (Peters, 2005).

The institution of the 'school of jurisprudence' (*madhhab*, plural *madhahib*) united Muslim scholars around certain legal doctrines and methodologies. This also brought more coherence and consistency in legal thought throughout the Islamic world since the adherents of these schools of jurisprudence were bound to follow the methodology of deduction as well as the actual opinions of the school's founding fathers. There are four jurisprudence schools in Sunni Muslim: the Hanafi [named after Abu Hanifa an-Nu'man (c. 699–767)], Maliki [named after Malik ibn Anas (c. 711–795)], Shafii [named after Muhammad ibn Idris al-Shafii (c. 767- 820)] and Hanbali [named after Ahmad bin Hanbal (c. 780-855)]. Most of the Shi'a Muslims follow the Ja'fari jurisprudence [named after Ja'far al-Sadiq (702-765)].

Controversies on many essential legal issues are persisting between different *madhahib* and sometimes even within the same *madhhab*. Interestingly, Muslims view such controversies and differences in Islamic legal opinion as permission for the Muslim public to follow any of these legal opinions. Furthermore, these differences in Islamic legal opinions stem from the uncontested ability of Muslims scholars across different ages to derive new legal opinions that suit their contemporary political, social and economic settings. This gives the Islamic legal system a dynamic part that can make Islamic laws cope with the changes across time and place. This is defined under Islamic jurisprudence as *ijtihad*, which is defined as "the making of a decision in Islamic law (*shari'a*) by personal effort, independently of any school of jurisprudence" (Wehr, 1976).

Gibb (1953), Zidan (1969, pp. 146-148), Anderson (1976), Al-Shawkani (1990, p. 38), Al-Ashkar (2005, p. 260) and Al-Milad (2011) emphasize on the idea that since the 10th century A.D., Muslim scholars from the abovementioned *madhahib* felt that all the fundamental questions of

fiqh had been carefully studied and entirely finalized. A general consent started to materialize to the effect that from that point in time onwards no Muslim legal scholar might be considered to have the required qualifications for independent reasoning in law (*Mujtahed)*, and that all related future activity would have to be limited to the justification, application, and interpretation of the canon as it had been laid down once and for all. This 'closing of the door of *ijtihad*' gave rise to the concept of *taqlid*, a term that literally means 'imitation', that is; obeying the decision of a certain religious authority without essentially examining the scriptural basis or reasoning of that specific decision. In other words, accepting the verdict of scholars of *fiqh* without demanding an elucidation of the processes by which they arrive at it, hence observance of one of the classical schools of *madhahib*.

A considerable body of Islamic law literature refutes the aforesaid claim and argues that the door of *ijtihad* had never closed at any point in time (Hallaq, 1984, p. 33; Bediuzzaman, 1996; Kabbani, 2006; Salman, 2007; Al-Qabas, 2011). Nevertheless, nearly all of the above mentioned studies agree that *ijtihad* should be practiced only by highly qualified Muslim legal scholars to make sure their novel opinions are valid enough to be followed by Muslims. It is noticeable, however, that most of the contemporary *sunni fiqh* books base their legal decision only on the four *madhhab*[*] and that they hardly contain any legal opinion by any Muslim legal scholars after 10th century A.D (Ismail, 1997; Sabek, 1971).

3. Types of punishments in Islamic criminal law

According to Zidan (1969, p. 474), Lippman (1989, p. 38), Hosny (2006), and Ramadan (2006b, p. 1610), there are three main categories of punishments for offenses in Islamic penal system. The first and most flexible of these punishments is *ta'zir*. *Ta'zir* is derived from the verb *azzar*, which literally means "to discipline with a punishment less than *hadd*" (Academy of the Arabic language, 2004; Omar, 2008). Al-Mursi (1999, p. 189) defines *ta'zir* as "a disciplinary and deterrent penalty on certain individual(s) for a forbidden and inappropriate conduct that cannot be punished by *hadd, qisas, diya or kaffara* (penance). *Ta'zir* is performed by whichever method the ruler (or judge) sees it is appropriate and deterrent." Under the heading of *ta'zir*, the authorities can punish at their discretion all kinds of socially disagreeable behavior from an Islamic point of view such as cheating, gambling, and when two individuals of the opposite sex and who are not related by marriage are alone in a private place (*khulwa*) (Bahnasy, 1988, p. 34; Al-Mursi, 1999, p. 191). *Ta'zir* can even be imposed on those who decline to carry out religious duties such as ritual prayer or fasting (Peters, 2005, p. 66). The corrective powers of the authorities are hardly restricted and, as a consequence, the doctrine offers little protection to the accused.

Such punishment setup can induce uncertainty in law enforcement since a rational offender will not be able to deduce what the punishment will be for a certain unlawful act. Yet, El-Awa (1983) and Al-Khalifi (1992, p. 266) note that the judge is obliged under *shari'a* to make the

[*] *Al-Maktaba Al-Waqfeya*, one of the largest online sources of Islamic books, contains only five *fiqh* books that are not based on the four famous *madhahib*, see http://www.waqfeya.com/category.php?cid=67

punishment fit the crime since the *qur'an* states that "The guerdon of an ill-deed is an ill the like thereof. But whosoever pardoneth and amendeth, his wage is the affair of Allah. Lo! He loveth not wrong-doers." (Surah ash-Shura, 42:40) and "If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient." (Surah an-Nahl, 16:126). Therefore, it is expected that the level of punishment in *ta'zir* would correspond, to a certain extent, with the amount of harm done by the unlawful act. This would decrease the level of punishment uncertainty that an offender faces.

El-Awa (1993, pp. 100-109) categorizes different kinds of *ta'zir* that was traditionally practiced by Muslim jurists against transgressors. These categories of *ta'zir* punishments include admonition, reprimand, threat, boycott, public disclosure, fines and the seizure of property, imprisonment, flogging, and death penalty. However, it should be noted that death penalty, practiced as a *ta'zir* punishment, is applied only in the cases of high treason, homosexuality, propagating heretical or anti-Islamic doctrines, and on habitual offenders who returns to crime (El-Awa, 1993, p. 109). According to Peters (2005, p. 66), out of the aforementioned types of *ta'zir,* the most common *ta'zir* punishments through the history of Islam were flogging, public rebuke, banishment and imprisonment until repentance. An important point to be taken into consideration is that the repentance of the accused prohibits and stops any *ta'zir* punishment. This is not the case of *hadd* where repentance does not stop the punishment. It is worth noting that Islamic jurisprudence does not provide a clear methodology with regards to dealing with accused persons that could unfavorably use this rule only to avoid *ta'zir.*

The second category is *qisas* and *diya* punishments which have provisions regarding offences against persons. *Qisas*, applicable for murder or injury, is based on the notion of retaliation and self-administered justice: it involves inflicting the same punishment on the defendant as inflicted on the victim, usually by using the same methods (El-Awa, 1993, p. 71; Al-Mursi, 1999, pp. 141-145; Busaq, 2005, p. 164). *Diya*, which generally corresponds to manslaughter, involves financially compensating an injured or the family of a deceased person in case the act of injury or murder was unintentional (corresponding to involuntary manslaughter) or semi-intentional (corresponding to voluntary manslaughter) (Busaq, 2005, p. 162; Peters, 2005, p. 49; Al-Tusi, 2008). Nevertheless, *qisas* is applied in case the injured or the deceased's family refuse to pardon the offender and do not accept *diya* as well (El-Awa, 1993, p. 77; Al-Mursi, 1999; Peters, 2005, p. 44).

The third and most severe category is the *hudud* (or *hadd*, in the singular) punishment laid out in the *qur'an*. The word *hudud* literally means "limits" or "boundaries" (Kamali, 1998, p. 218). The punishment prescribed for these offenses are seen as "claims of God" (Peters, 2005, p. 54). Because they are specified by God, they are regarded as fixed and cannot be changed. They include theft (punishable by amputation), armed robbery and banditry (punishable by death, amputation of limbs, banishment and crucifixion), extra-marital sex (punishable by death or flogging), unfounded accusation of extra-marital sex (punishable by flogging), consumption of alcohol (punishable by flogging) and apostasy or renunciation of Islam (punishable by death) (Sabek, 1971, p. 302; Al-Mursi, 1999, p. 4; Peters, 2005, p. 53). As with the whole body of *fiqh, madhahib* differ to a certain extent regarding the required provisions for applying prescribed punishments for each category of crime. Nevertheless, our analysis of theft under Islamic

criminal law will mainly be based on the *fiqh* opinions with the highest degree of consensus among different *madhahib.* To conclude this section, it is essential to remember that, as the whole body of *fiqh,* most of islamic criminal provisions did not significantly develop after the 10th century A.D. due to the declining of *ijtihad* efforts and the rise of *taqlid* through Muslim community. The next section will deal extensively with provisions on theft under Islamic criminal law.

4. Theft under Islamic criminal law

Under Islamic *shari'a,* theft is considered a *hadd* crime, where a specific and fixed punishment is administered. This punishment is established by *qur'an*:

"As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from Allah. Allah is Mighty, Wise. But whoso repenteth after his wrongdoing and amendeth, lo! Allah will relent toward him. Lo! Allah is Forgiving, Merciful." (Surah al-Mã'ida 5:38-39)

According to Ali (1955, p. 605) and Al-Mursi (1999, p. 6), cutting the hands was already an established punishment for theft in pre-Islamic Arabia. Islam approved such punishment and the prophet Muhammad himself administered it through his reign (Sabek, 1971, p. 413). With *hudud* punishments described as 'brutal and medieval' (One Law for All, 2010, p. 6) and 'cruel' (Brems, 2001, p. 217), Muslim jurists and *fiqh* scholars try to revoke such criticism and provide a three-fold rationale behind such punishment for theft crimes; first, cutting the hand of a thief makes it very hard for this handicapped offender to commit another theft in the future. Moreover, the amputation serves as a signal for the society that this individual was a convicted criminal and, therefore, interacting with such person must be kept to a minimum (Sedki, 1987, pp. 236-237; Al-Mursi, 1999, pp. 7-8). Second, by cutting the hand of a thief, this person is believed to have made amends for the sin of theft and will not be punished for it in the afterlife (Al-Mursi, 1999, p. 6). On the contrary, Peters (2005, pp. 53-54) undermines this reason and states that "expiation or purification from sin is only of secondary importance and does not extend to all cases in which fixed penalties are imposed, as these punishments also apply to non-Muslims, who cannot be purified from their sins". Lastly and most importantly, there is a consensus among Muslim legal scholars that the main reason of applying such punishment is for deterrence (Sabek, 1971, p. 411; Sedki, 1987, p. 236; Al-Mursi, 1999, p. 6; Peters, 2005, p. 53; Busaq, 2005; Al-Sheha, 2007, p. 121). As law and economics literature is vastly interested in the concept of deterrence and its effect on crime, we attempt to analyze the deterrent effect of Islamic punishment on crimes by using the tools provided by the aforesaid literature. However, before doing this, a closer look on the conditions needed to apply punishment of theft crimes in Islam is required.

Even though the *qur'an* establishes the punishment for theft, the holy book of Muslims does not provide any provisions regarding how this punishment should be applied. Nevertheless, the main schools of *fiqh* develop an extensive set of requirements where a theft can be considered a *hadd* crime and is therefore punished by amputation of the right hand (or, according to the

Shiites, of the four fingers of the right hand). These set of rules is derived from three main sources, which are the actions and sayings attributed to the prophet Muhammad, the understandings of prophet companions - the first generation of Muslims in the 7th century A.D., and the interpretation of Muslim scholars for rationale of the prophet and his companions (Sabek, 1971, pp. 410-426; Al-Mursi, 1999, pp. 5-23). These provisions for *hadd* application have two categorizes; those related to the thief; and those related with the stolen item. As for the former, the most important provisions is that the thief must be sane, adult, not have any share in the money stolen, and to not be stealing under compulsion of need or of another person. For the latter category, the stolen item must have been taken from a secure place and have a certain minimum value (*nissab*) and to be taken in secret among other requirements (for a complete list of these provisions, see appendix).

Related literature argues that the most important of these requirements for *hadd* application are the surreptitious nature of theft, as well as the minimum value of stolen item. As for the former, Ramadan (2006b, p. 1617) states that "The 'taking secretly' element is extraordinarily important with respect to the definition of the offense and the appropriate punishment". The secretive nature of stealing is embedded in the meaning of theft in Arabic language. According to Merriam-Webster (1984, p. 819), the word "Theft" is synonym in English language to "larceny", "robbery", "stealing", and "thievery". However, this word corresponds to the term "*Sariqa"* in Arabic language which literally means "to take in secret" (Masoud, 2001; Academy of the Arabic language, 2004; Sabek, 1971, p. 412). As definition of theft in Islamic *Fiqh* emphasise on the secretive nature of stealing, legal decisions by muslim scholars are affected by this notion.

As for the latter, the concept of *nissab* in theft is established by the act of Prophet Muhammad, who amputated the hand of a thief for stealing a shield that was worth three Dirhams (Bukhari, 1996, Vol VIII, Book 81-No. 788/789/790) and his saying that, "The hand should be cut off for stealing something that is worth a quarter of a Dinar or more." (Bukhari, 1996, Vol VIII, Book 81- No. 780). At the time of Muhammad, three dirhams were equal to quarter of a Dinar (Sabek, 1971, p. 420). Consequantly, the value of the stolen goods must be at least 8.91 g of silver (3 silver coins of 2.97 g) or 1.06 g of gold (one-quarter of a gold dinar of 4.25 g, according to the Malikites and Shafiites jurisprudence schools), or 29.7 g of silver (10 coins, according to the Hanafites school). In order to avoid this confusion, Al-Masha'al (2007) studies different opinions regarding the minimum value of the stolen item and reaches the conclusion that the suitable current value is 1.06 grams of gold, which approximately equals $62.5 in current US dollars[*]. In case the theft did not meet the conditions needed to apply the fixed *hadd* punishment for amputation of the actor's hand, then the actor may be sentenced to a *ta'zir* punishment. As aforementioned, *ta'zir* gives wide-ranging powers for the judge or ruler as they punish those who have committed theft but could not be convicted on technical grounds (e.g. in cases of uncertainty of evidence (*shubha*), or when the owner of the stolen item pardons the

[*] Gold-US Dollars conversion was taken place at August 31, 2011 using goldprice.org website, http://goldprice.org/Calculators/Gold-Price-Calculators.html

accused) and also those who have committed theft but do not fall under their abovementioned strict conditions (Bahnasy, 1988, p. 19; Peters, 2005, p. 66).

As it can be deduced from this section, punishment of theft under Islamic penal law is extremely different from western legal framework and even from contemporary legal systems in most Arabic and Islamic countries. Under the framework of international law, such punishments, whether for *hadd* or *ta'zir*, are considered cruel and inhuman. Article 5 of the Universal Declaration of Human Rights states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Moreover, Article 10, paragraph 1 of the ICCPR states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Nevertheless, Palmer and Henderson (1998) concludes their study on the economics of cruel and unusual punishments by declaring that such kinds of severe punishments would possibly provide a significant level of deterrence in society's arsenal against crime. It is of importance to point out at this stage that this study does not project any ethical predisposition or judgments on the Islamic criminal law. This study also is not intended to compare between the "modern-humane" western legal institutions and the "archaic-brutal" Islamic laws. Our main research question is "what can the economic theory of deterrence tell us about the deterrence effects of Islamic law?". In the next section, we will investigate if the punishment of ta'zir and hadd in their current condition would provide deterrence for criminals. These provisions will be analyzed from the point of view of deterrence theory latter in the next section.

5. Deterrence in theory of Islamic criminal law

Most of the literature dealing with punishment in Islamic penal law in general argues that the underlying principles of all fields of Islamic law are both deterrence and retribution. However, deterrence is stressed upon more evidently in most studies (Sabek, 1971; Bahnasy, 1988; El-Awa, 1993; Peters, 2005). Peters (2005) argues that even though the Islamic laws related to homicide are based on retribution, the concept of deterrence plays a major role in this case as well as *qur'an* states:

'And there is life for you in retaliation, O men of understanding that ye may ward off [evil].' (Surah Al-Baqara 2:179)

This is usually understood as signifying that retaliation will deter people from killing. Nevertheless, we could not find any Islamic law study dealing with the deterrence model that this law proposes for specific crimes such as theft. Deterrence theory assumes the rationality of the criminal. The criminal considers the consequence of her behavior before committing a crime through calculating the expected benefit from committing the crime and the expected cost in case of arrest and punishment (Becker, 1968). Therefore, such criminal "will commit the

act if and only if his expected utility from doing so, taking into account his gain and the chance of being caught and sanctioned, exceeds his utility if he does not commit the act" (Polinsky & Shavell, 2000).

Law and economics literature dealing with deterrence theory usually separates between three notions of deterrence; general, specific and marginal deterrence. General deterrence focuses on reducing the probability of deviance in the general population by threatening all members of society with sanctions (LaFave & Scott, 1972; Scaros, 2011, p. 286). Blumstein (1978) defines general deterrence as "the inhibiting effect of sanction on the criminal activity of people other than the sanctioned offender." In other words, when general public perceive that offenders in this society receive punishment as a consequence of their deviant act, others are assumed to rationally avoid crime (Williams & McShane, 1994, p. 19). Specific deterrence shifts from threatening all members of society with sanctions for criminal activity to the actual application of punishment onto specific offenders, with the aim of preventing these offender from future criminal acts by outweighing the gain from the crime with a suitable sanction (Scaros, 2011, p. 286). In other words, if the expected utility of violating law rises with the collective harm generated in a given society, it might be optimal for this society to install a set of sanctions that increases with the social harm associated to that specific violation. With severe sanctions, any criminal would be threatened of the negative consequence of crime. Therefore, the expected utility for committing any offence would be lower than the expected cost of crime in case there is a sufficient level of detection in that society. Most of the studies dealing with Islamic law does not clearly differentiate between general and specific deterrence. However, it can be seen that the two concepts are aimed by the setup of Islamic punishments of crime. A considerable body of Islamic criminal law literature argues that punishments of theft under Islamic law can be severe, however, it is an effective deterrent since it helps preventing future acts of crime in a given society (see for example (Sabek, 1971; El-Awa, 1993; Al-Awabdeh, 2005; Ramadan H. M., 2006a). Ramadan (2006b) clearly states that "Islamic law employs a general deterrence approach in its fullest sense by prescribing tough punishment for offenses".

Marginal deterrence is not mentioned or considered in studies that dealt with Islamic law so far. The term marginal deterrence in its modern sense comes from Stigler (1970). However, classical writings on crime and punishment have already dealt with marginal deterrence, most noticeably in Beccaria (1770/1983) and Montesquieu (1748/1977). Bentham (1789/1973) states that the rationale behind punishment is "to induce a man to choose always the least mischievous of two offenses; therefore where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less." Shavell (1992) argues that while deterrence theory mostly focuses on situations in which individuals consider whether or not to commit a single harmful act, marginal deterrence deals with individuals choosing to perform one of several harmful acts. In other words, it is the tendency of an individual to be deterred from committing a more harmful act due to the difference, or margin, between the expected sanction for such act and a less harmful one. Thus, the question here is "which crime" rather than "crime or no crime". Friedman and Sjostrom (1993) argues that the logic behind the concept of marginal deterrence is demonstrated in the

English proverb "As good be hanged for a sheep as a lamb"[*], where a thief has the option to carry off one animal from the flock. However, if the penalty is the same whichever animal he chooses to steal, he might as well take the most valuable. In the next section, we will use the concept of 'marginal deterrence' to analyze the Islamic criminal law of theft.

6. Marginal deterrence in Islamic criminal law of theft

As previously mentioned, Islamic criminal law provides two sanctions for stealing; *hadd,* a severe sanction which requires cutting the right hand of a thief if found guilty, and *ta'zir,* which corresponds to a variable sanction that is less than *hadd* punishment. A rational offender would only commits theft if the gain from the crime exceeds the probability of apprehension times the cost of the sanction. As literature on Islamic criminal law presents no special provisions with regards to apprehension of theft, it is implied that the expected probability of apprehension in *hadd* crimes is the same as that of *ta'zir*. According to Polinsky and Shavell (2000) and Dana (2001), efficient deterrence (or optimal law enforcement) is realized when the expected cost for a certain crime is equivalent to the social harm caused by this crime or offense. Consequently, the two types of Islamic sanctions for theft should correspond to the expected social harm from committing this offense in order to have efficient marginal deterrence. However, it is noticeable that the social harm associated with committing a *ta'zir* crime is *larger* than that associated with the severe *hadd* crime. The reason behind such skewed punishment setup is that the requirements needed to apply *hadd* are directed to prevent petty theft more than crimes of embezzlement, fraud or bribery, which can cause greater social harm as the stolen amount in these latter crimes may be much larger than that of the former.

Sabek (1971, p. 412), Al-Mursi (1999, p. 6), and Ramadan (2006b, p. 1617) justify the punishment setup for theft by arguing that the harm generated by theft is of a much higher scale than that generated by embezzlement since the social harm of embezzlement 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. Conversely, social harm resulting from theft extends far beyond the value of the stolen property and the trust relationship between the parties as it negatively affects the entire sphere of social peace and order. Furthermore, if stealing property by means of secret taking is allowd to be common by imposing a lesser sanction, this would promote an environment of guardedness and suspicion which would negatively influence everyday activities and cause economic losses (Ramadan H. M., 2006b). On this basis, muslim jurists rationalize that larceny which encompasses secret taking deserves a more severe punishment than embezzlement.

From a marginal deterrence perspective, this law structure is inefficient since, ceteris paribus, a rational offender choosing between committing a crime of petty theft such as pick pocketing,

[*] It is interesting to note that the origin of this proverb comes from a legal setup that is reminiscent to that of Islamic criminal law and *hadd* punishment. Quinion (2005) states that "The origin [of the proverb] lies in the brutal history of English law. At one time, a great many crimes automatically attracted the death penalty: you could be hanged, for example, for stealing goods worth more than a shilling. Sheep stealing was among these capital crimes. So if you were going to steal a sheep, you might as well take a full-grown one rather than a lamb, because the penalty was going to be the same either way."

which is punished with right hand amputation, and a crime of fraud, bribery or embezzlement, which is punished with *ta'zir,* would choose the latter since it is the crime with lesser punishment and can be of considerable high return. In other words, an offender would be better stealing *more* and avoiding the requirements for *hadd* in order to be punished, in case the criminal is apprehended, under *ta'zir*. To further demonstrate this essential point, we present the following five cases which better reveal the inefficiencies of Islamic criminal law of theft in its current form:

A. Embezzlement

As abovementioned, embezzlement is punished with *ta'zir* under Islamic criminal law. This provision is mainly based on Prophet Mohammad's saying "the embezzler, the looter and the traitor should not be punished by *hadd*" (Al-Darmi, 2000, No. 2236). Al-Hamawi (2003, p. 331) notes that the definition of embezzlement in Islam differs from that of contemporary law since *fiqh* defines embezzlement as "an overt and unlawful acquisition of something in the presence of the owner" (Al-Sarkhasi, 1978; Ibn Qudama, 1984). This definition does not prescribe whether the item stolen is from public or private property. Moreover, the concept of the owner's presence remains blurry through Islamic criminal law as no specific definition is given regarding the meaning of "owner's presence". However, the crime of treason mentioned in the above mentioned *hadith* corresponds with embezzlement in contemporary legal theory, since treason is defined as "unlawfully taking from an entrusted property" (Al-Bahoti, 1997).

Ibn Qayyim Al-Jawziyya (1968, p. 88) justifies the logic behind this *hadith* by arguing that one cannot take precautions against the thief who breaks into houses and breaches one's hiding-places and breaks locks; the owner of the goods cannot do any more than that (i.e., hiding them in appropriate places). Therefore, if it were not prescribed for the hand of the thief to be cut off, then people would steal from one another and a great deal of harm would be done, and the problem of theft would be grievous. This is unlike the cases of looting and embezzlement, as the looter is the one who overtly steals in the sight of people, making it easy for them to stop this criminal act. As for the embezzler, this is the one who takes things when the owner is not paying attention. So, there has to be some form of negligence which enables the embezzler to steal, otherwise when property owner is careful and alert, such crime can be easily avoided. According to Ramadan (2006b, p. 1616), the main indispensable and distinguishable element between theft and larcenous acts, including embezzlement, fraudulent larceny, and debtor/pledge refusal to return the pledge/debt, is secret taking of property.

Given such punishment setup for embezzlement, it would be better for a rational offender to overtly steal valuable property when the owner is not paying attention and without using force. As one of the requirements of a crime to be considered a theft is that the owner of the stolen item must not know about the crime, this offender would face an accusation of embezzlement rather than a theft and is punished under *ta'zir* regulations and not *hadd*. Nevertheless, if the thief used force during the theft, this act will be considered an armed robbery (*haraba*) and is punished by cross amputation of the thief's right hand and left foot. Moreover, the punishment

setup does not consider value of the stolen item by any chance. In other words, embezzling an indefinitely large amount of public or private property will be punished with *ta'zir*, while an offender's right hand can be amputated for pick pocketing any amount more than or equal $62.5. Such an inefficient punishment scheme would influence a prospective offender's preferences towards committing embezzlement due to its lower punishment compared to the extremely punished act of theft, assuming that the benefit of crime and the probability of apprehension are the same in both cases.

B. Stealing public property

Muslim jurists argue that the main purpose of Islamic criminal law is to protect people and their concern (Sedki, 1987, p. 73). Peters (2005, p. 54), states that "the objective of *hadd* penalties is to protect public interest" while Hosny (2006, p. 18) notes that "Allah did not set any legal rule except for the reason of public interest". Protecting public interest would certainly entail securing public property against theft by setting an appropriate sanction for the social harm corresponding to such offense. However, An-Na'im (1990, p. 5) notes that "Public law has traditionally been the least developed aspect of *shari'a*". A general consensus appears among all *madhahib* (except Maliki) that *ta'zir* is the appropriate punishment for stealing public property, no matter what the value of the stolen property is. The rationale behind this legal rule is that *hadd* is not applied in case the thief had any share in the property stolen. Since public property is partially owned by every individual in the society, there is no doubt that the thief partially owns the stolen property (Sabek, 1971, p. 415; Al-Mursi, 1999, p. 11; Al-Hamawi, 2003, p. 345; Ramadan H. M., 2006b, p. 1630). It can be seen that private property is more protected under Islamic *shari'a* than public property since stealing any private property with a value that exceeds *nissab* is punished with *hadd*. On the other hand, stealing any amount of public property, no matter how large or small this amount is, through committing crimes like tax evasion, bribery and unlawful appropriation of development aid can only be punished with *ta'zir.* Therefore, ceteris paribus, a rational offender would rather steal public than private property and facing a lesser sanction in case the offender was apprehended.

C. Stealing perishable foods

Stealing perishable foodstuffs is punished under *ta'zir*, regardless of the amount of food or its value (Al-Mursi, 1999, pp. 15-16; Peters, 2005, p. 56; Ramadan H. M., 2006b, p. 1618). Therefore, under such set of punishments, a rational offender would rather steal any amount of food products than committing petty theft, ceteris paribus. Ramadan (2006b, p. 1618) presents an interesting example that sheds light on how specific the punishment for stealing consumable food is in Islamic criminal law. The example supposes that an offender stole a certain item and swallowed it. In this case, Islamic criminal law distinguishes between the case where the stolen property is consumable (e.g. food or drink) and the other case where the property is non-consumable (e.g. jewelry or money). In the former, the offense committed is criminal damage rather than theft. However, in the latter case, Muslim scholars present two propositions:

- First, swallowing property that is not safely retrieved afterwards is considered consumption; therefore, the crime committed is criminal damage.
- Second, swallowing property that is safely retrieved afterwards is considered "taking secretly." Therefore, the actor is liable for theft if the other requirements of the crime are present and a *hadd* punishment is applied.

Therefore, it can stated that retrieving the property safely after swallowing is the benchmark for offense classification. If the property is retrieved safely, the actor has committed theft, punished with *hadd*. If not, then the offense committed is criminal damage, punished by *ta'zir*.

D. Stealing forbidden items

Stealing forbidden items under Islam such as pork and alcoholic drinks, no matter their value or amount, would be punished under *ta'zir* and not *hadd*. Moreover, the majority of Muslim scholars prohibit music and its instruments, therefore stealing musical instruments would also be punished under *ta'zir* independent of the value of the stolen instruments. We can see that these crimes can vastly exceed petty theft in social harm. So, assigning a lesser punishment for the former can motivate prospective thieves to steal such forbidden items in order to avoid any probability of getting their hands amputated.

E. The crime of kidnapping

Kidnapping and abduction is synonyms in Islamic criminal law. Interestingly, the punishment of kidnapping in Islam depends on the status of the victim, whether a slave or a free person (Sabek, 1971, p. 417; Ibn Jabrin, 2001; Ouda, 2009). The major Islamic *madhahib* (except Maliki) propose that, in case of the former, *hadd* is applied on the kidnapper since a slave is considered of monetary value and the slave's owner would be losing a valuable item. However, in the latter case, a kidnapper would be punished by *ta'zir* since a free person is not treated as money. In other words, kidnapping a slave is punished more severely than kidnapping a free person (Al-Mursi, 1999, p. 11; Al-Marzok, 2005; Al-Washli, 2008, p. 479). This sanction setup presents an interesting conundrum, which can be demonstrated in three situations. First, in case an offender threatens a victim with a weapon, then this offender, in case of apprehension, will face the highly severe punishment of *haraba* (one of several sanctions that include death, crucifixion, cutting hands and legs, or banishment) (Sabek, 1971, p. 400). Second, in case an offender pickpockets a victim, then this offender face *hadd*, and the offender's hand is amputated. Third, and most interestingly, in case an offender kidnaps a child while using no weapon, then this offender receives the least of these punishments and *ta'zir* is applied. Such an inefficient setup of punishments can lead potential offenders to focus more on crimes of kidnapping than to commit petty theft, a change which could drastically increase social harm from criminal activity.

7. Conclusion

The novelty of this study stems from analyzing Islamic criminal laws through theories developed by the fields of 'new institutional economics' (NIE) and 'law and economics'. Being revered by approx. fifth of world population, these laws obtain their significance from Muslim's resolute belief in their divine nature. Additionally, with the historical upsurge of Islamic movements in Arab spring countries and calls for full application of *shari'a* through their respective societies, it becomes apparent that attempts to apply Islamic criminal law may soon materialize. Interestingly, no studies were conducted by Islamic movements or interested parties to forecast the expected impact of applying these criminal laws, which may radically alter the legal and penological setup of the respective countries. Furthermore, researches that aim to analyze law from an economics viewpoint did not tackle Islamic laws so far. Thus, this study can be a first step towards bringing the attention of economists and legal researchers towards Islamic law at this crucial time of political and legal developments in Arab spring countries.

When using the concept of marginal deterrence on Islamic penal laws of theft, the study has demonstrated that a rational offender would chose to steal an item that does not correspond with the conditions specified for the severe punishment of *hadd* and would chose given the same return a crime that would face the lesser punishment, which in our case is *ta'zir*. Legal rationale would set law so that the severity of punishment is positively correlated with the seriousness of the crime in hand. The current setup of Islamic criminal law of theft contains major inefficiencies as crimes with severe social harm have relatively lenient punishments while less serious crimes and petty theft have an extreme punishment of hand amputation. Consequently, criminals would prefer to commit more dangerous crimes with high level of social harm and economic cost of crime to society would significantly rise. The reason behind such inefficient legal setup is that crucial economic and legal concepts were not fully developed or taken into consideration by founders of *madhahib* in the 8th and 9th century A.D. .Even at our present time, contemporary Muslim jurists still base their legal verdicts on those *madhahib*, indefinitely prolonging the archaic viewpoints of *madhahib* founders. We call for a modern Islamic reinterpretation and recoding of Islamic penal laws as it offers little help in deterring crime, especially serious crime, in its current status-quo.

However, it is still not clear whether reason and logic motivate Muslim jurists to restructure Islamic laws of theft to correspond with sound legal and penological policies or if their belief in the infallibility of the current form of Islamic law deter them from extrapolating new legal verdicts. An-Na'im (1990, p. 112) tackles this point and doubtfully notes that "search for rational justification may help the believer to understand the wisdom and rationale of the [*Shari'a*] rule, but failure to find sufficient objective justification does not relieve him or her of the duty to comply. In this way, and as far as Muslims are concerned, penological and sociological considerations cannot affect the principle of *hudud*. In other words, the existence of *hudud* as part of the criminal law of an Islamic state is not dependant on the existence or strength of penological or sociological justifications". Nevertheless, we hope that, with the eminent potential of applying *shari'a* in Arab spring countries, Muslim jurists find enough motivation to review legal verdicts of Islamic criminal law in order to achieve efficient marginal deterrence. Our study demonstrates that, in its current form, an efficient marginal deterrence

is not provided through Islamic criminal law of theft due to its skewed and inefficient setup of punishments for criminal acts.

Further research on Islamic criminal law is needed at this point in time. Most importantly, since Islamic law was implemented with varying degrees across different societies through fifteen centuries of Islamic history, empirical studies are much needed to investigate the effects of applying this law on the crime rate and deterrence through the respective societies. Since literature of new institutional economics, as well as that of the specific field of law and economics, has developed advanced models in their quest to determine the optimal levels of law enforcement and deterrence in various settings, in-depth theoretical investigation of the stance of Islamic criminal law regarding different crimes is needed as well.

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Appendix

Requirements of applying *hadd* punishment for theft crimes in *shari'a* and *fiqh*[*]

Regarding the Actor:

1. The offender must be sane and adult (more than 15 years old according to most *madhaheb*).
2. The offender must not have resorted to stealing under compulsion. If that person had been obliged to do so because of hunger or poverty, the penal code is not applied.
3. If the actor claims that, when taking the item in question, the intention of stealing did not exist and the judge considers this, then the hand amputation penalty is not applied.
4. If before a theft can be proved, the offender goes to the judge and repents and promises not to steal in future, this person is saved from the punishment. However, once the theft has been proved, repentance is of no consequence and punishment will be implemented.
5. The offender must take away the stolen item from its proper place. If one takes out the thing from its owner's designated safe place and another actor steals it away, neither of the two can be punished for theft. Because, the one who has taken out the thing from its safe place has not stolen it and the one who has stolen it has not done so from its place of safety.
6. If the owner takes back his goods or allows the offender to keep them before the matter is reported to the judge and does not press for a penalty.
7. If the offender steals a certain good in the presence of its owner, the *hadd* punishment is not applied as theft is defined under Islamic penal law as "taking something without the knowledge of its owner". In such case, the actor is beaten up and warned about repeating this act again. However if a weapon was used in the theft, the punishment is equal to that of being at war against the Muslim society and is punished by *haraba*, a severe set of punishments which include crucifixion, cross amputation of the thief's right hand and left foot, banishment and death.
8. In order to prove the theft, two just Muslim witnesses should have seen the actor stealing. It may also be the case where there is only one witness but the owner of the stolen item also testifies that the specific actor has been seen stealing.

Regarding the stolen item:

9. The item stolen must have been taken from a secure place. If something is not kept in a safe place and left unsecured, its theft does not incur punishment.

[*] Sources: Kamal-Al-Din A. Al-Mursi, Al-hudud al-shariya fe al-deen al-islami (The legal hudud in Islam). (Dar Al-Ma'refa Al-Jame'iya, 1999). Elsayed Sabek. Fiqh alsunna (The jurisprudence of sunna). (Dar Al-Fikr for printing, publishing and distribution., 1971). Rudolph Peters. Crime and punishment in Islamic law: theory and practice from the sixteenth to the Twenty-first century. (Cambridge University Press, 2005). Mohamed B. Ismail. Al-fiqh al-wadeh (The clear fiqh). (Dar Al-Manar, 1997). Mohamed S. El-Awa, Punishment in Islamic law: a comparative study. (American Trust Publications, 1993).

10. The stolen item must be moveable. Stealing a building or a land property is not punished by *hudud*.
11. The stolen item has to have a certain minimum value (*nissab*).
12. The stolen item must be taken away in a surreptitious way. If someone steals goods from a market booth in broad daylight, the fixed penalty for theft cannot be imposed because the goods were not secretly stolen.
13. The stolen item must not be partially owned by the actor. Since Islam stresses on the notion that the children owe their lives and their belongings to their parents, if a father steals from his son, he is not punished. On the contrary if a son or a daughter steals from the father or mother their hands are amputated.
14. Stealing public utility or state treasury does not entail the fixed punishment of *hadd*, as it is considered to be partially owned by the actor. The value of the stolen public utility or the amount stolen out of the state treasury is not taken into consideration.
15. The stolen item must not be entrusted to the actor. Therefore, there is no *hadd* punishment for embezzlement, i.e. the misappropriation of goods entrusted to the embezzler.
16. If the use of the stolen things is considered forbidden, there is no *hadd* punishment against the robber. Forbidden items include wine, pork, pornographic material, copyrighted art that exposes private parts of men and women, musical instruments and cigarettes among others.
17. Perishable foodstuffs cannot entail the fixed punishment.

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