

FAMILY THEFT PERSPECTIVE POSITIVE LAW AND ISLAMIC PENAL LAW

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Abstract

Theft is an immoral act and against the law in every country, including Indonesia. The crime of theft is an act that takes someone's goods against the law, the same thing is also stated in Article 362 of the Criminal Code which is hereinafter referred to as a criminal offense. The perpetrators of criminal acts of theft are sometimes inseparable from the closest people such as playmates, coworkers and even worse are committed by family. Article 367 of the Criminal Code states that if the crime of theft committed by the family such as a wife or husband, then the perpetrator can be sanctioned if the family or the injured party reports the act, in short, Article 367 of the Criminal Code states that if the crime of theft committed by the family is different from the crime of theft in general, namely with differences in the type of offense, theft committed in general is a general offense, while if committed by the family then the offense is a complaint offense. The purpose of this research is to answer the problems related to the crime of theft committed by the family with a review from the point of view of positive law and also Islamic law. The research method used in this research is a type of normative juridical research, namely legal research that refers to literature studies. The topic or problem described in this research is described in an analytical descriptive way. The sanctions imposed in Islamic law related to the crime of theft committed by the family are literally no different from positive criminal law, which provides differences in the mechanism for imposing penalties. In Islamic law, if the crime of theft is committed by the family, it is forbidden for him to be sentenced to cutting

hands, but with other penalties such as ta'zir or paying dhaman (fines) in accordance with the stolen property, it is different from theft committed by other people or in general.

Keywords: Sanctions, Theft, Family

Abstrak

Pencurian merupakan suatu perbuatan yang amoral dan bertentangan dengan hukum disetiap negara, termasuk di Indonesia. Tindak pidana pencurian merupakan suatu tindakan yang mengambil barang seseorang dengan cara melawan hukum, hal senada tersebut juga tertuang dalam pasal 362 KUHP yang selanjutnya disebut sebagai suatu tindak pidana. Pelaku tindak pidana pencurian terkadang tidak terlepas dari orang – orang terdekat seperti teman bermain, rekan – rekan kerja dan bahkan yang lebih parah adalah dilakukan oleh keluarga. Dalam pasal 367 KUHP mengatakan bahwa jika tindak pidana pencurian yang dilakukan oleh keluarga seperti istri atau suami, maka pelaku dapat dikenakan sanksi jika pihak keluarga atau pihak yang dirugikan melaporkan perbuatan tersebut, secara singkat pasal 367 KUHP ini mengatakan bahwa jika perbuatan tindak pidana pencurian yang dilakukan oleh keluarga berbeda dengan tindak pidana pencurian secara umum yaitu dengan perbedaan jenis deliknya, pencurian yang dilakukan secara umum merupakan delik umum, sementara jika dilakukan oleh keluarga maka deliknya merupakan delik aduan. Tujuan penelitian ini adalah untuk menjawab permasalahan terkait tindak pidana pencurian yang dilakukan oleh keluarga dengan tinjauan dari sudut pandang hukum positif dan juga hukum islam. Metode penelitian yang digunakan pada penelitian ini merupakan jenis penelitian yuridis normatif, yaitu penelitian hukum yang mengacu pada studi kepustakaan. Topik atau persoalan yang digambarkan pada penelitian ini diuraikan dengan cara deskriptif analitis. Sanksi yang dijatuhkan dalam hukum islam terkait tindak pidana pencurian yang dilakukan oleh keluarga secara harfiah tidak berbeda dengan hukum pidana positif, yaitu memberikan perbedaan mekanisme dalam penjatuhan hukumannya.

Dalam hukum islam jika tindak pidana pencurian yang dilakukan oleh keluarga haram baginya dijatuhkan hukuman potong tangan, melainkan dengan hukuman lain seperti ta'zir atau membayar dhaman (ganti kerugian) sesuai dengan harta yang dicuri, hal itu berbeda dengan pencurian yang dilakukan oleh orang lain atau secara umum.

Kata kunci: Sanksi, Pencurian, Keluarga

Introduction

The family is part of a society characterized as a small group consisting of several people, namely parents, children and other family members who live together or live in the same house by depending on each other. Families are generally calculated based on blood ties or also called brotherhood. Communication in the family is important to form a sense of belonging and respect among family members, so as to create a harmonious family away from conflicts and problems involving family members. In certain circumstances conflicts in the family cannot be avoided, such as theft in the family. Theft is always seen as only done by people who are not family, because the family is seen as having equal rights to other people's property that belongs to the family. In fact, family relationships do not absolutely make ownership of objects or prices become common property, so when one party claims ownership with the intention of controlling it, it can be categorized as theft.

Theft is one type of crime against property regulated in Chapter XXII of the Second Book of the Criminal Code and is an inexhaustible problem. Theft in its essential form is regulated in Article 362 of the Criminal Code (KUHP). The crime of theft is a formally formulated offense, where what is prohibited and threatened with punishment is an act that in this case is an act of "taking". The offense of theft is regulated in Articles 362 to Article 367 of the Criminal Code. The offense of theft is the most common offense, listed in all Criminal Codes in the world.

According to Cleiren ((Rondonuwu 2017) taking (wegnemen) means deliberately with intent. There is a purpose to have. The intention must be aimed "to take possession of the thing which he took for himself against the right". If the theft was committed by a family member, either in a straight line down or in a side line up to the second degree, this claim against them can only be brought if there is a complaint by the aggrieved party. This type of theft is included in the geprivilegieerde diefstal

(complaint offense) and is regulated in Article 367 of the Criminal Code (KUHP). Given that the purpose of the formulation of complaint offenses in the Criminal Code is because the interests of other parties in certain matters (for example victims or families take precedence over the purpose of community protection of a prosecution), it is undeniable that there are times when long consideration is needed to decide whether a criminal act is prosecuted or not.

Meanwhile, in Islamic law, the act of theft does not come out of the four forms of taking musyarak property, acts of *ikhtilas*, *ghasab* and *nahab*, where sometimes jurisprudence scholars only mention it with the word theft without distinguishing whether it is a form of petty theft or a form of major theft (Eman 2021). However, in general, when they talk about theft, they mean petty theft. Because, when they talk about major theft, then the language they use is *al-harabah* (plunder) or *qath'u ath-thariq* (robbery) ((Darmawan and Wahyudi 2022)

Based on this, the author is interested in conducting research related to theft cases committed in the household referring to decision Number 86 / Pid.B / 2019 / PN Amt, the author is also interested in analyzing the decision by looking at the judge's consideration in sentencing perpetrators of theft committed by families in the household which will then be compared with a review in Islamic law, How is the instrument and the comparison of the two laws in providing punishment for perpetrators of theft committed by family members themselves.

Method

The research method used by the author is a normative juridical method, or legal research conducted by reading and studying some literature, it is the type of research that will be discussed in this study. Research that is analytical – descriptive is a picture that will describe the problems or findings to be studied. Then the data analysis in this study is a qualitative analysis. Secondary data in this study has a function as a source of research information. Secondary data in this study includes information from the review of the Criminal Code on the article of family theft in the household, decision Number 86 / Pid.B / 2019 / PN Amt, the Qur'an and also Hadith, as well as several articles and expert opinions that have a strong enough connection with the discussion in this study.

Discussion and Results

1. Theft According to Positive Law

Crimes against property are in the form of rape / assault on people's legal interests on other people's property (not belonging to the petindak), contained in Book II of the Criminal Code, namely:

- a. Theft (diefstal), regulated in Chapter XXII.
- b. Extortion and threats (afpersing and afdreiging), are regulated in Chapter XXIII.
- c. Verduistering, set out in Chapter XXIV.
- d. Deception (bedrog), regulated in Chapter XXV.
- e. The destruction and enterprise of things (versieling og beschadiging van goederen), is regulated in Chapter XXVII.
- f. Heling, set out in Chapter XXX.

The definition of theft according to the law and its elements formulated in article 362 of the Criminal Code, is in the form of a formulation of theft in its principal form which reads: "Whoever takes something that wholly or partly belongs to another person, with the intention to possess it unlawfully, is threatened with theft, with a maximum imprisonment of 5 years or a maximum fine of Rp. 900.00". For more details, if detailed the formula consists of elements, namely:

- 1) Objective Elements
 - a) Taking (Wegnemen)

From the existence of elements of actions that are prohibited from taking this shows that theft is a formal criminal offense. Taking is a positive behavior / material act, which is done by deliberate muscle movements generally using fingers and hands which are then directed at an object, touching it, holding it, and lifting it and carrying and moving it to another place or in its power.

As in written form, the activity of hands and fingers as mentioned above is not a requirement for the act of taking. The essential element of the act of taking is that there must be an active deed, directed at the object and the transfer of the power of that thing into its power. Based on this, taking can be formulated as doing an act against an object by bringing the object into its power in a real and absolute way. The element of absolute and real transfer of power of things is a condition for the completion of the act of taking, which means it is also a condition for the complete completion of a theft. As a statement from Arrest Hoge Raad (HR) dated November 12, 1894 which states that "the act of taking has been completed, if the object is in the perpetrator, even if he then releases it because it is known" (Chazawi 2021).

From the act of taking results in the transfer of power over the object only, nor the transfer of property rights over the thing into the hands

of the perpetrator. Because to transfer property rights to an object cannot occur by unlawful acts, but must be through legal acts, for example by buying and selling, grants and so on.

In this regard, Wirjono Prodjodikoro said that "the element of having objects is a contradiction with the element of violating the law, because owning objects which means making himself the owner must be according to the law, it is impossible to own other people's objects by violating the law (Berhimpong 2017).

b) Elements of Objects / Goods

Initially, the objects that became the object of theft in accordance with the information in *Memorie van Toelichting* (MvT) regarding the establishment of Article 362 of the Criminal Code were limited to movable objects (*roerend goed*) and tangible objects (*stoffelijk goed*) (Wicaksono 2020, 426). Immovable objects can only become objects of theft if they have been detached from fixed objects and become movable objects, houses that have been detached/released (S. R. Fauzi and Dona 2022, 43). If the offender first cuts down a tree or removes a door leaf and then takes it, then besides he has committed theft, he has also committed the crime of destruction of property (Article 406 of the Criminal Code). In this case, there is a concomitant act (Article 65 of the Criminal Code). Moving objects are any tangible and moving objects in accordance with the element of taking deeds (Mumek 2017). Objects whose power can be moved absolutely and tangibly are towards moving and tangible objects only. In practice, the notion of an object that can be the object of theft as described above is fully adopted, sometimes interpreted so broadly that it has deviated considerably, as in the following cases (Chazawi 2021, 9):

- 1) The person whose act of tapping electricity, by HR in his arrest on May 23, 1921 was qualified as theft of electricity, (known as *elektrische arrest*). Obviously here electrical energy has remained an object of theft. In society it is widely known about the theft of electrical energy that can be qualified as theft of electricity. Even by Law No. 15 of 1985 concerning Electricity, the act of using electricity without such rights is declared theft as referred to in the Criminal Code.
- 2) The person who obtains gas by the Municipality in contravention of the conditions of delivering gas through a meter, is blamed by HR for stealing gas, regardless of who has tampered with the meter (*arrest HR dated 9-11-1932*).

c) Elements partially or wholly belong to others

The object does not need to belong entirely to someone else, just part of it, while part of it belongs to the perpetrator himself. Like a motorcycle belonging to A and B, which A then takes it from B and A sells it. However, if the motorcycle has previously been in his possession and then sells it, then it is not theft that occurs but embezzlement (Article 372). The other person is not the perpetrator. Thus, theft can also occur against objects belonging to an entity such as State-owned. So objects that can be the object of theft must be objects that have owners. Things that do not have an owner cannot be objects of theft. For example, objects that have been thrown in the trash (Chazawi 2021, 11).

3) Subjective elements

a) Intent to have

The intention to have consists of two elements, namely the first element of intent (intentionality as intent or opzet als oogmerk), the element of error in theft, and the second element of having. The two elements are distinguishable and inseparable. The purpose of the act of taking someone else's property must be aimed at owning it (Chazawi 2021, 13). As a subjective element, to possess is to have for oneself or to be made into one's possessions. When connected with the element of intent, it means that before doing the act of taking in the acter there is already a will (mental attitude) towards the item to be made as his own. Another definition of possessing is contained in the MvT regarding the establishment of article 362 of the Criminal Code which states that possessing is controlling something as if he were the owner of the object (Hamamah and Apriyanti 2021, 43).

In practice, this definition given by MvT is often adopted, as seen in the HR arrest dated 14-2-1938 which states "it is required for the purpose of acting as if the owner of an object is against the right of the perpetrator to have taken an electric current with the intention of unlawfully moving the tools contained in the workshop (Ubwarin 2021, 8).

b) Against the law

The intention of having against the law or the intention of possessing it is directed against the law, meaning that before acting to do the act of taking objects, he already knows, is aware of possessing other people's objects (in this way) it is contrary to the law (Irianty 2021). For this reason, the unlawful element in theft is classified as subjective unlawful. This opinion is presumably in accordance with the information in MvT which states that, if the element of intentionality is expressly included in the formulation of a criminal act, it means that intentionality

must be directed at all elements behind it. The element of intent is part of intentionality (Walandouw 2020).

2. Theft According to Islamic Law

Theft is the act of secretly taking someone else's property in bad faith (Sularno 2012, 19). What is meant by taking property secretly is taking things without the owner's knowledge and without his willingness, such as taking things from someone else's house when the occupants are sleeping. Allah says in the Qur'an Surah Al-Maidah verse 38, That is: men who steal and women who steal, cut off their hands both (as) retribution for what they do and as a torment from Allah and Allah is Mighty and Most Wise. From the verse above explains that in every event of theft, the perpetrator can be threatened with chopping off hands. If you steal, stealing has reached 10 dirhams or more. If the thief is a minor, then the child cannot be sentenced to chopping off hands. However, it was left to his parents to be guided. And the punishment for chopping off hands in theft is only imposed if conditions are met, among others (Rahmi 2018, 53–70):

- a. The stolen treasure was taken secretly, unnoticed. Taken means that the property has moved from its storage place and has passed from the possession of the owner to the control of the thief.
- b. Stolen goods must have value. Chopping off hands will not apply to thieves of grass or sand and thieves of illegal items such as wine or pork.
- c. Stolen items must be stored in a safe place, either in sight or somewhere safe (hirz).
- d. The stolen item must belong to someone else. As a consequence, the penalty of chopping off hands is not imposed if the stolen property has become the property of the thief or if he owns part of the item or he has a right to the item.
- e. The theft must reach a certain minimum value (nisab). Imam Malik measured the nisab at 1/4 dinar or more, while Imam Abu Haneefa stated that the nisab of theft was worth 10 dirhams or 1 dinar. According to Imam Abu Haneefah, it is not compulsory to cut off hands on property thieves in mahram families, because they are allowed to go in and out without permission. According to Imam Shafi'I and Imam Ahmad, a father is not subject to chopping off his hands for stealing the property of his son, grandson, and so on to the bottom. Vice versa, the child cannot be sanctioned with chopping off hands, for stealing the property of his father, grandfather and so on and above. According to Imam Abu Haneefa

there is no punishment for chopping off hands in cases of theft between husband and wife.

Theft according to shara' is the taking by a puberty and reasonable believer of another's property secretly, if the item reaches the nisab (minimum limit) from its place of storage without any subhat of the goods taken (Andriyadi 2022, 1). In Islamic law there are two thefts: theft which requires the fall of hudud law, theft which requires the imposition of ta'zir (Rusmiati, Syahrizal, and Din 2017, 339–52). Theft that requires the punishment of hudud consists of two things: petty theft (*sariqah sugra*) and grand theft (*sariqah kubra*). Theft whose punishment is takzir (Darmawan and Wahyudi 2022).

3. Family Theft According to Positive Law and Islamic Law

According to the Criminal Code (KUHP), theft committed by relatives or families of victims, in this case children, is called theft among families. This is regulated in Article 367 paragraph (2) of the Criminal Code which in full reads: If he is a husband (wife) who is separated table and bed or separate property, or if he is a blood relative or cemented, either in a straight line or a deviant line of the second degree, then against that person it is only possible to hold prosecution if there is a complaint affected by a crime.

In the Criminal Code, Article 367 is contained in Chapter XXI on Theft. Regarding Article 367 paragraph (2) of the Criminal Code, R. Soesilo in his book *The Criminal Code and its Complete Commentaries* Article by Article, explained that: (Soesilo, Alfian, and Rachmawati 2021, 145–54)"... If the person who commits or assists in the theft is a relative mentioned in paragraph two of this article, then the maker can only be prosecuted on a complaint from the person who owns the item (complaint offense)."

Complaint offense means offense that can only be processed if there is a complaint or report from a person who is a victim of a criminal act (Kumendong 2017) According to Utrecht, in the offense the prosecution complaint against the offense depends on the consent of the aggrieved (victim) (TRIYANTO 2017). In this complaint, the victim of the crime can withdraw his report to the authorities if between them there has been a peace.

In the event that a complaint has been made, but then the victim wants to withdraw the complaint (in the event that the victim includes the family scope as stated in Article 367 of the Criminal Code), then the complaint can be withdrawn/withdrawn within 3 (three) months after the complaint is filed (see Article 75 of the Criminal Code) (Lukman 2019).

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Then the Criminal Code explains that if the theft was committed by family members, either in a straight line down or in a side line to the second level, this claim against them can only be made if there is a complaint by the aggrieved party. This type of theft is included in the *geprivilegieerde diefstal* (complaint offense) and is regulated in Article 367 of the Criminal Code (KUHP).

If the theft was committed by a family member, either in a straight line down or in a side line up to the second degree, this claim against them can only be brought if there is a complaint by the aggrieved party. This type of theft is included in the class of *geprivilegieerde diefstal* (complaint offense) and is regulated in Article 367 of the Criminal Code (KUHP), which reads: 1. If the maker or servant of one of the crimes in this chapter is the husband (wife) of the person affected by the crime and is not separated table and bed or separate property, then against the maker or servant it is not possible to hold criminal charges. 2. If he is a husband (wife) who has separated a table and bed or property, or if he is a blood relative or cement, either in a straight line or crisp deviating from the second degree, then against that person it is only possible to hold prosecution if there is a complaint of crime. If according to the matrilineal institution, the power of the father is exercised by someone other than the biological father (himself), then the provisions of the above verse apply also to that person. Based on Article 367 of the Criminal Code above, it explains that perpetrators of theft in a new family can be charged with criminal charges if there is a complaint from the victim of the theft. So that if there is no complaint from the aggrieved party, then there will be no legal sanctions for the perpetrators of theft in this family. This is as regulated and explained in the Criminal Code Article 367 paragraph 2 paragraph, which reads If the person is her husband (wife) who has been released from the obligation to live in the same house with his wife (husband), or blood family, or temporary family, either in straight descent, or deviant offspring in the second degree, then the person against the person himself can only be prosecuted if there is a complaint from the person aggrieved against the crime committed. It is also explained that as long as the marriage bond between husband and wife has not been broken, then between the two who steal property cannot be prosecuted. However, when the two have separated or divorced, then the theft they committed can be prosecuted even if there is no complaint from the party who was harmed by the theft. Meanwhile, if the person who commits or assists in theft is a relative as stated in paragraph 2 above that the perpetrator of theft or who assists in theft who comes from the victim's family will only be prosecuted if there is

a complaint from the victim of theft (Hutomo, Giyono, and Amala 2023, 23–35).

One example of a case of theft in the family as experienced by H. Sulaiman. defendant RIZKI MAULANA Als LANA Bin SYAHLIANOOR on an unremembered day and date in May 2019 at approximately 10.00 WITA or at least at another time in May 2019, located at Jl. Negara Dipa Rt.13 Kel.Sungai Malang Kec.Amuntai Tengah Kab. Hulu Sungai Utara, or at least in a place that is still included in the jurisdiction of the Amuntai District Court, He the defendant has taken something wholly or partly belonging to another person with the intention to possess unlawfully, which is to enter the place of committing the crime, or to arrive at the thing he took, by breaking, cutting or climbing or by using a key, which was done by the defendant in the following way: At the time and place as mentioned above began when the defendant RIZKI MAULANA came to Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) and the defendant said "KEK ASK FOR MONEY" and Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) said no then Defendant RIZKI MAULANA got angry and immediately went out of the house to the stall of Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) and Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) immediately came out of the house then Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) saw the defendant RIZKI MAULANA broke the glass of the stall door of the Witness using a hammer and took the key to the door of the stall Witness H. SULAIMAN Als H. SULAI Bin H. SURA (Alm) who was on the table inside the stall and opened the door of the stall The witness and defendant RIZKI MAULANA entered the stall then and saw the stall in a mess also saw Sdr.RIZKI MAULANA already wearing a samurai Witness who the Witness put on a glass table wrapped around his waist and saw the Witness at the stall Sdr.RIZKI MAULANA immediately opened The samurai wrapped around his waist and simultaneously the police officers came and Sdr. RIZKI MAULANA immediately ran away and the Witness immediately saw that the Witness's merchandise money in the drawer was no longer there. That the defendant RIZKI MAULANA Als LANA Bin SYAHLIANOOR did not ask permission first to the owner witness H. SULAIMAN Als H. SULAI Bin H. SURA.

According to Shafi'i, Hanabillah and Hanafiyah that a child who steals his parents' property or vice versa, is not executed with his hands cut off, because he means stealing his own property. This has been alleged by the Hanabillah version of Ibn Qudamah: Fathers are not executed with their hands cut off if they steal their son's property. Because it means he takes his own property (Hartanti, Suprihandoko, and Syafi'i 2021).

Likewise, a mother does not cut off her hand, when it comes to stealing her child's property. As for the evidence, they use as an argument, the hadith of the Prophet PBUH narrated by Ibn Majah. And the hadith tells us that Hisyam bin Amar, recounted Jesus bin Jonah, recounted Yusuf bin Ishak from Muhammad bin Munkadir from Jabir bin Abdullah. That someone said: O Prophet PBUH, I have a property and a child. And my father desperately needed my treasure. Thus, the Prophet PBUH said: You and your property belong to your father.

Likewise, it is not sentenced to chop off hands, husbands who steal their wives' property or vice versa. They argued with the charity (asar) of the companions of Umar bin Khatab. And the charity of the companion is to have told Us Malik from Ibn Shihab from Saib bin Yazib, that 'Abdullah bin Amir Al Hadramani with his assistant (khadam) had gone to Umar bin Khatab (r.a.) and said: "Cut off the hand of this khadam, because he has stolen" Then Umar (r.a.) asked him, what he stole, he replied: "This Khadam has stolen my wife's mirror which costs six dirhams". Then Umar said: I hope that he will not be sentenced to chop off his hands, your khadam steals your property. According to Hanafiyah, some of the Shafi'iyah and Hanabilah groups, can also be used as an argument not to be sentenced to chop off hands for husbands who steal their wives' property or vice versa this has been signaled by Abu Haneefah: If the maid is not sentenced to chop off hands, then the husband takes precedence in this rukhsah (leniency).

Based on the asar of Umar's companions (r.a.), Imam Shafi'i argued, namely: For ikhtiyat (be careful), it is not punishable to cut off hands, husbands who steal their wives' property, wives who steal their husband's property and slaves who steal the property of fellow slaves, based on asar and syubhat in property. According to Hanabilah, family members include relatives who are not accepted by their testimony and inherit each other without hijab. Therefore, it is not punishable to cut off hands, if there is theft within the family sphere. This has been outlined by Ibn Qudamah in the book Al-Mugni that since each of them inherits each other without hijab and does not accept his witness, and according to the custom of breadth (freedom) on the other's property, (husband's property or otherwise), parents are similar to children in terms of property.

In addition to the hadith of the Prophet (peace be upon him) and Asar companions whom they made arguments, they also put forward the postulates of the Qur'an Ibn Qudamah version of Hanabilah stated Q.S. al Nisa verse 36 namely, worship Allah and do not associate Him with anything. And do good to two mothers, fathers ... (Qs. Al Nisa; 36) The above

verse confirms that the child's obligation must be kind to both parents. Therefore, according to Hanabalah, if the sanction of cutting off hands is applied to parents who steal their children's property, then automatically the rights of parents and obligations of children will not be achieved.

Another argument put forward by Imam Abu Haneefa is that if the sanction of chopping off hands is imposed on theft of the family sphere, then this could break the kinship. So such is the law haram, based on the principle of fiqh that is, something that leads to haram, then the law is haram. According to Malikiyah, only the father cannot be sentenced to chop off his hands if he steals his son's property. Meanwhile, if the person who stole it was another relative, then the sanction of cutting off hands must still be enforced. This has been alleged by Ibn Rushd, namely, Imam Malik argued in this matter, that the father is not sanctioned with chopping off his hands, if he steals only his son's property, while to others, the sanction of chopping off hands should still be enforced.

The argument made oien Malikiyah is the hadith of the Prophet Muhammad SAW narrated by Ibn Majah from Jabir which reads that is, you and your property belong (to) your father. (H.R. Ibn Majah) According to them, the hadith shows that only the father has the right to his son, not vice versa. As for the husband who steals his wife's property or vice versa according to Malikiyah, Hanabilah and Qaul Jadid (new opinion) Shafi'iyah is his property stored in hirz or something (house) that is not inhabited by both of them, then the sanction is cutting off hands. This is alleged by Ibn Rushd that is, Imam Malik said: If the treasure is in a separate house (not inhabited by the two of them, together), then the sanction of the person who steals the property of the monk (close friend) is the cutting of the hand.

Mazahib al Arba'ah had a consensus (ijma) that hirz was one of the conditions for stolen property, to be sanctioned with chopping off hands for theft. And the hirz is void so hirz, if there is an entry permit from the owner. This has been outlined by Imam Abu Haneefa that is, it is not punishable to cut off the hands of people who steal within the family sphere because according to custom, each of them can enter (into the family home) without permission. Because there was an entry permit there, there was a thief on hirz. Moreover, if they are convicted of chopping off their hands for stealing, then it can lead to the breaking of fraternal ties. And it is haram.

On this issue, Abu Haneefa argued to Q.S. Al Nur: 61: There is no obstacle to yourself, eating (with them) in your own house or in the house of your fathers, in your mother's house, in the house of your brothers, in your sister's house, in your father's brother's house in your father's sister's

house, in your mother's brother's house in your mother's sister's house, in the house you have the keys to or in the house of your friends... (Qs. Al Nur; 61) The verse mentioned above, allows us to eat in their homes. Therefore, according to Abu Haneefah, there was permission to enter their home. So that Hirz's position fell with the entry permit. According to Al Maragi that what is meant by the words *buyutikum* in the above verse is to include the home of children and wives. And his statement, he meant not to sin against you, to eat at the house of your wives and your families. In this case it includes also your children's home, because the child's house is the parents' house too. Based on al-Maragi's opinion, the author argues that parents who steal their children's property or vice versa and husbands who steal their wife's property or vice versa, are not sanctioned with chopping off hands.

4. Types of punishment for perpetrators of theft in the family

Theft in Islamic law is of two kinds, namely as follows:

- a. Theft whose punishment is limited is theft whose threat of punishment has been defined in the Qur'an and Sunnah (M. Fauzi 2016) Theft whose penalties are limited is divided into two parts, namely petty theft (small) and heavy theft (large).
- b. Theft whose punishment is *ta'zir*. means to teach a lesson. *Ta'zir* is also interpreted as *Ar-Raddu wal Man'u*, which means to resist and prevent (Syarbaini 2019) In general, the crime of *ta'zir* is divided into three parts, namely as follows (Rofiq, Pujiyono, and Arief 2021, 241):
 - 1) The crime of *hudud* and the crime of *kisas* that are *syubhat*, or vague, or unqualified, but are immoral.
 - 2) Criminal acts or acts prescribed by the Qur'an and Hadith, but not sanctioned.
 - 3) Various criminal acts or crimes determined by *ulil amri* (rulers) based on Islamic teachings for the sake of public good.

New theft is threatened with a limited penalty if it meets several elements (Miswar 2018)(Miswar 2018):

- 1) The action of taking it in secret.
- 2) The elements of objects taken are treasures
- 3) The element of the thing taken away is the right of others
- 4) The existence of unlawful intent.

If the act of theft has been proven and has completed all the elements and conditions are:

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- a. Hand Chopping Penalty Theft that is subject to hand chopping limits must meet the following conditions (Situmorang and Hutagaol 2022) a) The act falls under the definition of theft. b) The stolen property reaches nisab. c) Stolen property is treasure that is preserved (allowed to be owned), d) Stolen property is in storage. e) The perpetrator is a mukalaf, intelligent, and baligh, both Muslim and ahlul dhimmah. f) The perpetrator is not the father, not the child, or not the spouse of the owner of the stolen property. g) The perpetrator has no semi-ownership of the stolen property. h) The theft has been proven before the court, i.e. by the confession of the perpetrator and/or the testimony of two just men.
- b. According to Imam Abu Haneefa and his disciples, compensation can be imposed against the thief if he is not subject to chopping off hands (Nairazi 2019, 96).

Kesimpulan

After thoroughly discussing the sanctions for theft committed by the family in the point of view of positive law and Islamic law, it can draw some conclusions as follows: the sanctions for theft committed by the family are very different from the criminal act of theft committed by others or in general. As explained in article 367 of the Criminal Code which says that the criminal act of theft committed by the family must first be reported by the family or the injured party, of course this is different from article 362 of the Criminal Code which says that every crime of theft can be given a criminal sanction of imprisonment without having to be first reported by the injured party, It's anyone who sees it and wants to report it.

So save the author in the criminal act of theft committed by the family in positive law is slightly distinguished from theft in general, namely by distinguishing the type of delict, the crime of theft in general is a common offense, while if committed by the family it will turn into a complaint offense. The same thing is also applied in Islamic law, in Islamic law theft is an act that must be sentenced to chop off hands, but if the theft is committed by the family, then the law of cutting hands is haram for him to be imposed, because the law of cutting hands imposed by the family is considered to be able to break the relationship between the family. Therefore, in Islamic law, according to some scholars, the punishment for theft committed by the family is not punishable by chopping off hands, but switching to the law of ta'zir, which is to be given a dhaman sanction or compensation according to the property stolen.

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