

## **Corporal Punishment (Amputation of a Hand): The Concept of *sariqa* (Theft) in Theory and in Practice**

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### **ABSTRACT**

*In this article, the Islamic concept of sariqa (theft), a crime against property, will be examined. To give the reader a legal background, a summary of the legal doctrines will be given. The question of whether the “hadd” punishments were enforced will be closely examined in the light of judicial records.*

### **ÖZET**

*Bu çalışmada, mala karşı işlenen bir suç olan hırsızlık konsepti ele alınacaktır. Okuyucuya, hukuksal arka plan hakkında bilgi vermek amacıyla bu konu hakkındaki hukuk doktrinlerinin bir özeti verilecektir. Had cezalarının uygulanıp uygulanmadığı sorusu, mahkeme kayıtları ışığı altında dikkatlice incelenektir.*

**KEYWORDS:** *Corporal Punishment, Amputation of hand, Theft, Sariqa, Ta‘zir, Criminal Law, Hanafi, Legal Studies.*

**ANAHTAR KELİMELER:** *Bedensel Ceza, El Kesimi, Hırsızlık, Serika, Sirkat, Ta‘zir, Ceza Hukuku, Hanefi, Hukuk Çalışmaları.*

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## INTRODUCTION

It is to be noted at the outset that modern Turkish criminal law, since the establishment of the Republic of Turkish in 1923, is secular, based on Western law.<sup>1</sup> With the establishment of modern Turkey under the leadership of Mustafa Kemal Atatürk, the *shari'a* courts under study were abolished. The law issued on 4 Ramadan 1342/1924 called *Mehakim-i Şer'iyenin İlgasına ve Mehakim Teşkilatına Dair Ahkamı Muaddil Kanun* (Law Abolishing the *Shari'a* Courts and Changing the Provisions of the Law Regarding the Organization of the Courts),<sup>2</sup> brought the *shari'a* courts to an end. The corporal punishment which is the subject of this study is no longer a part of the Turkish criminal justice system. In addition, the Turkish parliament abolished the death penalty on 3 October 2001.<sup>3</sup>

The main aim of this work is to compare the legal content of the judicial registers with Islamic/Hanafî legal doctrines and to find out how well they correspond. Since this is primarily a study of the *sicils* (judicial records), it is worth looking at the way in which a case in a *qadi* court progressed. Although we know almost nothing about what might have happened before and after the session of a particular case, we know the procedure a case followed.

Once a case is brought to the attention of the *qadi*, he demands that the defendant be presented to the court. The defendant either he voluntary comes to the court himself or he is brought by the police. Once he is present in the court, the plaintiff proceeds with his case, putting forward his allegation. If the defendant admits to the accusation, the case ends in the plaintiff's favor. If he denies the allegation, the plaintiff is requested to produce his evidence, which in most criminal cases, is the testimony of two just male witnesses. After the inquiry of their legal credibility, the case comes to an end. If the plaintiff is not able to produce evidence, he offers oath to the defendant. If the defendant takes the oath, the case ends in his favor, if he does not, the case is given to the

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<sup>1</sup>The original Turkish criminal code was Law No. 765 and was adopted on 1 March 1926 from the Italian criminal code. Remzi Özmen, *TÜRK CEZA KANUNU* (Turkish Criminal Law) 180 (Seçkin Yayıncılık, 2005). A new secular criminal code, Law Nr. 5237, was passed by the Turkish parliament on 26 September 2004 and was promulgated by Official Gazete Nr. 25611, dated Oct. 11, 2004. See also Salih Omurtak, Atatürk, İSLAM ANSİKLOPEDİSİ 775-81 (Milli Eğitim Bakanlığı Yayınları, İstanbul); Mahmut Esat, *Esbab-ı Mücibe Layıhası in MEDENİ KANUN, BOÇLAR KANUNU VE İLGİLİ MEVZUAT*, (Kemal OĞUZMAN, ed., Filiz Kitapevi, 1991).

<sup>2</sup>*Ceride-i Adliye*, 1340-1341, No. 22-363, 4 Ramadan 1342, 5-17.

<sup>3</sup>Neither capital punishment nor general confiscation shall be imposed as punishment. 1982 TURKISH CONST., art. 38, as amended on May 22, 2004.

plaintiff. It is to be noted that in *hadd* crimes,<sup>4</sup> an oath is not part of the procedure. However, in the Hanafi doctrine, an oath can be offered to a suspect accused of theft, with the provision that if s/he refuses to swear that he did not commit the offence, the *hadd* drops.<sup>5</sup> The crime can then be dealt with *ta'zir*.<sup>6</sup>

### A Summary of the Law

*Sariqa* literally means “theft and robbery.”<sup>7</sup> As a legal term, it signifies “taking by stealth out of *hirz* (custody), something of the value of [at least] ten *dirhams* [*nisab*],<sup>8</sup> in which s/he has neither *milk* (ownership) nor *shubhat al-milk*<sup>9</sup> (uncertainty regarding his/her ownership).”<sup>10</sup>

<sup>4</sup>The *hadd* refers to the punishments fixed by the “shari‘a” as “haqq Allah” (the right of God), comprising “zina” (unlawful intercourse), “qadhif” (false accusation of zina), “shurb al-khamr” (wine drinking), “sariqa” (theft), and “qat‘ al-tariq” (highway robbery). Shams al-Din al-Sarakhsi, *AL-MABSUT*, vol. 9, 36 (Dar al-Ma‘rifa, 1986); Burhan al-Din al-Marghinani, *AL-HIDAYA*, vol. 4, 167 (Matba‘a Mustafa al-Halabi, 1971).

<sup>5</sup>Ibrahim al-Halabi, *MULTAQA AL-ABHUR*, 320 (Güryay Matbaası, 1981).

<sup>6</sup>This refers to discretionary punishment issued by the “*qadi*.” “*Ta'zir*” covers wide range of crimes. Abu Bakr b. Mas‘ud al-Kasani, *BADA‘I AL-SINA‘I*, Vol. 7, 63 (Dar al-Kutub al-Arabi, 1982); Al-Marghinani, *supra* note 4, at vol. 2, 116-18. *See also* Muhammed b. Ali İbn Senan, *AL-JANİBU TA'ZİR Fİ JARİMAT-İ ZİNA* (Dar al-Ma‘had, 1982); Osman Şekerci, *İSLAM CEZA HUKUKUNDA TA'ZİR SUÇLARI VE CEZALARI (DISCRETIONARY PUNISHMENT CRIMES AND PENALTIES IN ISLAMIC LAW)* (Yeni Ufuklar Neşriyat, no date); Ahmed Fethi Behnesi, *AL-TA'ZİR Fİ İSLAM*, (Muassasa al-Haliğ al-Arabi, 1988). Recep Çiğdem, *The Concept of Ta'zir (Discretionary Punishment) in Theory and in Practice*, 12 *SELÇUK ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ (SELÇUK UNIVERSITY LAW JOURNAL)* 167-179 (2004).

<sup>7</sup>Hans Wehr, *A DICTIONARY OF MODERN WRITTEN ARABIC: ARABIC-ENGLISH*, (J. Milton Cowan, ed., Librairie du Liban, 1980).

<sup>8</sup>Three *dirham* in the view of Malik and Hanbal or a quarter of a “*dinar*” in the view of Shafis. Yahya b. Sharaf al-Nawawi, *MINHAJ, MUGHNI AL-MUHTAJ*, vol 4, 158-59 (Matba‘a Mustafa al-Halabi, 1958); Muhammed al-Shirbini al-Khatibi, *AL-MUGHNI AL-MUHTAJ İLA MA‘RİFAT MA‘ANİ AL-ALFADH AL-MİNHAJ*, VOL 4, 158-59 (Matba‘a Mustafa al-Halabi, 1958); Abdullah b. Ahmad Ibn Qudama, *AL-MUGHNI*, vol 10, 270-02 (Dar al-Fikr, 1992). Muhammed b. Ahmed Ibn Rushd, *BİDAYAT AL-MUJTAHİD WA NİHAYAT AL-MUQTASİD*, vol. 2, 334-35 (Dar al-Fikr, no date); Ömer Nasuhi Bilmen, *HUKUKU İSLAMİYYE VE İSTİLAHATI FİKHİYYE KAMUSU*, vol. 3, 261-2 (Bilmen Basımevi, 1969).

<sup>9</sup>For a discussion of this term, *see* Colin Imber, *EBU’S-SUUD: THE ISLAMIC LEGAL TRADITION* 213-15 (Edinburgh University Press, 1997).

<sup>10</sup>al-Halabi, *supra* note 5, at 199.

The thief, whether Muslim or *dhimmi*, free or slave, must be a *mukallaf*, i.e., legally capable, adult, and sound of mind.<sup>11</sup> *Hirz* signifies keeping a valuable item in a secure place or in the custody of a guardian. The question of how the provision of *hirz* is satisfied is dealt with by ethical reasoning by Sunni jurists.<sup>12</sup> For instance, in the view of Hanafis, drilling a hole in the wall of a house in order to take out a valuable item by hand does not breach the *hirz*, so it is not an offence of *sariqa*.<sup>13</sup> Whereas according to Shafis and Hanbalis, this breaks the *hirz* and so is then an offence of *sariqa*.<sup>14</sup>

According to Hanafis, the stipulation of *milk* and *shubhat al-milk* excludes the following from the definition:

1. Things whose ownership is considered to be legal (*mubah*) in a Muslim land, such as wood, fish, and birds, unless they are owned by a particular person. Here *hadd* is required according to Malik (d. 179/785), Shafi Shafi'i (d. 204/819) and Hanbal (d. 241/855).<sup>15</sup>

2. Stealing property of which the offender is a part-owner, or stealing from public property. The latter brings about the *hadd*, in the view of Malik.<sup>16</sup>

Robbery (*nahb*), snatching things unawares (*ikhtilas*), and embezzlement (*khiyana*) are also excluded;<sup>17</sup> the first two by the stipulation of stealth, the last by the condition of *hirz*.<sup>18</sup>

If several people collectively perform an act of *sariqa*, the *hadd* is put into effect only if the value of the object, when divided by the number of

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<sup>11</sup>*Id.*; al-Shirbini, *supra* note 8, at vol. 4, 174; Ibn Qudama, *supra* note 8, at vol. 10, 270-72; Ibn Rushd, *supra* note 8, at vol. 2, 334.

<sup>12</sup>al-Shirbini, *supra* note 8, at vol. 4, 159-70; Ibn Qudama, *supra* note 8, at vol. 10, 246-59; Ibn Rushd, *supra* note 8, at vol. 2, pp. 336-7.

<sup>13</sup>Muhammad b. Mahmud al-Babarti, *SHARH AL-'INAYA*, vol. 5, 362 (Matba'a Mustafa al-Halabi, 1970).

<sup>14</sup>al-Shirbini, *supra* note 8, at vol. 4, pp. 171-72; Ibn Qudama, *supra* note 8, at vol. 10, 256.

<sup>15</sup>Ibn Rushd, *supra* note 8, at vol. 2, 337; Ibn Qudama, *supra* note 8, at vol. 10, 242-44.

<sup>16</sup>al-Shirbini, *supra* note 8, at vol. 4, 162-63; Ibn Rushd, *supra* note 8, at vol. 2, 338; Ibn Qudama, *supra* note 8, at vol. 10, p. 283.

<sup>17</sup>Ibn Rushd, *supra* note 8, at vol. 2, 334; Ibn Qudama, *supra* note 8, at vol. 10, 236.

<sup>18</sup>For additional exclusions, see Al-Marghinani, *supra* note 4, vol 2 118-26; al-Halabi, *supra* note 5, at 199-203.

perpetrators, equals at least ten *dirhams*, according to Hanafis and Shafis. Malik and Hanbal hold the opposite view; in their opinion, they may receive the *hadd* even if the value of the object does not reach *nisab* for each person.<sup>19</sup>

The terminology used in the description of *sariqa* plays a significant role in the cases. For instance, if the witnesses use an expression such as “X has *taken away* the property of Y,” avoiding the word “stolen,” no *hadd* is applicable, but the property itself or its value is to be returned to its original owner.<sup>20</sup>

Similarly, no crime of *sariqa* is committed if the thief returns the object to the owner before the case is taken to the court,<sup>21</sup> or if, after the verdict, the owner donates or sells the stolen object to the thief.<sup>22</sup> Additionally, if the thief claims that the object belongs to him, the *hadd* immediately lapses, even if he does not produce any evidence.<sup>23</sup> Most importantly, a *hadd* crime may not be prosecuted unless the victim him/herself brings the case to the court and demands a *sariqa* trial.<sup>24</sup>

A *sariqa* crime can be established either by the confession of the thief him/herself once, according to Malik, Abu Hanifa (d.150/767), Muhammad al-Shaibani (d.189/805) and Shafi; or twice, according to Abu Yusuf (d.182/798) and Ahmad b. Hanbal; or by the testimony of two male eye-witnesses.<sup>25</sup> To

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<sup>19</sup>Al-Marghinani, *supra* note 4, at vol. 2, 119. Nawawi, *supra* note 8, at vol. 4, 160; al-Shirbini, *supra* note 8, at vol. 4, 160; Ibn Rushd, *supra* note 8, at vol. 2, 336; Ibn Qudama, *supra* note 8, at vol. 10, 289.

<sup>20</sup>Kamal al-Din Ibn Humam, *FATH AL-QADIR*, vol. 7, 368-69 (Matba‘a Mustafa al-Halabi, 1970).

<sup>21</sup>Al-Marghinani, *supra* note 4, at vol. 2, 128.

<sup>22</sup>According to Malik, Shafi and Hanbal, here “hadd” is applicable. al-Marghinani, *supra* note 4, at vol. 2, 128; al-Shirbini, *supra* note 8, at vol. 4, 177; Ibn Rushd, *supra* note 8, at vol. 2, 340; Ibn Qudama, *supra* note 4, at vol. 10, 272-73.

<sup>23</sup>al-Marghinani, *supra* note 4, at vol. 2, 129; Nawawi, 1958, *supra* note 8, at 161; al-Shirbini, *supra* note 8, at vol. 4, 161; Ibn Qudama, *supra* note 8, at vol. 10, pp. 293-6.

<sup>24</sup>According to Malik, “da‘wa” (claim) of the victim is not required. al-Marghinani, *supra* note 4, at vol. 2, 127; Ibn Qudama, *supra* note 8, at vol. 10, 294; Bilmen, *supra* note 8, at vol. 3, 281-82.

<sup>25</sup>Al-Marghinani, *supra* note 4, at vol. 2, 118-19. Nawawi, *supra* note 8, at vol. 4, 175; al-Shirbini, *supra* note 8, at vol. 4, 175; Ibn Qudama, *supra* note 8, at vol. 10, 285-86; Bilmen, *supra* note 8, at vol. 3, 278.

mitigate the punishment, it is recommended to suggest that the thief retract his confession.<sup>26</sup>

The punishment for *sariqa* is amputation of the right hand at the wrist, and, in the case of a second theft, the left foot at the ankle.<sup>27</sup> In the case of further thefts, or if the second hand or foot is not fully usable, the thief is imprisoned until he repents.<sup>28</sup> According to Malik and Shafi, at the third offense, he loses his left hand, in the fourth case, his right foot; after in the further thefts, he receives *ta'zir* (discretionary) punishment.<sup>29</sup>

According to Hanafis, the *hadd* punishment excludes pecuniary liability, unless the stolen object is still in existence, in which case it must be returned to the owner.<sup>30</sup> According to Malik, Shafi and Ahmad, the *hadd* does not exclude pecuniary liability in any circumstances. They agree with Hanafis when the stolen object is still in existence; however, if the object is damaged, they differ. According to Malik, if the thief is a rich person, he is required to pay its value. If he is a poor person, no compensation is required. In the view of Shafi and Ahmad, the thief is required to pay its value regardless of his economic status.<sup>31</sup>

In order to see the living tradition of *fiqh*, let us now quote several *fatwas* of the muftis:

1. Question: If Zayd brings a lawsuit against Amr, 'you have stolen my 1000 akçe from a secure place (*mahruza*)' and Amr admits to the theft from a secure place and does not retract, what is required to Amr?

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<sup>26</sup>Ibn Humam, *supra* note 8, at vol. 5, 223. Nawawi, *supra* note 8, at vol. 4, 175-76; al-Shirbini, *supra* note 8, at vol. 4, 175-56; Ibn Qudama, *supra* note 8, at vol. 10, 288.

<sup>27</sup>al-Marghinani, *supra* note 4, at vol. 2, 126; al Halabi *supra* note 5, at 203.

<sup>28</sup>al-Marghinani, *supra* note 4, at vol. 2, 126.

<sup>29</sup>Nawawi, *supra* note 8, at vol. 4, 177-78; al-Shirbini, *supra* note 8, at vol. 4, 177-78; Ibn Qudama, *supra* note 8, at vol. 10, 261-70; Ibn Rushd, *supra* note 8, at vol. 2, 339; Bilmen, *supra* note 8, at vol. 3, 282-83.

<sup>30</sup>al-Marghinani, *supra* note 4, at vol. 2, 130.

<sup>31</sup>Nawawi, *supra* note 8, at vol. 4, 177; al-Shirbini, *supra* note 8, at vol. 4, 177; Ibn Qudama, *supra* note 8, at vol. 10, 274; Ibn Rushd, *supra* note 8, at, vol. 2, 338-39; Bilmen, *supra* note 8, at vol. 3, 284-86.

Answer: Chopping off of the hand.<sup>32</sup>

2. Question: If Zayd brings a lawsuit against Amr, ‘you have stolen my belongings worth of 1000 akçe from a secure place (*mahruza*) in my house’ and Amr denies, and Zayd proves his case in accordance with *shari‘a*, is he entitled to have the hand of Amr cut off?

Answer: Yes, he is.<sup>33</sup>

3. Question: If Zayd brings a lawsuit against Bakr, who is the *mazun*<sup>34</sup> [the permitted] slave of Amr, ‘you have stolen my 300 *guruş*<sup>35</sup> secured in a chest in my house’ and Bakr admits to the theft as written [above] and does not retract, is Zayd entitled to have the hand of Bakr cut off and to take back the remaining amount of the aforesaid money from Bakr?

Answer: Yes, he is.<sup>36</sup>

These *fatwas* are in line with the legal theories and suggest that these were issued upon the request of real people. In other words, these represent the problems of real life.

#### The Court Cases

I would like to begin with a case in which a penalty of *sariqa* (amputation of hand) was issued.<sup>37</sup> The second records the chopping of the hand of the

<sup>32</sup>Salih b. Ahmed al-Kafawi, *FATAWA ALI EFENDI MA‘A NUQUL LIL KAFAWI*, vol. 1, 147 (Matba‘a ‘Amira, no date).

<sup>33</sup>*Id.*

<sup>34</sup>“Abd mazun” signifies a slave who has been authorized by his owner to do trade. See Halabi, *supra* note 5, at 388.

<sup>35</sup>“Guruş” refers to several types of European silver coins circulated in the Ottoman empire. See Şevket Pamuk, *Money in the Ottoman Empire, 1326-1914*, in *ECONOMY AND SOCIAL HISTORY*, (Halil İNALCIK and David QUATAERT, ed., Cambridge University Press, 1994).

<sup>36</sup>Kafawi, *supra* note 32, at vol. 1, 147.

<sup>37</sup>Menekşe mentions that in 17<sup>th</sup> and 18<sup>th</sup> centuries Ottoman Empire, only in four “*sariqa*” cases did the culprits received “*sariqa*” punishment (chopping of the hand), three of which were issued by a controversial judge (Beyazizâde Ahmed effendi) who held the office of the military judge of Rumeli between 1680-1683. Sheikh Mehmet effendi, *Shaqaiq al-Numaniyya wa Dhayillari*, vol. 3, 535 (Abdulkadir Özcan, ed., Çağrı Yayınları, 1989); Ahmet Çelebi İzgör & İlyas Çelebi, *Beyazizâde Ahmet effendi*, *TÜRKİYE DİYANET VAKFI İSLAM ANSİKLOPEDİSİ*, vol. 6, pp.

culprit and his demand that the case be reviewed. The third involves *ta'zir* punishment.

Case 1:<sup>38</sup>

A person called *Al-Hac* Mehmed b. Rasul, a dealer of prayer beads in the market located near the mosque of his Excellency the diseased Sultan Beyazid, whose sins are forgiven, in the protected Istanbul, in the presence of a man named Mehmed b. Abdullah, originally from the residents of Malkara, [currently] resident in Süleymaniye *tabhane* (printing house) in the aforesaid city, [Mehmed b. Rasul] brought a lawsuit against him in the noble court, stating:

‘On the twentieth day of the month of this document, on Friday night, after the nightfall prayer, the aforesaid Mehmed, from the side of tomb near the aforesaid mosque, entered the market and by making a hole in the ceiling entered my shop which is located in the aforesaid market, and stole twenty dice beads and twenty one 500 pieces of beads and a thousand crystal seeds and seven hundred carnelian seeds and a hundred twenty *Salmani* (a kind of) stone and ten ambers and one silver butt of dagger and one bezoarstone worth of 70 *guruş*, [which are] presented to the court. [These] are my own property. I found them on his hands. I demand that the foresaid Mehmed should be interrogated and that the aforesaid goods which still exist should be taken for me and that his right hand should be cut off.’

When asked, the aforesaid Mehmed in his reply voluntarily admitted and confessed [stating]:

The case is as written above. On the twentieth day of the month of this document, at Friday night, after the nightfall prayer, from the side of tomb near the aforesaid mosque, I entered the market and made a hole in the ceiling of the aforesaid plaintiff's shop which is located in the aforesaid market, and I stole the aforesaid goods which are the property of the aforesaid plaintiff.’

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55-6; Ömer Menekşe, XVII VE XVIII. YÜZYILDA OSMANLI DEVLETİNDE HIRSIZLIK SUÇU VE CEZASI (THIEVERY CRIME AND PUNISHMENT IN THE OTTOMAN STATE IN THE 17<sup>TH</sup> AND 18<sup>TH</sup> CENTURYS) 110-113 (Unpublished Ph.D. Thesis, Marmara University, İstanbul, 1998)(on file with the author)[hereinafter “Menekşe Thesis”].Ömer Menekşe, *Osmanlı'da Zina Cezası olarak Recm*, 2 MARİFE 17 (2003).

<sup>38</sup>İstanbul Müftülüğü, *Şer'iyye Sicilleri Arşivi*, 25 İSTANBUL BAB MAHKEMESİ 165. See also Menekşe (Thesis), *supra* note 37, at Atch 2. A copy of these documents was kindly provided by the Islamic Research Center (Isam), İstanbul.

Accordingly, the aforesaid Mehmed was warned to hand the aforesaid goods which are in his hands to the aforesaid plaintiff.

From the residents of the aforesaid market, the persons named *Seyyid*<sup>39</sup> İbrahim b. Mehmed, resident in the quarter of Haraccı Muhyiddin, and *Seyyid* Ivaz b. *Seyyid* Hüseyin, resident in the quarter of Zeyrek and *Seyyid* Şaban b. Mehmed and *Seyyid* Mehmed b. İbrahim, residents in the quarter of *Molla* Husrev and *Al-Hac* Nasuhi b. Mahmud and Mahmud b. Mehmed residents in the quarter of Hoca Pasha and Ahmed b. Mustafa resident in the quarter of *Molla* Fenari informed the court, in the presence of the aforesaid Mehmed, that the value of the aforesaid goods equals 70 *guruş*.

The *nisab* (value) has been determined. Accordingly, the amputation of the right hand of the aforesaid Mehmed is the requirement of the *shari'a*.

What happened was written on 25 *Dhilhijja* 1087 (28 February 1677).

*Shuhud al-Hal*:<sup>40</sup> Hasan efendi the peers of the scribes, the first scribe; Yusuf efendi the peers of the scribes, the second scribe; Murad *ağa*, currently *Çavuş başı* (the head of the sergeants); Kasım *ağa*, Vice *Muhzır*; <sup>41</sup> *Al-Hac* Kemaleddin *ağa*; Recep *ağa*, head of the *Muhzırs*, and others.

In this case, we see a man called Mehmed b. Rasul filing a complaint against his counterpart named Mehmed b. Abdullah, accusing him of stealing his valuable goods from his shop. The defendant admitted to the crime of theft. Since the goods were in his hands and were presented to the court, in accordance with the law, the judge ordered the defendant to hand them back to their owner. Afterwards, several people (experts), informed the court that the value of the stolen goods equals 70 *guruş*. As we understand from the following statement 'the *nisab* has been determined,' 70 *guruş* equalled ten *dirham* which is the minimum amount to trigger *sariqa* punishment. Once the requirements of the law – *nisab* (10 *dirham*/70 *guruş*), *hirz* (a secure place/drilling the ceiling of

<sup>39</sup>This is a title given to the descendants of the Prophet Muhammed. Gustav Bayerle, PASHAS, BEGS, AND EFENDIS: A HISTORICAL DICTIONARY OF TITLES AND TERMS IN THE OTTOMAN EMPIRE 136 (The Isis Press, 1997).

<sup>40</sup>These were the witnesses to the proceedings of the court and executed several functions. See Ronald C. Jennings, *Kadi, Court, and Legal Procedure in 17<sup>th</sup> Century Ottoman Kayseri*, 68 *STUDIA ISLAMICA*, 143-44 (1978); Recep Çiğdem, *The Register of the Law Court of Istanbul 1612-1613: A Legal Analysis* 84-86 (2001) (unpublished PhD thesis, University of Manchester).

<sup>41</sup>The "muhzır" was charged with summoning accused persons to the court. For other functions, see Uriel HEYD, *STUDIES IN OLD OTTOMAN CRIMINAL LAW* 236, 272fn (The Clarendon Press, 1973).

the shop)<sup>42</sup> and a demand of *sariqa* penalty by the plaintiff – are satisfied, the *qadi* passed his judgment condemning the culprit to amputation of the right hand. Although the *qadi* condemned the criminal to corporal punishment, we do not know whether it was executed by the authorities. The case which will be examined below suggests that the punishments were enforced.

The criminal was caught with the stolen objects which made it almost impossible for him to deny the case. The statement ‘voluntarily’ might have been inserted into the record to conform to the law as force invalidates confession.<sup>43</sup>

The presence of a *Çavuş başı* Murad *ağa* in the court indicates that the crime was investigated by an executive authority, and that he brought the stolen objects to the court as circumstantial evidence. Once he completed his investigation, he handed the culprit over to the *Muhzirs* Recep *ağa* and Kasım *ağa* and they brought him to the court. These probably were the people who submitted the convicted to the executioner of the punishment.

The defendant perhaps was a convert since the patronymic “son of Abdullah” was commonly borne by converts and slave-borns.<sup>44</sup> His place of residence, ‘*tabhane*,’ indicates that he was a laborer and was staying at the place of his work. He might have been a poor person in need of money. The reasons behind the theft and his economic circumstances were not raised in the court and this was not business of the court. However, his method of theft suggests that he was a professional thief and reconnoitered the place contemplated for the commission of the crime. This means theft was an aforethought and planned one.

#### Case 2:<sup>45</sup>

Ahmed b. Abdullah, the initiator of this document, from the residents of the village Damdan, a dependency of the town Şebinkarahisar, in the province of Anatolia, in the presence of a person called Abdi b. Mustafa, resident in the

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<sup>42</sup>Al-Marghinani, *supra* note 4, at vol. 2, 121-23.

<sup>43</sup>Al-Marghinani, *supra* note 4, at vol. 3, 275-78.

<sup>44</sup>Ronald C. Jennings, *Limitations of the Judicial Powers of the Kadi in 17<sup>th</sup> Century Ottoman Kayseri*, 50 *STUDIA ISLAMICA* 241-43 (1979); C. Madeline Zilfi, *We Do Not Get Along: Women And Hul Divorce in the 18<sup>th</sup> Century*, in *WOMEN IN THE OTTOMAN EMPIRE: MIDDLE EASTERN WOMEN IN THE EARLY MODERN ERA* 286 (Brill Academic, 1997).

<sup>45</sup>İstanbul Müftülüğü, *Şer’iyye Sicilleri Arşivi*, 128 RUMELİ KAZASKERLİĞİ MAHKEMESİ (RUMELI MILITARY COURT) 93; Menekşe, *supra* note 8, at Atch 4.

quarter of Davutpasha, in the protected Istanbul, currently a vendor in the market *Molla Gurani*, [Ahmed] brought a lawsuit against him in the noble court and stated:

‘One and half years prior to the date of this document, the aforesaid Abdi was a *Subaşı* (police)<sup>46</sup> in the aforesaid village. He brought a lawsuit against me face-to-face for some quantity of thread which I had bought and [which] was in the hands of *dhimmi* named Sanor, [resident] in the aforesaid village, stating that it (thread) was his own property and that it got lost. He proved his claim. He received it (the thread) as restitution of property from him [Sanor],[illegible]. The aforesaid Abdi seized me and chopped my right hand at the wrist with his own butcher knife. I demand that he should be interrogated and that its requirement should be enforced.’

When asked, the aforesaid Abdi in his reply stated: ‘Since it was established that on the aforesaid date, the aforesaid plaintiff stole the aforementioned thread from a secure place, and that its value reached the *nisab*, the *qadi* of the aforesaid town, Yahya *efendi* issued a judgment condemning him to amputation of the hand. Since I was a *Subaşı*, he [the *qadi*] ordered me to chop his [Ahmed’s] hand. I myself being a *mubaşir* [server] did not amputate his hand.’ He denied that he himself cut off [the hand of the plaintiff] and refused the allegation written above.

After interrogation and denial, first, when evidence was demanded that it was the aforesaid Abdi who himself cut off the hand [of the plaintiff], the persons named Ahmed b. Mustafa and *Seyyid* Fazlullah b. Yakup, originally from the village called *Külük* a dependency of the aforesaid town who are staying as quests in the rooms of Haydar in *Süleymaniye* in the aforesaid city, came to the court for testimony.

After being called to witness, they stated: ‘In fact, on the aforesaid date, the aforesaid Abdi himself cut off the right hand at the wrist of the aforesaid plaintiff with his own butcher knife in our presence. We are witnesses in this case and bear witness.’ They bore witness.

Mustafa *efendi* b. Abdulaziz was sent by the noble for the *tazkiya* and *ta’dil* (legal integrity) of the two witnesses. When he asked about the aforesaid two witnesses from the residents of the aforesaid village, the persons named Mustafa *efendi* b. İsmail preacher, and Mustafa *efendi* b. Hüseyin preacher, and *Seyyid*

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<sup>46</sup>According to Pakalin, Sertoğlu and Bayerle, “Subaşı” executed several functions, including that of night guard and police. Mehmet Zeki Pakalin, *OSMANLI TARİH DEYİMLERİ VE TERİMLERİ SÖZLÜĞÜ*, vol 3, 259-61 (Maarif Basımevi, 1954); Midhat Sertoğlu, *Resimli Osmanlı Tarihi Ansiklopedisi* 298 (Istanbul Matbaası, 1958); Bayerle, *supra* note 39 at 238.

Halil Hilmi b. Mehmed, and *Seyyid* Mehmed b. Kadı, and *Seyyid* Hasan Hilmi b. Hüseyin, and Ahmed b. Hüseyin, and *Molla* (religious scholar) Hüsni b. Hüseyin, and *Molla* Süleyman b. Ragıp and Ömer b. Mehmed, each informed that the aforesaid two witnesses are just and their testimony is acceptable. Mustafa *efendi* wrote the report in its place and informed the court of it.

The testimony of the foresaid two witnesses has been accepted.

Afterwards, when evidence was demanded from the aforesaid Abdi that it was established in the aforesaid town that the aforesaid Ahmed was a thief and that the *qadi* of the aforesaid town Yahya *efendi* passed a judgement condemning him to amputation [of hand], he asked for a delay for his evidence.

He was granted a *shar'it*<sup>47</sup> (legal) delay by the court.

What happened was written upon request.

Written on 3 *Ramadan* 1091 (27 September 1680)

*Shuhud al-Hal*: Mehmed *çelebi*<sup>48</sup> b. Haydar, *Seyyid* Hüseyin *çelebi* b. Hüseyin, *Seyyid* Mehmed b. Kadı, Hasan *beşe*<sup>49</sup> b. Cuma.

This case records an important allegation that a man's hand was chopped illegally. A certain Ahmed, perhaps, a convert, accused a *Subaşı* named Abdi of cutting off his right hand at the wrist without legal authorization. The defendant denied that he himself had amputated his hand but admitted that his hand was cut off upon the authorization of a *qadi* named Yahya *efendi* on the grounds that he stole certain thread from a secure place, and that its value reached the *nisab*. The plaintiff proved his claim that his hand was cut off by Abdi with the testimony of two male witnesses whose legal integrity was established by the testimony of several men. Afterwards, the *qadi* demanded evidence from the

<sup>47</sup>The term 'legal delay' corresponds to three days. Al-Marghinani, *supra* note 4, at vol. 3, 159.

<sup>48</sup>Çelebi was used for the Sultan's sons until 15<sup>th</sup> century. Since then, it was designated to the literate people as a title of respect. Sertoğlu, *supra* note 46 at 65; Bayerle, *supra* note 39 at 30.

However, according to Zilfi, it "probably denotes association with a trade." Zilfi, *supra* note 44 at 280, 294.

<sup>49</sup>*Beşe* "refers to an affiliation '[of some indeterminate kind]' with the soldiery or guardsmen units of the Empire." It seems to mean Janissary. Sertoğlu, *supra* note 46 at 62; Pakalın, *supra* note 46, at vol. 1, 317; Ronald C. Jennings, *The Society and Economy of Maçuka in the Ottoman Judicial Registers of Trabzon, 1560-1640*, in CONTINUITY AND CHANGE IN LATE BYZANTINE AND EARLY OTTOMAN SOCIETY 137 (Dumbarton Oaks, 1986); Zilfi, *supra* note 44 at 280, 294.

defendant who asked for a delay to bring evidence, where the record ends but not the case. We do not know how the case ended.

To speculate as to how the case developed, it seems that the defendant lost a certain quantity of thread and found it in the hands of a certain *dhimmi* Sanor. Once he identified the man who gave it to Sanor, he took the case to the court. As we understand from the statement of the plaintiff Ahmed, the defendant Abdi won the case despite Ahmed's claim that it was his own property since he had bought it. Upon winning the case, he amputated Ahmed's hand. This raises the question of whether the amputation was a legal one. Did the court issue a *sariqa* punishment and order the defendant who was a *Subaşı*, an executioner of the punishments, to carry out the amputation or did Abdi cut off his hand without a legal authorisation?

The defendant's denial of the amputation by himself suggests that it was an illegal one. This in turn shows that in Abdi's case, the *qadi* ordered the restitution of the property but did not condemn Ahmed to amputation of hand. This reminds us the statement of Heyd that "since the very first centuries of Islam, therefore, criminal justice remained largely outside the jurisdiction of the *qadis*. A wide range of crimes and misdemeanors was examined and punished by the head of the police [*Subaşı*]."<sup>50</sup>

It is also possible that the *Subaşı* carried out the judgment of the court by chopping the hand of the plaintiff but denied it in the court since he did not have the legal document at hand and he was far away from Şebinkarahisar, (approximately 1000 km away from Istanbul) where he served as *Subaşı*. His demand for a delay suggests that the amputation was a legal one and he had such a document. He might have travelled to Şebinkarahisar in order to have an entry issued from the original register. Gerber's study of the Bursa sicils indicates that the *Subaşı* acted as a prosecutor in some criminal cases<sup>51</sup> but that he did not punish the offenders himself. This was also the requirement of the *kanunname* (code)<sup>52</sup> of Sultan Süleyman (1520-1566):

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<sup>50</sup>Heyd, *supra* note 41, at 1.

<sup>51</sup>Haim Gerber, Social and Economic Position of Women in an Ottoman City, Bursa 1600-1700", 12 INTERNATIONAL JOURNAL OF MIDDLE EASTERN STUDIES 239 (1980).

<sup>52</sup>This code was most likely in practice at the time of our source, since the criminal code of Sultan Süleyman (d.1566) was, in principle, at least, in force for 326 (1520-1846) years which covers the period of our purposes. See Ahmet Akgündüz, OSMANLI KANUNNAMELERİ VE HUKUKİ TAHLİLLERİ (OTTOMAN DIGESTS AND LEGAL ANALYSES), Vol 1, 30 (Fey Vakfı, 1990).

“The executive officers (*ehl-i- ‘örf*) shall not imprison and hurt any person unless [he is convicted] by the *qadi*.”<sup>53</sup>

The case was seen in Rumeli Military Court, a high court. On the question of why he did not take the case to a *qadi* in Şebinkarahisar, there are two possibilities: first, since this was a high court, he expected the case to be revived, quashing the earlier one; second, since the defendant was in Istanbul, it was easy for him to have him summoned to the court. Reviving a case after one and half years suggests that the plaintiff was trying to get compensation, and derive monetary benefit from the defendant. This is because if he were to establish his case and did not want retaliation, he is entitled to half of a *diya*, a certain amount of money.<sup>54</sup>

We learn from the document that the witnesses were guests in Istanbul. It is highly likely that they were brought to Istanbul by the plaintiff and it was him who met their expenses during their stay in Istanbul. Their presence in the court also indicates that the punishment was carried out in front of the people, that is to say the execution was open to the public, as we see it in twenty-first century Iran.<sup>55</sup>

An interesting point made by the document is that a *Subaşı* was working in Istanbul as a vendor. He might have resigned or might have been dismissed from the police force.

Case 3:<sup>56</sup>

A *Kaime* (written document) [has been sent]. In accordance with the exalted *Firman* (Sultanic decree), when the affairs of the aforesaid (viz.) Yoda the son of Eliz, a Jew was asked from the head of *Ases*<sup>57</sup> *Hacı Hüseyin ağa*, and

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<sup>53</sup>Heyd, *supra* note 41, at 127.

<sup>54</sup>Al-Marghinani, *supra* note 4, at vol. 4, 180.

<sup>55</sup>“Iran has hanged at least nine men convicted for rape, kidnapping and armed robbery, as reported by state media. . . . State television showed the five convicts' bodies hanging from the gallows under a banner saying "Implementing justice = Elevating security. The footage showed thousands of spectators at the execution held back by iron fencing and a police cordon.” BBC News Report Aug. 1, 2007, *Iran Executes Nine More Criminals*, available at [http://news.bbc.co.uk/1/hi/world/middle\\_east/6926387.stm](http://news.bbc.co.uk/1/hi/world/middle_east/6926387.stm) (last visited Dec. 13, 2007).

<sup>56</sup>İstanbul Müftülüğü, *Şer'îyye Sicilleri Arşivi*, 25 İSTANBUL KADILİĞİ 142.

<sup>57</sup>Chief guardsmen in a town. NEW REDHOUSE TURKISH-ENGLISH DICTIONARY (Redhouse Yayinevi, 1994).

*Subaşı* Mustafa, and the scribes of the dungeon *Seyyid* Feyzullah, Halil, and the sergeant (*Haseki*) of the dungeon Mehmed, and the guards of the dungeon Ömer, İbrahim, İsmail, and [from] the ones who knows [Yoda's affairs], Mehmed and his brother Mustafa who are barbers near the dungeon, and the *Subaşı* of Balat Mustafa and his partner *Hacı* Ali, and İbrahim who has house in Balat but works in Süleymaniye as *Attar* (perfumer), and seller of skullcaps Hüseyin, in their reply, they stated face to face:

'Theft is his perpetual habit. Previously, on one occasion he was confined to cell in prison due to the suspicion of theft. He stole goods from the house of Ali, *Kethüda*<sup>58</sup> of the door, who is present in the session of the court and afterwards he made reconciliation with the aforesaid Ali for the goods he stole. This time, as explained in the *Kaime*, he did not obey and [attacked] Ali, a *nefer* (staff, soldier) of the dungeon, with the instrument of war during the seizure.'

It is known that *ta'zir* of such persons is among the matters which are subject to the Exalted decision, the *buyruldu*.<sup>59</sup> The command is in the hands of his Excellency who he has the right of command.

24 *Rabi' al-Awwal* 1180 (30 August 1766)

This is a case for which a *Firman* was issued; that is to say the case was heard in an Istanbul court upon the request of the executive authorities. The culprit was presented to the court as a perpetual thief. Several military and civil men testified in the court that a Jew named Yoda was a thief and he did not want to give up this habit. In order to substantiate their claim, they also brought a victim of theft named Ali, with whom the thief had made a compromise, thereby ending the case.

Since theft was his habit, and the suspect was professional and harmful to the society, the *qadi* demanded *ta'zir*, perhaps intending capital punishment.<sup>60</sup>

<sup>58</sup>Jennings states that "it is not clear whether the *kethüda* was an independent officer...or whether he just acted in place of an absent *sancak begi*...[or] whether the office was permanent or temporary." Jennings, *supra* note 49 at 168.

<sup>59</sup>Written commands of high administrative officials such as Grand Vezir, Defterdar (the director of finances), or Beylerbeyi. Such documents were authenticated by a "pençe" (the stylised signature of the issuer). Sertoğlu, *supra* note 46 at 53; Bayerle, *supra* note 39, at 25, 34, and 124.

<sup>60</sup>For capital punishments in the Ottoman Empire, see Ahmet Mumcu, *OSMANLI DEVLETİNDE SİYASETEN KATİL (POLITICAL HOMICIDE IN THE OTTOMAN GOVERNMENT)* (Ajans-Türk Matbaası, 1963).

Although Ottoman criminal code required banishment for perpetual thieves,<sup>61</sup> it seems to me that the *qadi* did not demand it as the culprit was already under arrest and was in prison. The statement ‘it is known that *ta‘zir* of such persons is among the matters which are subject to the Exalted decision, the *buyruldu*’ suggests that the *qadi* demanded severe punishment which needed the approval of the political authority. This is in line with the statement of Heyd, “one reason why in many cases the *qadis* did not sentence the accused to a specific penalty is that the result of their investigation was to be submitted to the Sultan. The *buyruldu* registers contain a large number of such decisions in criminal matters.”<sup>62</sup>

The thief’s compromise with his victim indicates that he was a professional thief and was aware of the law. Since he knew that if was taken to the court as a thief and the victim demanded *hadd* punishment, he could lose his hand, so he made a *sulh* with the victim, preventing him from taking the case to the judicial authorities. The presentation of the case suggests that the authorities did not have enough evidence to have him condemned to *sariqa* punishment. Since they had reasonable doubt without conclusive evidence, they brought the case to the court. It is also interesting to see that several civilians accompanied the military people and that a *Firman* was issued for the case being seen in a court of law. The latter indicates that the suspect was a real problem to the society.

The last part of the plaintiff’s statement, that he attacked Ali with the instrument of war during the seizure, is not very clear. We do not know where he was seized. However, the title of Ali as staff of the dungeon suggests that the attack took place in the prison. If this is the case, the question of how he was able to reach the instruments of war rises. Did he have an outside accomplice who smuggled it into the prison or was it a weapon/sword of Ali who lost it to him during the fight/seizure? Whatever the case might have been, he was a trouble not only to the society but also to the military officials. This is why they wanted to get rid of him and remove him from the society forever.

## CONCLUSION

The primary aim of this article has been to find out whether the *hadd* punishments were applied. An examination of the registers has confirmed that despite its rarity the *hadd* penalties were actually applied.

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<sup>61</sup>Çoşkun Uçok, Osmanlı Kanunnamelerinde İslam Ceza Hukukuna Aykırı Hükümler-III (PROVISIONS CONTRARY TO ISLAMIC LAW IN THE OTTOMAN STATUTES), 4 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ (ANKARA UNIVERSITY LAW REVIEW) 66 (1947); See also Akgündüz, *supra* note 52, at vol. 4, 301-05.

<sup>62</sup>Heyd, *supra* note 41, at 255-56.

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Jurists made an effort in all judicial discussions to mitigate the harshness of *hadd* punishments if it all possible. Unless the victim of a theft filed a complaint in a court of law demanding the *sariqa* punishment in particular, the *hadd* was not available. Although it was very rare, as we have seen, some demanded corporal punishment – amputation of the hand of the thief.

It has been underlined that there were irregularities in the application of *hadd* punishment. We have noted that a *subaşı* (police officer) was summoned to a military court to face the allegation that he amputated the hand of a man illegally. This vindicates the point that the police were involved in crimes and that the victims did not hesitate to pursue them.

It has also been noted that there were troublemakers. Those whose habit was theft were dealt severe punishment (*ta'zir*). He was probably condemned to capital punishment in order to be removed from society forever.

It must be underlined that these are the cases that made their way to the courts. We know almost nothing about the cases which are not reported. For this reason, it is impossible to estimate the number of theft incidences. We also do not know what transpired prior to or after a particular court session. We also do not know the impacts of the crimes on society. Neither do we know the psychology of the criminal after the execution of the punishment nor the reasons behind the crimes.