

## The Overview of the Acts of Theft in Islam

by

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### Abstract

The purpose of this study was to overview the Islamic law perspective on the acts of theft. The type of research carried out in this study is normative juridical research. The study reveals that Islamic law obliges to avoid something that smells of doubt. Islamic law is more flexible because of the mechanism for imposing sanctions looking at the background and reasons of the perpetrators as well as the social situation and conditions of the community. This is because Islamic Law is more concerned with the aspect of the soul, namely guarding oneself against destruction for the sake of human survival.

**Keywords:** Theft, Islam, sanctions for theft, judicial.

### Introduction:

The crime of theft is a common type of bad deed including in Indonesia. The security and position of one's property can be threatened by this kind of act. An area that is prone to theft has the meaning that there is no longer any guarantee of security and status of property not to transfer power without rights and outside the wishes of the real owner. Theft is a crime that is punishable by sentences that are classified as severe in formal juridical terms. In fact, incidents of theft are still often found in people's lives and the effects are increasing severely. With this fact, many people think that the law has failed to achieve its objectives. In the climax, then the existing forms of punishment are considered as the scapegoat. This view does not only come from ordinary people but even from legal experts.

In Islamic law, for example, it is very serious in protecting the position and property security. This is because the most fundamental purpose of Islamic law (*Shari'a*) itself is to protect and/or maintain. The crime of theft is an act that violates norms that exist in society, both legal norms and national and religious norms. Any religion forbids adherents to commit an act of theft because it can cause a detrimental impact on the victim and order in society. The positive law that applies to Indonesia also prohibits people from possessing goods that are not their rights against the law as regulated in Chapter XXII Book II of the Criminal Code (Jahroh, 2011).

It is prescribed that Islamic law aims to protect and realize the benefit of mankind, both individual safeties as well as public safety. Safety is all about aspects of human interests, namely aspects of *dharuriyat* (primary), *hajiyyat* (secondary), and *tahsiniyat* (complementary). The *dharuriyat* aspect consists of religion, soul, mind, lineage and property. In the absence or if this aspect is disturbed, life will be chaotic. That is why Islam pays great attention to protecting and maintaining these benefits, Islam has set rules in the form of orders and prohibitions certain, these rules are accompanied by the threat of world punishment in addition to punishment in the afterlife

if it is violated. The wisdom of the threatened punishment is imposed so that charcoal is afraid and afraid to take action against the criminal.

In Islamic law, private ownership of property is due to its rights highly respected and considered a sacred right. One may not act arbitrarily to take someone's property that is not their right with any consideration. The problem is that the general public doesn't understand much of Islamic criminal law in depth. The community only arrests the impression that the sanctions of Islamic criminal law are cruel and terrible. Society assumes that every theft must be the punishment is cutting off a hand even though in Islamic law there are conditions that must be met so that they can be implemented the punishment. The community considers that the system of western law is more in line with human rights and a sense of justice in society. In addition, people assume that the system of western law is perfect and complete, covering the ins and outs of aspects of Islamic life. These assumptions have now influenced people's way of thinking. Islam is the religion whose presence is grace, blessing, love and kindness for nature and its contents.

Law in Indonesia by adopting Dutch law continues to grow rapidly. However, some Islamic jurists can also develop according to the times by taking the values contained in it. In Islamic law and legal principles can be applied generally and are acceptable to society. Along with the times, crime is getting worse developing and increasing various types of crime. In recent years there have been more and more crimes against property or theft.

According to the big Indonesian dictionary, the meaning of the word "steal" is to take someone else's property without permission or illegally. "Thieve" means a person who seeks or thief. "Stolen" means the proceeds of theft or stolen goods. Whereas the meaning of "theft" is process, method, and deed. Definition of theft according to law and its elements formulated in Article 362 of the Criminal Code, is in the form of a theft formula in its main form which reads: whoever takes something objects that are wholly or partly owned by another person, with the intention of to be unlawfully possessed, threatened with theft, with imprisonment for a maximum of 5 years or a fine of a maximum of Rp. 900, 00.

Anton Tabah in an independent voice stated that in Indonesia, serious theft increased from 48,466 cases in 1998 to 51,315 cases in 1989. This proves that the troubleshooting system of theft at this time has not been able to reduce the rate of theft crime in Indonesia. There is a need for a more comprehensive response system strict and appropriate punishment for the crime. Based on the background of the problem above, then what becomes the crux of the matter is, how does the crime of theft compare according to the Criminal Code and Islamic Law?

### **Research Method:**

This research was conducted by examining and reviewing Islamic law from library materials relevant to research in the form of literature, scientific works, i.e., research results, regulations legislation, magazines, newspapers, scientific journals, and documentation from various institutions related to this research (Waluyo, 2008). Data obtained and sourced from a review of literature studies in the form of literature, works of scientific research laws and regulations, the Criminal Code, magazines, newspapers, and documentation from various also related written materials that are relevant to this research.

## An Overview of Theft from a Legal Perspective in Islam:

The word “*jinayah*” is a verbal noun form (*masdar*) of the word “*jana*”. Etymologically “*jana*” means to sin or wrong, while *Jinayah* is defined as an act of sin or wrongdoing (Munajat, 2004). As in the sentence *jana ‘ala qaumih* *jinayatan* means he has made a mistake against his people. The word *jana* also means “pluck”, as in the sentence *jana as-samarat*, which means “picking the fruit from the tree.” Those who do evil are called *jani* and those who are subject to the deed are called *jani mujna alaih* (Muslich, 2004). The word *jinayah* in legal terms is often referred to as an offence or crime. In terminology, the word *jinayah* has several meanings, as stated by Imam Al-Mawardi that *jinayah* are acts that are prohibited by religion (*syara’*) which is threatened with *had* or *takzir* punishment. The language (*sariqah*) comes from the word *saraqah*, which means steal (Zuhdi, 2016). Etymologically, stealing is taking objects and or other people’s belongings secretly (Yanggo, 2005).

Meanwhile, terminologically, the definition of *sariqah* was put forward by several experts following. According to Muhammad Al-Khatib Al-Syarbini, a mazhab cleric, Syafi’I said that *sariqah* literally means taking property (others) secretly and in *syara’* terms is taking (other people’s) property secretly and unjustly, taken from its storage place which is usually used to store it under various conditions. According to A. Djazuli in his book *Fiqh Jinayah*, theft has the meaning of transferring stolen property from the owner to the thief Wahbah Al-Zuhaili said that *Sariqah* is taking other people’s property from the place where it is usually used to stored secretly (Djazuli, 2019). Included in the category of stealing is stealing information and views if it is done secretly. From some of the above formulations, it can be concluded that *sariqah* is taking other people’s goods or property secretly from their place of storage which is usually used to store said goods or assets (Irfan, 2013).

According to *syara’*, theft is taking other people’s property by *mukallaf* with a printed 10 dirhams, stored in a storage area usually used or guarded by a guard and there is no doubt. As for the meaning of the above understanding, it can be described as follows:

- i. The sentence is taken by a *mukallaf*, i.e., a sane adult, if the person who takes the wealth reaches the amount of one *nisab* (amount) is done by a minor or a crazy person, and then he is not entitled to the punishment of cutting off his hand.
- ii. Secretly. If an adult and a sane person take property openly, it doesn’t secretly, then he does not have the right to be sentenced to cut off his hand according to *syara’*, because he did not take it secretly. Therefore, the person who pickpockets is not called a thief according to *syara’* which requires cutting off his hand, because he takes other people’s openly, not secretly.
- iii. *Nisab* (amount) of 10 dirhams printed. Whoever steals a piece of war that is not printed into money weighing ten dirhams or more, while the price is less than 10 dirhams printed, then he is not considered a thief according to *syara’*, therefore he is not subject to cutting off his hand.
- iv. Saved somewhere. It means that the stolen item should be taken from a place prepared for storing what is called a *fuqoha* as *hirzan*. So, houses, flats, hotels, closet drawers, and so on that can be used to store money safely, are all called storage places.
- v. Kept under the care of a guard. That is, the items taken are guarded by guards. In this case, the goods are placed in a place that is not usually prepared for storage of

goods, but a guard is determined, for example, a security guard and so on with the intention that the goods are not stolen or lost. As an example, people who want to build a house or put iron, cement, blocks, stones and so on in public places and appoint someone to guard it against irresponsible hands. If a person takes something from these items, even though the caretaker is negligent and the item taken reaches the *nishab* (amount) of ten dirhams, then he is considered a thief by *syar'* and will be sentenced to cut off his hand.

- vi. There is no *syuhbat*. That is, the hand of the person who takes the treasure that is kept in its place of storage is not cut off, unless the property he takes is free from doubt, for example, if the husband takes his wife's property from the place of storage, the husband is punished with cutting off his hand. Meanwhile, the punishment becomes invalid because of doubts based on the hadith of the Prophet SAW. Likewise, the hands of people who steal property from their relatives are not cut off, for example, someone steals the property of his uncle or his uncle's daughter and others. Likewise, the punishment is not cutting off the hand because it is doubtful that the stolen property is booty.

### **Types of Theft According to Islamic Law According to Abdul Qadir Audiah:**

There are two kinds of *sariqah* according to Islamic law, namely, *sariqah* which is threatened with had (Had punishment is the same as *hudud*, namely punishment whose number, type, and technicality have been explained in the Qur'an and Hadith In terms of punishment for thieves who have met the requirements and pillars, it is mentioned in Surah Al Maidah verse 38 and in several hadiths of the prophet accompanied by explanations by the scholars) and *sariqah* which is threatened with *ta'zir*. *Sariqah* which is threatened with *hadd* is divided into two, namely major theft and petty theft. Petty theft is stealing someone else's property. Meanwhile, major theft takes people's property by force. This type of theft is called robbery. So according to the definition above, theft is divided into two, namely

- i. *Sariqah*, which is threatened with *hadd*, is theft for which the threat of punishment has been confirmed in the types and levels in the Qur'an and Sunnah. According to Abdul Qadir Audah, this theft is further divided into two, namely:
- Major theft is taking other people's property with violence. The major theft was carried out with the knowledge of the victim but he did not allow it to happen to result in violence.
  - Petty theft is taking other people's property secretly, not being realized by the victim and carried out without permission.

This petty theft must fulfil these two elements simultaneously. If one of these elements is not present, then it cannot be called petty theft.

- ii. *Sariqah* who is threatened with *ta'zir* means to teach a lesson. *Ta'zir* is also interpreted as *Ar-Raddu wal Man'u*, which means to refuse and prevent. In general, *ta'zir* crimes are divided into three parts (Muslich, 2005), namely as follows:

- *Hudud* crimes and *kisas* crimes are doubtful, unclear, or do not meet the requirements, but are immoral.
- Criminal acts or disobedience is determined by the Qur'an and Hadith, but the sanctions are not determined.
- Various criminal acts or disobedience are determined by *ulil amri* (rulers) based on Islamic teachings for the public good.

### Elements of Theft According to Islamic Law

Theft is only given a sentence if it fulfils several elements (Muslich, 2004) namely:

- i. The act of taking secretly or secretly or taking stealth occurs when the owner (victim) is not aware of the taking of the goods and he does not give it up.
- ii. Goods are taken in the form of property. One of the important elements for the imposition of a hand cut off is that the item stolen must be of a mal value (treasure), there are several conditions that must be met for the punishment to be cut off. The conditions are:
  - The stolen goods must be mal *mutaqawwin*, namely goods that are considered valuable according to the *syara'*. According to Shafi'i, Maliki and Hambali, what is meant by valuable objects are objects that are glorified by *syara'*, that is, not objects that are forbidden by *syara'* such as wine, pigs, dogs, carrion, and so on, because these objects according to Islam and the Muslims have no value. For stealing objects that are forbidden by the *syara'*, they are not subject to the penalty of cutting off their hands. This was expressed by Abdul Qadir Audah, "That it is not sentenced to cut off the hands of educated dog thieves (helder) or uneducated dogs, even though the price is expensive because it is forbidden to sell and buy them.
  - The goods must be movable goods. In order to impose a punishment for thieves, it is required that the stolen goods must be movable goods or objects. An object can be considered a moving object if the object can be moved from one place to another.
  - The goods must be stored goods. *Jumhur fuqaha* are of the opinion that one of the conditions for the imposition of a had punishment for the thief is that the stolen goods must be stored in the place where they are stored. Meanwhile, *Zahiriyah* and a group of hadith experts still apply hadd punishment even though the theft is not from the place of storage if the stolen item reaches the *nisab* that was stolen (Yanggo, 2005).
  - The item reaches the *nisab* (amount). The criminal act of theft is only subject to punishment for the perpetrator if the stolen item reaches the *nisab* of theft. The *nisab* of stolen property that can result in a cut-off penalty is a quarter of a dinar (approximately worth 1.62 grams of gold).
- iii. The property belongs to someone else. In order to realize the criminal act of theft where the perpetrator can be subject to a had sentence, it is required that the stolen goods are other people's goods. In relation to this element, the most important thing is that the item has an owner, and the owner is not the thief but someone else. Thus,

if the item does not have an owner, such as permissible objects, the taking is not considered a theft which is punishable by cutting off the hand, even if it is done secretly.

- iv. The existence of unlawful intent. This element is fulfilled if the perpetrator of the theft takes an item that he knows that the item does not belong to him, and therefore it is forbidden to take it. A person who steals cannot be subject to a hard punishment if there is still doubt (unclear) about the stolen item. In this case, the thief is only subject to *ta'zir* punishment.

The element is part of something that cannot be divided and if that part is missing then that something cannot be said to be something. These parts are arranged and form a unity and give birth to an understanding or definition. As for the elements that make up the understanding, there are a number of differences between the crime of theft according to the Criminal Code and Islamic Law. One of them is in Islamic law if someone steals property from a house in the presence of the owner and the thief does not use physical force and violence, then the case does not include petty theft, but looting. Likewise, someone who seizes other people's property is not included in petty theft, but burglary or plunder. Petty theft here is tantamount to the term principal theft in the Criminal Code.

#### **Elements of the crime of theft according to the Criminal Code:**

- i. The element of the act of taking the first element of the crime of theft is the act of taking goods. The word take (*wegnemen*) in a narrow sense is limited to moving the hands and fingers, holding the object, and diverting it to another place. From the element of action that is prohibited from being taken. This shows that theft is a formal crime. Taking is a positive behaviour/material action, which is carried out with deliberate movements. In general, using fingers and hands then directed at an object, touching it, holding it, lifting it then carrying and moving it to another place or in its power. The main element of the act of taking must be an active action, aimed at the object and the transfer of the object's power into its power. Based on this, taking can be formulated as doing an act against an object by bringing the object into its real and absolute power. The element of an absolute and real transfer of power of objects is a condition for the completion of the act of taking, which means it is also a condition for the completion of a perfect theft.
- ii. Elements of Objects. The object of this theft is in accordance with the information in *Memorie van Toelichting* regarding the formation of Article 362 of the Criminal Code which is limited to movable objects (*roerend goed*). Immovable objects can only become objects of theft if they have been separated from them into fixed objects and movable objects. Movable objects are objects that are tangible and move in accordance with the element of the act of taking. Movable objects are objects that can move independently or can be moved (Article 509 of the Civil Code). While immovable objects are objects which because of their nature cannot be moved.
- iii. Elements Partly or Wholly Owned by others. The object does not need to be wholly owned by another person, only part of it belongs to the actor himself. For example, a motorcycle that is jointly owned by A and B, which A then takes from B's power and sells it. However, if initially, the motorcycle was in his possession and then

sold, then it was not a theft that occurred but embezzlement (Article 372 of the Criminal Code).

- iv. With the Intention to Possess against the Law the intention to possess consists of two elements, namely the first element of intent (intentional as intent or *opzet als oogmerk*), in the form of an element of error in theft, and the second element of possessing it. The two elements can be distinguished and separated from each other.<sup>53</sup> The purpose of the act of taking other people's property must be aimed at possessing it, from the combination of these two elements shows that in the crime of theft, the notion of possessing does not imply the transfer of ownership rights to the stolen goods. to the hands of the perpetrator, with reason. First, it cannot transfer property rights by unlawful acts, and secondly, the element of this theft is its intention (subjective). As a subjective element, having is to have for oneself or to be made into one's possessions. If it is connected with the element of intent, it means that before taking the act of taking in the perpetrator, there is already an intention (inner attitude) towards the item to be used as his own. The purpose of possessing against the law or the intention of possessing it is aimed at being against the law, meaning that before taking the act of taking objects, he already knows, is aware that possessing other people's objects (in this way) is against the law. For this reason, the unlawful element in theft is classified as a subjective unlawful element. This opinion would be in accordance with the information which states that, if the element of intent is explicitly stated in the formulation of a crime, it means that the intention must be aimed at all the elements behind it (Moeljatno, 2002). The element of intent is part of intentionality. In legal practice, it is proven that violating the law in theft tends to be interpreted as violating subjective law as the opinion of the Supreme Court is reflected in the legal considerations of its decision.<sup>1</sup> Where the Supreme Court cancels the decision of the Jakarta High Court (which convicts) and acquits the defendant on the basis that the public prosecutor's indictment is not proven legally and convincingly, with legal considerations it is not proven that there is an element of violating the law. Because when the defendant took the items from the office, he assumed that the items taken by the defendant belonged to his late husband. As an heir, the defendant has the right to take these items (Harahap, 1988, p. 868). The part of the sentence that reads "she assumes that the items taken by the defendant belonged to her late husband" is an application of the notion of against the law subjective theft in a concrete case in a court decision. Although in fact he is not entitled to take because the goods do not belong to his husband, but because he thinks that the goods belong to his husband, the inner attitude towards such acts of taking in the absence of a subjective unlawful nature as referred to in Article 362 of the Criminal Code. Meanwhile, what is meant by against the law (*wederrechtelijk*) the law does not provide further explanation. Basically, against the law is the reprehensible or forbidden nature of a certain act. Judging from where or for what reasons the disgraceful nature or prohibition of an act, in doctrine it is known that there are two kinds of against the law, namely the first against the formal law, and the second against the material law. To violate formal law is contrary to written law, meaning that the reprehensible nature or

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<sup>1</sup> No. 680 K/Pid/1982 dated 30-7-1983

prohibition of an act lies in or is caused by written law. In order to be convicted of an act, it must match the formulation of the offence stated in the law (Moeljatno, 2002). Meanwhile, against the material law, is contrary to the principles of community law, which principles can be in unwritten law or have been formed in the written law. In other words, against this material law, the disgraceful or forbidden nature of an act lies in the community. The opinion of Vos states that breaking the law is an act that the community does not want or is not allowed (Moeljatno, 2002).

### **Conclusion:**

The comparison of views regarding the crime of theft according to the Criminal Code and Islamic Law in terms of elements, namely both have the element of taking, and the object element in both has an unlawful element in both. The difference is that in Islamic law the element of taking in more detail becomes taking it secretly, objects are described more specifically in the place of storage. If these elements are met, the perpetrator is subject to a cut on his hand. In addition, if the goods become the joint property of the perpetrator and the victim, they will not be subject to the penalty of cutting their hands. Unlike the Criminal Code, there are elements that are partly or wholly owned by other people. This means that if the stolen goods are the common property of the perpetrator and the victim, they can be punished. As for the comparison of the crime of theft according to the Criminal Code and Islamic Law in terms of the form of punishment, namely in Article 362 of the Criminal Code, it is subject to a sentence of 5 years in prison or a fine, while in Islamic law it is divided into two, namely the punishment of cutting off hands if the elements and conditions are met and Tazir if the elements are not fulfilled. In addition, in the mechanism of giving punishment, Islamic law is more flexible because it looks at the background and reasons of the perpetrators and sees the situation and condition of the community.

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