

Theft under Islamic and Indonesian Criminal Law

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Abstract

Theft violates both legal and religious norms and it is a crime under Islamic and Indonesian Criminal Law. The study aims at comparing the regulation of theft both in Indonesia and in Islam. This normative legal research relies on secondary data and employs comparative approach. Comparison is made to explore the similarities and differences between Islamic criminal law and Indonesian criminal law with regard to theft especially on how this crime defined, the form of punishment, the requirement for imposing the punishments, and how effective are these punishment to deterring people from committing theft. The results of the study show that the use of imprisonment for theft as adopted in the Indonesian Penal Code seems to be ineffective for controlling theft cases. Hadd punishment as introduced in Islamic criminal law seems to be more promising for addressing the increasing number of theft cases. This is so because the application of cutting hand off not only prevents the thief to repeat the crime but also preventing others to do the same. Therefore, both special and general deterrence purposes are satisfied.

Keywords: theft; Indonesian Penal Code; Islamic Criminal Law; fiqh jinayah; comparative study

1. Introduction

Theft is an act that violates the main or basic norms that live in society, namely religious norms and legal norms (Cloward & Ohlin, 2013). Any religion will prohibit an act of theft because it is a sin that must be accounted for by the culprit in this world and the hereafter. The positive law that applies in a country also guarantees the personal rights of everyone, one of which is the right to own every object. The crime of theft regulated in Chapter XXII Book II of the Criminal Code is the crime of theft in the main form which contains all the elements of the crime of theft (Butt & Lindsey, 2020).

In Islamic law property is meant to support life. Islamic law respects private ownership of property and makes their right to property a sacred right (Moors, 2018). No one may take arbitrary action against people for any reason. According to *syara'*, theft is stealing by an adult, sane person from another person's property secretly, if the item reaches the *nisab* (minimum limit) from the place of storage without *syubhat* for the goods taken (Zulhuda & Mohamed, 2015). In Islamic law there are two thefts: theft which requires the fall of *hudud* law and theft which requires the imposition of *ta'zir* punishment (Gouda, 2016). Theft that requires *hudud* punishment consists of two things: petty theft (*sariqah sugra*) and major theft (*sariqah kubra*).

Islamic law views the crime of theft as a dangerous crime and therefore the punishment has been determined by *syara'* (Fathurokhmandan & Fauzi, 2015), namely the punishment of cutting off a hand as stated in Surah Al-Maidah verse 38 that states "Men who steal and women who steal, cut off their hands (as) revenge for what they do and as punishment from Allah. And Allah is Mighty, Most Wise." In imposing the punishment of cutting off a hand, the scholars consider that the stolen property has legal value, must be stored in an ordinary storage place and reaches the *nisab*. If it does not reach the *nisab*, then there is no punishment for cutting off the hand but it is replaced by *ta'zir*.

Based on the background of the problems above, this paper aims to find out how the crime of theft is as regulated in the Criminal Code (KUHP)? How is the crime of theft regulated in Islamic criminal law? and how is the comparison of the crime of theft according to the Criminal Code (KUHP) and Islamic criminal law?

2. Method

This type of research is normative legal research, namely research conducted by examining library materials or secondary data. Secondary data sources are supporting data or additional data for primary data. Secondary data is data that is not directly obtained from the research object. The types of data and data sources used in this study are secondary data. Secondary data is data obtained by an organization or individual originating from other parties who have previously collected or processed it. Secondary data consists of 3 types of legal materials, namely: primary legal materials, secondary legal materials, and tertiary legal materials. The data that has been collected is analyzed qualitatively using the deductive method, namely drawing conclusions that start from general knowledge and then draw a specific conclusion.

3. Discussion and Analysis

3.1. Theft under the Indonesian Criminal Code (KUHP)

The criminal act of theft in the Criminal Code (KUHP) is regulated in Article 362, Article 364, Article 363 paragraph (1) and paragraph (2), Article 365 and Article 367 of the Criminal Code (KUHP) (Santoso, 2020). Indonesian criminal law, whose essence is included in the Criminal Code (KUHP), originates from the Netherlands, because Indonesia was once colonized by the Dutch (Wibowo, 2018). Theft in the Criminal Code is regulated in Chapter XXII in Book II starting from Article 362 to Article 367 of the Criminal Code. The forms of theft in the Criminal Code are as follows: Theft in the main form; Major theft; violent theft; Petty theft, and family theft. Theft in the main form is regulated in Article 362 of the Criminal Code with objective elements, namely taking goods that are wholly or partly owned by another person, and subjective elements, namely with the intention to own illegally. Taking here means moving the item from its original place to another (Anggraeni, 2020). Goods that are wholly or partly owned by other people, namely the meaning of goods here are goods that have value in the economic life of a person. The item must be wholly or partly owned by someone else. With the intention to own, namely the realization of a will, desire or goal of the perpetrator to own goods unlawfully, namely the act of possessing what is desired without the perpetrator's own rights (Sugiharti et al, 2022).

Theft in serious forms is regulated in Article 363 of the Criminal Code with the following elements: livestock theft, theft during fires, eruptions, floods, earthquakes or seaquakes, volcanic eruptions, shipwrecks or stranded, train accidents, riots, rebellion or danger of war; Theft at night in a closed house or yard where there is a house, is committed by people who are there without the knowledge or desire of those who are entitled; Theft is committed by 2 or more people together; Theft committed by dismantling, breaking or climbing or by using a false key, false order or false official attire (Nugraha, 2022). Furthermore, violent theft regulated in Article 365 of the Criminal Code with the following elements (Yanto, 2016), namely theft preceded, accompanied, followed by violence or threats of violence against a person with the intention of preparing or facilitating the theft, or if caught red-handed provides an opportunity for oneself or other participants in the crime to escape, retaining possession of the stolen item. In addition, minor theft is regulated in Article 364 of the Criminal Code with the following elements (Renhard et al, 2021), namely the act regulated in Article 362 of the Criminal Code, the act regulated in Article 363 of the Criminal Code paragraph 1 number 4 and 5, the act was not carried out in a closed house or yard where a House. Furthermore, the price of the stolen goods does not exceed the amount of Rp. 25.

Meanwhile, regarding theft in the family, it is regulated in Article 367 of the Criminal Code (Yolanda, 2020), consisting of two types, namely the first in Article 367 (1) where a husband (wife) who does not separate the table and bed from his wife (husband) has committed or assisted in committing theft against his wife (husband). In this case, the prosecution of the husband (wife) cannot be carried out. Then the second is stipulated in Article 367 (2) where a husband (wife) who has a table and bed separated requires that if the act is committed by a family member in a straight line or in a side line up to degree 2 and only legal prosecution can be carried out as far as them. Furthermore, complaints against the perpetrators were made by the wife or husband against whom the crime was committed (Nurhayati et al, 2019). This crime is a relatively criminal offense. This criminal provision can only be applied to husbands, wives whose desks and beds are separated, and family members in a straight line or in a side line up to the second degree. Whereas participants who do not fall into this group can be prosecuted without complaints from the party who feels aggrieved.

3.2. Theft under Islamic Criminal Law

Theft is an act of stealing other people's property by stealth. Theft is one of the most destructive acts in society. If left unchecked, the damage it causes will impact the entire community. Therefore, countermeasures must be carried out by imposing appropriate penalties to create a deterrent effect. The way one person takes another person's property varies greatly. Some took it openly, and some took it secretly without the owner knowing. In terms of *fiqh*, the first is called *ghashab* and the second is called *sirqa*. In Islamic criminal law, the act of theft exists in 2 (two) forms, this is explained by Ahmad Wardi Muslich (Sahara and Suriyani, 2018), namely the first where theft carries a maximum penalty and the second theft carries a *ta'zir*. As for theft, the punishment of had is divided into two parts, namely minor theft and major theft.

Minor and major theft have been explained by Abd. Al-Qadir Audah, is an act of taking other people's property secretly, namely by way of stealth. Furthermore, he explained that major theft is an act of taking other people's property by means of violence (Ahangar, 2014). Then Imam Taqiyuddin Abu Bakar Bin Muhammad Alhusaini further explained, that stealing (*sariqah*), is taking other people's property secretly and removing it from the place of storage (which is appropriate for storing the treasure) (Harahap, 2021). In line with this, Wahbah Az-

Zuhaili also explained that theft is taking other people's assets from their proper storage secretly and clandestinely (Ari, 2021). In other words, a thief is a person who secretly takes other people's things and/or belongings to own them. From the explanation above, the elements of theft can be broken down as follows, namely, the goods are taken secretly, the goods taken are concrete assets, the goods taken are valuable, the goods belong to other people, and are taken deliberately to possess it.

Theft is one of the seven types of *hudud jarimah*. *Jarimah hudud* is a criminal act whose criminal sanctions have been absolutely determined by Allah SWT. Thus humans do not have the right to determine criminal sanctions except for criminal sanctions that have been determined by Allah SWT in the Qur'an. This is because *hudud* crimes are among the most serious crimes in Islamic criminal law. As for the application of criminal sanctions for the perpetrators of theft if proven, then there are two types of alternative criminal sanctions imposed, namely: (1) compensation (*Dhaman*), (2) the punishment of cutting off hands (Rusmiati et al, 2017).

Therefore the criminal sanction which is expressly prohibited in the Qur'an in surah al-Maidah [5] verse 38 (Wahyudi, 2018): "Men who steal and women who steal, cut off their hands both (as) retribution for what they do and as punishment from Allah. and Allah is Mighty, Most Wise" (Q.S. al-Maidah (5): 38). The verse begins with the word *as-saariq* which means a man who steals, does not start with the word *as-saariqah* which means a woman who steals, in contrast to the verse about adultery which begins with the word *az-zaaniyah* which means a woman who commits adultery, then it is followed by with the word *az-zaani* men who commit adultery. This implicitly illustrates that the theft is mostly done by men.

The punishment of cutting off a hand is the right of Allah which cannot be aborted either by the victim or by *ulil amri* (Mukhtar, 2016), if the perpetrator of the theft has fulfilled three conditions, namely: (1) *taklif* (reasonable and mature), (2) not forced, and (3) no doubt about the stolen property. Then A. Rahman also gave an explanation, that the *hadd* punishment of hand cutting was applied after the following conditions were fulfilled, namely:

1. The person who has committed the theft must be of sound mind;
2. Adult;
3. There was no element of coercion when committing theft;
4. Was not hungry when he committed the theft.

Based on the explanation above, it can be seen that if the perpetrator is a child, crazy and in a state of compulsion, and in a state of hunger, that is, pressed by the necessities of life, then he cannot be sentenced to *hadd* cutting off his hands (Okon, 2014), based on the hadith of Rasulullah SAW which was narrated by Aisyah r.a, namely: From 'Aisyah r.a in fact the Prophet SAW said: 'Abolished the legal provisions of three people, namely (1) from a sleeping person until he wakes up, (2) from a madman until he recovers, (3) from a child underage until he becomes an adult (H.R. Ahmad, Abu Dawud, Nasa'i, Ibn Majah, and Al-Hakim).

Likewise in a state of doubt, then avoid punishment (Rabb, 2015). This is mentioned in a hadith narrated by Baihaqi, namely: From Ali ra, I heard the Messenger of Allah. said: Reject *hudud* because there is doubt (H.R. Baihaqi). So if there is an element of doubt (*syubhat*) in theft, then the perpetrator is not subject to *hadd* punishment, because *hadd* punishment is a perfect and complete punishment that requires that the crime must also be perfect, while the presence of doubtful elements in the crime makes it impossible to say that it is perfect.

3.3. Comparison between the Crime of Theft Based on the Indonesian Criminal Law and Islamic Law

Judging from the legal sources, it can be seen in comparison that the national criminal law originates from the Criminal Code (KUHP), while Islamic criminal law originates from the Al-Qur'an (Yasir et al, 2022) which is contained in Surah Al-Maidah (5) verse: 38, As-sunnah, Ijma', Qiyas, and other sources. Meanwhile, in terms of its elements, the act of taking according to *Fiqh Jinayah* must be carried out in secret, while the act of taking in the Criminal Code does not require it to be carried out in a clandestine manner. Furthermore, regarding the elements of goods according to *Fiqh Jinayah*, the object must have a value as property and have a certain level (*nisab*) (Tellenbach, 2014), whereas according to the Criminal Code goods such as trees on the side of the road which belong to the general public, electricity, even a single human hair are also objects of acts of theft as long as it is taken without the permission of the owner.

Furthermore, the types of theft crimes according to the Criminal Code consist of: Theft in the main form, Minor theft, Aggravated theft, Theft with violence, Theft within the family (Assegaf, 2020). While the types of theft according to Islamic criminal law consist of 2 (two) parts, namely: 1). *Hudūd* punishment for theft, 2). Theft, which carries a *ta'zir* penalty, which is divided into all types of theft, which is subject to a *hadd* penalty, but the conditions are not met, or there is doubt, taking other people's property without the knowledge of the owner without his consent and without violence. As for the criminal sanctions that arise against the perpetrators of criminal acts in theft according to the Criminal Code, the sanctions are the same between one another, namely imprisonment and fines for the perpetrators. Meanwhile, according to *Fiqh Jinayah*, the criminal sanctions for the perpetrators of theft, the punishment can be in the form of cutting off hands (*Qishas*), the obligation to return stolen property, and *ta'zir* (Rezaei et al, 2019).

As for the similarities between Indonesian criminal law and Islamic criminal law, both of them underlie the imposition of criminal sanctions on human values (Butt, 2018). Where the national legal system bases this on Human Rights, while the Islamic criminal law system bases this on the basic principles of Islamic religious teachings, namely "*hablu min an-naas*" (the relationship between humans and humans themselves).

Between national criminal law and Islamic criminal law there is a reciprocal relationship that is interconnected and complements one another (Hendrawati and Krisnan, 2019). Where in this case the national criminal law which has an orientation towards human values is also embraced by Islamic criminal law. However, in the national criminal law the legal sanctions that are elicited gradually do not have effectiveness values as a deterrent in society (Braithwaite, 2018), so in this case the position of Islamic criminal law as a law that has severe and strict legal sanctions can complement the deficiencies of the national law. Harmonization between the national criminal law system and the Islamic criminal law system can produce a law that is relevant and effective and in accordance with the principle of diversity which is upheld by the Republic of Indonesia to protect the lives of Indonesian people from criminal acts of theft. This is also very effective in reducing the high rate of theft in the Republic of Indonesia with a conceptual condition that must be carried out as straight and fair as possible.

4. Conclusion

Based on the explanation above, it can be concluded that the sanctions for theft in the Criminal Code vary depending on the articles of theft that have been violated. For example, a violation of Article 362 of the Criminal Code is punishable by imprisonment for a maximum of 5 (five) years, a violation of Article 363 of the Criminal Code is punishable by a maximum imprisonment of 7 (seven) years, up to 9 (nine) years, a violation of Article 364 of the Criminal Code, then criminal sanction of 3 (three) months or a maximum fine of Rp. 900,000. Violation of Article 365 of the Criminal Code, is punishable by 9 (nine) years, 12 (twelve) years, 15 years, even up to death penalty. Violation of Article 367 of the Criminal Code, namely theft in the family, the criminal sanction can be applied if the injured party complains. Meanwhile, in Islamic criminal law, the punishment for theft is amputation. The punishment of cutting off a hand is God's right which cannot be revoked by either the victim or ulil amri, if three conditions are met, namely: (1) the thief is an adult; (2) sane; (3) the amount of goods stolen is worth a quarter of a Dinar, taken from a safe place, belonging to someone else, and there is no doubt (*syubhat*) about the goods.

There is a reciprocal link that is tied to and complements both national criminal law and Islamic criminal law. Whereas in this instance, Islamic criminal law also upholds the national criminal law, which is oriented on human values. However, the progressive legal consequences imposed by the national criminal law are ineffective as a deterrent in society. In this situation, the position of Islamic criminal law as a law with harsh and stern legal sanctions can be used to supplement the shortcomings of the national law. To safeguard the lives of Indonesian citizens from the crime of theft, it may be possible to harmonize the national criminal law system with the Islamic criminal law system. This would be in keeping with the principle of diversity advocated by the Republic of Indonesia. This has a conceptual need that must be carried out as straight-forward and equitable as feasible, which is also extremely effective in lowering the high rate of theft in the Republic of Indonesia.

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