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**APPLICATION OF CRIMINAL SANCTIONS AGAINST THEFT PERPETRATORS IN FORCED CONDITIONS**  
**(Comparison of Positive Law and Islamic Law)**

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**ABSTRACT**

Crimes against the property or wealth of others have occurred in many communities. This is done in various ways and opportunities are done alone or also done in groups. The law of theft is divided into several kinds of criteria depending on how much loss from the goods taken. Judging from the positive law, the crime of theft has been regulated in articles 362-367 of the Criminal Code which in these articles have criteria and additional weights in order to provide justice for potential victims and potential defendants. Whereas when viewed from the review of Islamic law, the rule will remain at any time because it has been explained in the Qur'an and hadith and the punishment limit for the severe, and the punishment of tak'zir for the light. The results of this study will show, among others, the similarities and differences in the application of criminal sanctions in terms of positive law and Islamic law. Both have similarities that both have criteria in the sanctions given to provide a deterrent effect, while the difference between the two from the law used is because Islamic law uses the legal basis of the Qur'an, hadith, and the agreement of scholars.

**Keywords:** Theft, Positive Law, Islamic Law

**INTRODUCTION**

Self-satisfaction is a necessity of daily life. Often, the need arises from the desire or pressure to maintain one's status. In general, every human being's needs will be met, although not completely, in situations that do not require internal or external pressure.

As a result, actions that have the potential to harm the environment or other people are often undertaken in an attempt to meet these urgent requirements. From one of these factors, humans will commit detrimental actions or which can lead to criminal acts such as committing acts of theft.

While the term "starafbaar feit" is translated as "criminal act" in positive law, this term is not defined in the Criminal Code. However, crime is sometimes equated with trespass, from the Latin word "delictum", so the terms are often used interchangeably.<sup>1</sup> A simple crime is an act that requires retribution. Moeljatno believes that the only thing that makes an act criminal is the fact that it is prohibited in criminal law from the start.<sup>2</sup>

Theft is a common crime in today's culture, affecting everything from jewelry and cars to the contents of the home.<sup>3</sup> Theft is the unlawful acquisition of another person's property with the intent to deprive them of their rights while concealing the theft from the owner. One further definition of theft is the unlawful taking of another person's property, whether in cash or goods, with the intent to deprive

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<sup>1</sup> Adami Chazawi, Pelajaran Hukum Pidana Bagian 3, PT RajaGrafindo Persada, Jakarta 2002, hlm 68.

<sup>2</sup> FARHAN, Muhammad Iqbal. *Penerapan diversi dalam penyelesaian tindak pidana anak menurut hukum positif dan hukum Islam (analisis kasus Putusan Perkara Nomor 15/Pid. Sus-Anak/2014/PN. TNG)*. 2016. Bachelor's Thesis. Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta.

<sup>3</sup> HAKIM, Abdul, et al. Peranan Polri dalam Penanggulangan Tindak Pidana Pencurian oleh Anak (Studi di Wilayah Hukum Kepolisian Resort Kota Medan). *Jurnal Mercatoria*, 2013, 6.2: 147-175.

that property.<sup>4</sup>Theft crimes that occur in society today are not just like ordinary theft crimes or just because of someone's desires, but committing theft because of the pressure of a need that must be met. As an example of the first case of urgent theft in 2020 in Medan, a man from Medan was determined to steal rice from a stall near his house. This 40 year old man was caught by residents stealing rice because he couldn't afford to buy food. In the second case, two mothers were arrested by the Blitar Police Criminal Investigation Unit in 2021 after they were suspected of committing retail theft. During the pandemic, the two mothers admitted that they had to steal their babies' milk to make ends meet.

The criminal act of theft is of course resolved or given legal sanctions which are contained in the Criminal Code (KUHP) which is regulated in Article 362, Chapter XXII Book II, apart from that it is also regulated in Article 363 of the Criminal Code (theft with aggravation), Article 364 (minor theft), Article 365 of the Criminal Code (Theft in the family environment). It is also different from the perspective of Islamic law, where the differences here are seen in the type of punishment and the methods of determining the punishment and the various sources of law that are used as a reference in resolving a crime of theft. Criminal law in Indonesia is based on positive law and not Islamic law, despite the fact that the majority of the country's population is Muslim.

Therefore, looking at the author's background in several cases that occurred among the community regarding theft in urgent situations, the author was inspired to study it more intensively and comprehensively. Review positive law and Islamic law to determine how to deal with perpetrators of urgent theft crimes, and then put that knowledge to use in real situations.

So on this occasion the author will write a paper entitled "Application for Criminal Perpetrators Who Commit Theft in Urgent Circumstances. Comparative Study of Positive Law and Islamic Law".

## RESEARCH METHODS

This research method combines normative or doctrinal legal methodology with philosophical and historical approaches and approaches.<sup>5</sup>Primary legal materials come from the Criminal Code and the Koran, while secondary legal materials come from magazines, books and articles that discuss the topic of theft from both positive law and Islamic law perspectives. To carry out qualitative data analysis, one must first understand and assemble the data that has been obtained and arranged systematically, and only then can conclusions be drawn using deductive thinking, that is, one must first think in terms of the basics of the things that general before one can draw conclusions.

## RESULTS AND DISCUSSION

### A. Analysis of Handling of Perpetrators of the Crime of Theft in Urgent Situations

Theft can be caused by various factors, including inadequate education, religious morals, and environmental factors, but economic factors have the greatest influence on the emergence of criminal behavior. Economic needs that must be met immediately require theft to be carried out to meet the needs. When theft is committed due to economic factors, the perpetrator is in the position of the victim, who commits theft under forced or emergency circumstances in order to support himself and his family.

Theft perpetrators can be categorized into two groups: old players and new players. Those with criminal experience are responsible for naming past players. In contrast, the new category of players

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<sup>4</sup> HUKUMAN, Sanksi. Muhammad Mamun 17.2500. 009 Pencurian Pencurian adalah mengambil hak orang lain yang bukan miliknya secara diam-diam tanpa paksaan dan tidak di ketahui oleh pemiliknya. Adapun pengertian lain pencurian adalah.

<sup>5</sup> Dimiyati, K., & Wardiono K. Metodologi Penelitian Hukum, Fakultas Hukum UMS, Surakarta

has never been charged with a crime.<sup>6</sup>Criminal penalties are aimed at those who violate or violate these rules, the penalties imposed vary based on the crime committed. For example, someone who commits a criminal act of ordinary theft or theft under urgent circumstances will be subject to punishment in accordance with applicable law. It is also different from the review of Islamic law, where the differences here can be seen in the type of punishment and the methods of determining the law and the various sources of law that are used as references in resolving a criminal act.<sup>7</sup>

MRS (55) and YLT (29), residents of Kota Lama, Kedungkandang District, Malang City, were reported to have stolen baby milk, various baby oils and snacks. This reminds of a previous incident where two mothers in Blitar stole milk and eucalyptus oil for the benefit of their children. The theft occurred in two locations on Tuesday, August 31 2021. MRS responded negatively when asked whether baby oil would be sold again. Even though their motivation for committing the theft was desperation and the need to provide for the baby, the police were unable to implement restorative justice because the victim did not stop peaceful efforts or mediation. The two mothers will be charged under Article 363 of the Criminal Code which carries a maximum prison sentence of seven years.<sup>8</sup>

## B. Analysis of Handling of Perpetrators of the Crime of Theft in Urgent Situations From a Review of Positive Law and Islamic Law

### 1. Judging from Positive Law

The overarching aim of law is to enforce order and security, making it possible for people to live in peace and harmony with each other. If every part of the universe did what it was supposed to, peace and tranquility would prevail. Criminal acts can be formulated in several ways in books II and III of the Criminal Code. These methods and techniques specify illegal actions that are prohibited or required to be performed, and those who violate or disobey these provisions will face severe penalties. Criminal acts consist of specific acts that are prohibited and specific acts that must be carried out, as well as special mental attitudes that the perpetrator must have in order to be punished.

Theft in its most general form is regulated in Article 362 of the Criminal Code, while aggravated theft is regulated in Article 363 and robbery in Article 365. Theft is defined as a crime in Article 362 of the Positive Law Criminal Code "Whoever takes an item, which wholly or partly belongs to another person, with the intent to possess it unlawfully, is threatened with theft, with a maximum prison sentence of five years, or a maximum fine of nine hundred rupiah."<sup>9</sup>Article 363 of the Criminal Code defines aggravated theft as a Class A offense that carries a maximum sentence of nine years in prison. Aggravated theft is determined by Article 363 of the Criminal Code and includes both basic theft determined by Article 362 and additional aggravating circumstances determined by Article 363.

First, there must be a "pickup" of the goods from the location. Because the meaning of "intentionally" has been conveyed in the word "take", "intentionally take" is not mentioned in the law. The first thing that comes to mind when we hear the word "take" is moving something from one location to another. The elements related to theft are that the perpetrator knows that the stolen goods completely belong to someone else and intends to take full control of the goods. The property stolen must be a physical object, but electricity can be a target for theft if interpreted broadly. Another requirement is portability. Members of Congress avoid using the word "immovable" in any official documents. Avoiding the term "immovable" in favor of the more

<sup>6</sup> LUTHFI, Muhamad; FATHY, Rusydan. Pelaku Pencurian: Konstruksi Subkultur Berlandaskan Modal Sosial. Share: Social Work Journal, 2019, 9.1: 60-65.

<sup>7</sup> HAMZAH, Indra. Menelaah Tindak Pidana Pencurian dalam Perspektif Hukum Islam dan Hukum Positif. 2020.

<sup>8</sup> <https://news.detik.com/berita-jawa-timur/d-5708525/2-ematik-ematik-di-blitar-curi-susu-dan-minyak-kayu-putih-demi-anak/2>

<sup>9</sup> LUTFI, Muhammad Adnan, et al. Studi Perbandingan Tentang Penetapan Sanksi Pidana Pencurian Berdasarkan Hukum Pidana Positif Indonesia dan Hukum Pidana Islam. *Borobudur Law and Society Journal*, 2022, 1.1: 20-30.

convenient “movable” makes it easier to retrieve items that, despite their immovable nature, can be separated and moved. To illustrate, consider the theft of a tree, which could not be removed before it was cut but is possible now.<sup>10</sup>

Restorative justice can be used as a form of law enforcement in situations that are resolved outside the court system. This is because there are many incidents in the real world where the criminal justice system does not function as expected, usually because it does not provide sufficient space for the interests of potential victims and defendants. Therefore, the restorative justice approach is a new framework and paradigm derived from the concept of restorative justice, where the families of perpetrators, victims, victims' families, the community and other related parties are all actively involved in the process of resolving criminal acts. healing uses fair, balanced, and impartial methods.<sup>11</sup>

As an example of the case that the author has given as an example for writing material, two mothers from Malang who stole milk and oil from a supermarket in Blitar to meet the needs of a baby were finally released after 6 days in Blitar Police custody but they were released after the owner the supermarket report. During the mediation process, the supermarket owner whose son is Anik was seen offering many apologies for reporting the two mothers who stole to the police. Anik added that he had visited the families of the two mothers who had stolen their supermarket and felt sorry for their families. Anik then questioned the public about his decision to complain about the criminals because he felt annoyed with them.<sup>12</sup>

Respect for human dignity is central to the idea of restorative justice. As unique and sociable animals, humans are not immune to mistakes and missing details. The problem is, a person who has the authority or right to impose punishment on another person who is deemed to have committed a crime or violated the rule of law is not necessarily better than the person being punished or the law which is used as a basis for having the integrity of justice.

## 2. An Overview of Islamic Law

Islam bestows the rule of law on mankind with the aim of improving and protecting human life. According to Islam, life does not end with this world; but rather continues in the afterlife, where the fairest judge of all human actions in the universe, Allah SWT, will hand down his verdict. The provisions of Islamic law are identical to the provisions of positive law; the only variation is who wrote each one. Because the terms of Islamic law were formed by the creator, who holds the highest position in the universe, and cannot be contested by other regulations. It is proven that the existing provisions are still experiencing difficulties so they must be evaluated in order to provide justice and enforce the law, while positive legal provisions are provisions developed by humans with limited thoughts and considerations.

Theft is a serious crime because it goes against the two most important norms of society: religion and the law. Theft is considered a serious offense in Islam, resulting in a major sin and the perpetrator is responsible both in this life and in the afterlife.

Theft is seen as a serious crime that has the potential to cause harm to other people in Islamic law, so the punishment is very severe, as explained in Surah Al-Maidah (5:38), which means the following: "The man who steals and the woman who steals, cut off the hands of both of them (as) retribution for what they did and as a punishment from Allah. And Allah is All-Mighty,

<sup>10</sup> HAMZAH, Indra. Menelaah Tindak Pidana Pencurian dalam Perspektif Hukum Islam dan Hukum Positif. 2020..

<sup>11</sup>. DENDA, PIDANA RINGAN DAN JUMLAH. GAGASAN MODEL ALTERNATIF PENYELESAIAN PERKARA TINDAK PIDANA PENCURIAN DENGAN MENERAPKAN KONSEP RESTORATIF JUSTICE DIKAITKAN DENGAN PERATURAN MAHKAMAH AGUNG NOMOR 2 TAHUN 2012 TENTANG PENYESUAIAN BATASAN TINDAK.

<sup>12</sup> -anak/2 <https://news.detik.com/berita-jawa-timur/d-5708525/2-emak-emak-di-blitar-curi-susu-dan-minyak-kayu-putih-demi>

All-Wise.”<sup>13</sup>

Many members of the public lack understanding of the imposition system and legal criteria for criminal activity in theft situations, which is a major problem when discussing criminal acts in theft cases. What they do know is that the fate of a thief is a terrible one. While there are other conditions where theft is permitted in Islam, society continues to adhere to the myth that violators are only punished by amputation. They believe that the human rights and justice guaranteed by western legal systems are superior. Western law is seen as superior because it gives the impression of being fairer in the breadth of relationships between societies and more humane, but it is also seen as flawless and comprehensive because it covers every aspect of human life.<sup>14</sup>

A woman who committed theft during the time of Rasulullah SAW had her hands cut off as punishment. In accordance with Allah SWT's instructions as seen in Surah Al-Maidah verse 38, at that time a woman asked the Messenger of Allah: "O Messenger of Allah, have you accepted my repentance, O Messenger of Allah?" Regarding the question a woman asked the Messenger of Allah, At that time, Allah SWT revealed Surah Al-Maidah verse 39 which firmly emphasized that He will always accept repentance from a criminal as long as the criminal is willing to always improve himself by exchanging his bad deeds for good ones.<sup>15</sup>

There are two forms of punishment recognized by Islamic law: had and ta'zir. The had punishment is given to those who commit major crimes such as murder or theft (major), while the ta'zir penalty is given to those who commit minor offenses such as: stealing (minor), drinking khomr, gambling, accusing someone of adultery and so on.<sup>16</sup>

In Islam, the law of cutting off hands is enforced according to very specific conditions and grounds. First, there is a prerequisite for the topic in question, namely that the perpetrator is an adult, not forced, and is aware that the act in question is against the law. Second, the circumstances surrounding the stolen goods, such as taking assets secretly without the owner's permission. Third, special conditions for objects, namely that the items stolen must be property and movable goods, and their value exceeds a certain limit (nisab). Theft is not considered perfect or complete if one of the previous elements is not met. That is why the ta'zir punishment is not the same as the hadd punishment.<sup>17</sup> Two types of theft are subject to the punishment of ta'zir: First, there is no complete or void record of any theft punishable by had, nor is there a limit to the permissibility of such activities. The second definition is the overt or deliberate seizure of another person's property without their permission or cooperation and without any resistance from the owner. Acts of iktilas, ghasab, and nahab are also included in this second scope.<sup>18</sup>

The penalty for cutting off hands is applied in the following circumstances: Except for stolen goods worth at least 1/4 dinar, the penalty for cutting off hands does not apply after the stolen property reaches the calculation. Because 4.25 grams of gold is equal to one Islamic dinar, then 1.0625 grams of gold is equal to a quarter of a dinar. The nishab for theft is equal to IDR 531,250.00 if 1 gram of gold is worth IDR 500,000. Rasulullah (as) said in Aisyah Rah: "It is not permissible for a thief to cut off his hand, except for a quarter of a dinar or more".<sup>19</sup>

<sup>13</sup> Al-Maidah ayat 38

<sup>14</sup> ARGENTHYN, Muhammad Viyan Rizqi, et al. STUDI KOMPARASI TENTANG TINDAK PIDANA PENCURIAN ANTARA HUKUM PIDANA INDONESIA DENGAN HUKUM PIDANA ISLAM. 2018.

<sup>15</sup> AISYAH, Faira; NURDIN, Nurdin; NADLIROH, Tri Amanatun. Taubat Sebagai Penggugur Had Terhadap Pelaku Tindak Pidana Pencurian (Jarimah Sirqah) Perspektif Imam Al Nawawi. *Jatiswara*, 2022, 37.1: 78-92.

<sup>16</sup> SUDARTI, S. TINDAK PIDANA PENCURIAN PADA SAAT TERJADI BENCANA ALAM DALAM HUKUM PIDANA ISLAM DAN HUKUM POSITIF PERSPEKTIF MAQASID ASY-SYARI'AH. *Ahkam: Jurnal Hukum Islam*, 2020, 8.1.

<sup>17</sup> Ibid

<sup>18</sup> HAMZAH, Indra. Menelaah Tindak Pidana Pencurian dalam Perspektif Hukum Islam dan Hukum Positif. 2020.

<sup>19</sup> Ibid.

The Ulama agree that if the criteria for theft are met, then the perpetrator must have his hands cut off, because this had is a provision from Allah SWT and not from humans. A thief must be forgiven by the victim or owner of the stolen goods before he or she can be brought to justice and have the sentence for the theft overturned. Then, if proven guilty, because it fulfills the requirements of theft, then the punishment of having one's hand cut off must be given and cannot be replaced by another punishment; not even remorse or remorse can undo the punishment.<sup>20</sup>

### C. Analysis of Similarities and Differences in the Implementation of the Crime of Theft

#### a. Equality

In the provision of laws that double the punishment or there are certain conditions that determine whether the perpetrator of the crime of theft will receive sanctions. In the previous Positive Law, namely in Article 362 of the Criminal Code as follows: "Theft is defined as the unlawful taking of another person's property with the aim of keeping it without permission. The maximum penalty for theft is five years in prison or a fine of Rp. 900,000.00". The maximum prison sentence for theft is five years, but can be increased to fifteen years if the theft results in death or serious injury (as specified in Article 365 paragraph 3 of the Criminal Code), and can be increased further. up to twenty years, if the theft was committed by a group.<sup>21</sup> These criteria are generally in line and have similarities such as the review of Islamic law, which in the concept of applying sanctions or punishment to thieves also has criteria which are one principle to provide a deterrent effect but when compared between the severity of the punishment given, the punishment given by Islamic law is which is heavier.

#### b. Difference

The main difference lies in the fact that the positive law that applies in Indonesia can undergo changes in accordance with changes and dynamics of society. Consequently, in positive law, sanctions, such as fines, imprisonment and detention, can vary, and in extreme cases a life sentence can be imposed. Meanwhile, according to the principles of the Koran, the punishment for theft is still cutting off both hands until the end of time.

Therefore, the application of criminal law in Islamic law will remain static throughout history. As a result, its presence is like a progressive system, which can be an inspiration for every existing positive law.

## CONCLUSION AND SUGGESTION

Theft is a criminal act which consists of taking an item secretly or stealing an item openly. This criminal act has been regulated in various sources of law, from Islamic law to positive law. Sometimes the crime of theft occurs due to various triggers. Starting from economic problems to revenge problems. Regarding the punishment for the perpetrators of theft, it varies depending on the level of the act, for example, in the punishment for thieves who have met the requirements for being sentenced to have their hands cut off as I have explained above, they will be sentenced to that punishment, but if the conditions are not met then the perpetrator will subject to tazir law.

Then, all humans have the same creator, the same ancestor, and they must all submit to Allah SWT as His favored creation, as stated and emphasized by Islamic law.

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<sup>21</sup> Ibid. hal 28



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