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Return of Stored Goods; Comparative Analysis of the Laws between the al-Shafi'i and the Hanafi School

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Abstract

This article discusses the punishment for thieves who return stolen goods from the perspective of the Syafi'i school and the Hanafi school. The type of research used by the author in completing this research is qualitative research which is a type of literature research conducted by finding and reviewing written sources such as books and so on. This research uses a juridical normative approach, which is the approach used in relation to the core issues obtained by various sources of literature both primary and secondary or based on the Qur'an, sunnah and consensus of scholars. The results of this study have shown that there are differences and similarities of opinion between the Syafi'i school and the Hanafi school with their respective methods of legal inference. Based on the opinion of the Syafi'i school that if a thief takes the property of another person then the thief gives back the property in a state known to the owner of the goods or not known at all and has been reported to the authorities or not reported then the thief will not escape punishment because it has exceeded two rights, namely the rights of God and human rights. The right of God in question is to violate the command or decree that has been established by God Almighty that stealing is forbidden, and the human right that is violated is to take property that is not his at all. Whereas the Hanafi sect of thieves will not be subject to a limit penalty if the perpetrator returns in circumstances not yet known to the owner and either has been reported or not to the judge. The thief is sentenced to a limit if he returns it after the owner knows because it can cause anger that leads to a limit penalty.

Keywords:

Return of Stored; Punishment; al-Sha'fii School; Hanafi School.

Abstrak

Artikel ini membahas tentang hukuman terhadap pencuri yang mengembalikan barang curian perspektif mazhab al-Syafi'i dan mazhab Hanafi. Jenis penelitian yang digunakan penulis dalam menyelesaikan penelitian ini adalah penelitian kualitatif yang merupakan jenis penelitian pustaka yang dilakukan dengan cara mencari dan menelaah sumber-sumber yang tertulis seperti buku dan sebagainya. Penelitian ini menggunakan pendekatan normatif yuridis yaitu pendekatan yang digunakan berkaitan dengan inti permasalahan yang diperoleh berbagai sumber literature baik primer dan sekunder atau berdasarkan Al-Quran, sunah dan ijma para ulama. Hasil dari penelitian ini telah menunjukkan bahwa adanya perbedaan dan persamaan pendapat antara mazhab al-Syafi'i dan mazhab Hanafi dengan metode istinbat hukum masing-masing. Berdasarkan pendapat mazhab al-Syafi'i bahwa apabila seorang pencuri mengambil harta kekayaan milik orang lain kemudian pencuri memberikan kembali harta itu dalam keadaan diketahui oleh pemilik barang atau belum diketahui sama sekali dan sudah dilaporkan kepada pihak yang berwajib atau belum dilaporkan maka pencuri tersebut tidak akan lepas dari hukuman karena sudah melampaui dua hak yaitu hak Allah dan hak

manusia. Hak Allah yang dimaksud itu adalah melanggar perintah atau ketetapan yang sudah ditetapkan oleh Allah yang Maha kuasa bahwa mencuri itu haram, dan hak manusia yang dilanggar yakni mengambil harta yang bukan sama sekali miliknya. Sedangkan mazhab Hanafi pencuri tidak akan dikenakan hukuman had jika pelaku mengembalikan dalam keadaan belum diketahui oleh pemilik dan baik sudah dilaporkan atau belum kepada hakim. Pencuri tersebut dijatuhkan hukuman had jika mengembalikan setelah diketahui oleh pemilik karena dapat menimbulkan rasa amarah yang menyebabkan dijatuhkan hukuman had.

Kata Kunci:

Pengembalian Barang; Sanksi; Mazhab al-Syafi'i; Mazhab Maliki.

Introduction

Humans are never completely free of mistakes, and hence civil and criminal issues continue to exist as a result of human progress.¹ As a result, human beings devise a wide range of rules and regulations, including, but not limited to, punishments for those who commit stealing.

The term *jarimah*, which refers to syara' prohibitions threatened by Allah with had or ta'zir punishment, is used in Islamic jurisprudence. The forbidden actions are quitting the prescribed action and doing what is forbidden. These are the prohibitions being discussed. Hence, what is indicated by syara' in the preceding paragraph is something that is prohibited by syara' and hence regarded as a sin.²

Meanwhile, *jinayah* is a verbal version of the noun (*masdar*) 'jana-yajni-jinayah', which signifies committing *sin* (*jarimah*), or what is typically viewed as bad acts committed by humans that are punishable in this world and the next.³

Jarimah hadd is one of the unlawful crimes specified in the Al-Quran and Hadith in terms of its nature, character, and severity of punishment.⁴ *Hadd* is proven to be associated with seven distinct forms of criminal offenses: adultery (forbidden husband and wife interactions), *qadzif* (accusing of adultery), *syurb* (drinking wine), *sariqah* (stealing), *hirabah* (harming), *riddah* (leaving Islam), and *bagyu* (rebel).⁵

Many people, particularly in Indonesia, doubt Islamic criminal law, which is frequently regarded as harsh, despite the fact that if one studies it in its completeness and is able to comprehend the philosophical purpose of Islamic

¹ Abdul Syatar, "Relevansi Antara Pidana Indonesia Dan Sanksi Pidana Islam," *DIKTUM: Jurnal Syariah Dan Hukum* 16, no. 1, Juli (2018): 118–34, doi:<https://doi.org/10.28988/diktum.v16i1.525>.

² Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam*, IV (Jakarta: Bulan Bintang, 1990), p. 1.

³ Islamul Haq, *Fiqih Jinayah*, I (Parepare: IAIN Parepare Nusantara Press, 2020), p. 7.

⁴ Wahyuddin Naro et al., "Shariah Assessment Toward the Prosecution of Cybercrime in Indonesia," *International Journal of Criminology and Sociology* 9 (2020): 572–86, doi:<https://doi.org/10.6000/1929-4409.2020.09.5>.

⁵ Al-Yasa' Abubakar and Marah Halim, *Hukum Pidana Islam Di Aceh (Penafsiran Dan Pedoman Pelaksanaan Qanun Tentang Perbuatan Pidana)* (Banda Aceh: Dinas Syariat Islam, 2011), p. 47.

criminal law, Islamic criminal law is the best and most moral. There are numerous divergences of view regarding Islamic criminal law, particularly regarding the burden of a thief on his stolen items and the fine requirements. As a result, the reviewer views this as a critical issue that should be investigated and resolved by seeking out sources of strong opinion based on the arguments.

Thus, it takes a school's perspective to address this issue that arises in the midst of society in order to establish justice and teach jarmah perpetrators to become better individuals who will not repeat their errors.

Methods

The type of research used by the author in completing this research is qualitative research which is a type of literature research conducted by finding and reviewing written sources such as books and so on. This research uses a juridical normative approach, which is the approach used in relation to the core issues obtained by various sources of literature both primary and secondary or based on the Qur'an, sunnah and consensus of scholars.

Definition and Legal Basis of the Crime of Theft

In Arabic, theft is referred to as *sariqah*, a *masdar* version of the phrase "saraka-yusriku-sarakan," which etymologically means someone has taken another person's property through deception and stealth.⁶

The terminology is:

أَخَذُ مَالٍ عَلَى وَجْهِ الْأَخْتِفَاءِ مِنْ مَالِكِهِ أَوْ نَائِبِهِ

Meaning :

*"Taking property from the owner or the person who succeeds the owner by stealth (position)"*⁷

Thus, *sariqah* (theft) is an act that Allah prohibits, namely taking other people's property secretly or secretly carried out by people who are capable of law or who are promiscuous, mature, and reasonable, and if the property exceeds the limit (*nishab*), the thief moves the item taken from its original storage location, and there is no element of *subhat*, the thief may face a *hadd* penalty.⁸

⁶ Ali Geno Berutu, *Fikih Jinayah* (Purwokerto: Pena Persada, 2020)., 46.

⁷ Muhammad bin Yunus, *Ar-Raudh Al Murabbi'*, IV (Beirut: Dar Al Kutub Al 'Ilmiyah, 1998)., p 388.

⁸ Haq, *Fiqih Jinayah*., p. 77.

According to Quraish Shihab, a jurisprudence expert, stealing is the act of taking valuable property from someone who is not entitled to it and carrying out the act secretly or secretly, taking property from a natural location where the owner keeps it, and the thief entering the property without the owner's permission or knowledge.⁹

It has been controlled in Islamic criminal law in relation to a banned crime, namely stealing or jarmahi sariqah, and has a legal basis that cannot be disturbed or overhauled by anyone, as the jarmah sariqah is incorporated in the jarmah hudd.

The following is the legal basis for the theft offense in Islamic criminal law in Surah Al-Maidah verse 38, Allah states:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جِزَاءً بِمَا كَسَبَا نَكَالًا مِّنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

Meaning:

"Cut off the hands of the man who steals and the woman who steals as retribution for their actions and as a punishment from Allah. Furthermore, Allah is Mighty, Most Wise."¹⁰

And in accordance with the hadith of the Prophet Muhammad. That is:

وَعَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ (لَعَنَ اللَّهُ السَّارِقَ ؛ يَسْرِقُ الْبَيْضَةَ ، فَتُقَطَّعُ يَدُهُ ، وَيَسْرِقُ الْحَبْلَ ، فَتُقَطَّعُ يَدُهُ) مُتَّفَقٌ عَلَيْهِ أَيْضًا

Meaning:

"According to Abi Hurairah, the Messenger of Allah (saw) said: Allah cursed the thief who steals an egg, cutting off his hand; and the thief who steals the rope, cutting off his hand." (HR. Bukhari no. 6285)¹¹

According to Shaykh Muhammad Bin Salih al-'Utsaimin:

أن يراد بذلك أن هذا السارق قد يسرق البيضة فتُهون السرقة في نفسه، ثم يسرق ما يبلغ النصاب فيقطع

Meaning:

"The significance of this hadith is that if someone steals eggs and then underestimates the deed, he will steal stuff that do not meet the nishab hadd for theft, and so his hand will be severed."¹²

⁹ Dedi Sumardi, *Hudud Dan HAM Dalam Hukum Pidana Islam* (Banda Aceh: Monara Grafika, 2011)., p. 62-63.

¹⁰ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Badan Litbang dan Diklat Kementerian Agama RI, 2019), doi:10.16309/j.cnki.issn.1007-1776.2003.03.004.

¹¹ Abu 'Abdullah Muhammad bin Isma'il Al-Bukhari, *Al-Jami' Al-Shahih*, I (Kairo: Dar al-Salafiyah, 2004).

¹² Muslim.or.id, "mencuri adalah dosa besar" <https://muslim.or.id/43057-mencuri-adalah-dosa-besar.html> (accesed on 18 May 2021)

Punishment Against Thieves According to the al-Shafi'i School and the Hanafi School

The researcher will outline the al-Shafi'i and Hanafi scholars' perspectives on the punishment of thieves in this discussion.¹³ There are divergent views among experts regarding the punishment and recompense for *sariqah*.

According to Imami al-Shafi'i, a thief's sentence and restitution might be combined. Why is that? Because a thief has violated two rights, namely the rights of Allah and the rights of servants; the rights of Allah are in the form of prohibition or prohibition of stealing, while the servant's right is to steal other people's property, which is not his right. As a result, a thief who violates these two rights must be treated fairly in order to be held accountable for the breach. Thus, the thief must bear the consequences of his actions and must restore stolen stuff if it is still in his possession; if it is not, the thief must recompense for the stolen goods.¹⁴ This is what scholars refer to as the *daman* principle.

When it is established that the thief has taken other people's wealth and has accumulated more than the *nishab* of a quarter of a dinar, according to Imam al-Shafi'i, he is vulnerable to having his hand chopped off. According to Imam al-Shafi'i scholars, the level is determined by the dinar's price, as the dinar's price serves as the benchmark or comparison at the time, as Imam Shafi'i stated that the thief's hand is not cut off until the thief takes property belonging to another person. with at least a quarter of a dinar. Imam al-Shafi'i believes that when a thief takes something belonging to another person for the first time, he will have his hands and feet cut off. He would also cut off his right hand up to the wrist. If the thief steals a second time, cut off the thief's left leg all the way to the ankle. If you continue to steal the third time, and if you continue to steal the fourth time, then continue cutting the right leg up to the wrist. Following that, if the thief commits the offense for the sixth time, he must be imprisoned for life or until repentance is demonstrated.¹⁵

¹³ Abdul Syatar and Chaerul Mundzir, *TOKOH DAN KETOKOHAN IMAM MAZHAB (Kontribusinya Terhadap Pengembangan Fikih Di Indonesia)* (Gowa: Alauddin University Press, 2021).

¹⁴ A. Djazuli, *Fiqh Jinayah (Upaya Menangulangi Kejahatan Dalam Islam)* (Jakarta: PT Raja Grafindo, 2000)., p. 51.

¹⁵ Mardani, "Sanksi Potong Tangan Bagi Pelaku Tindak Pidana Pencurian Dalam Perspektif Hukum Islam," *Ius Quia Iustum Law Journal of Islamic University of Indonesia* 15, no. 2 (2018): 253, doi:<https://doi.org/10.20885/iustum.vol15.iss2.art7>.

Meanwhile, the cleric Imam Abu Hanifah maintains that sanctions and compensation for the thief should not be combined, which means that if the thief is sentenced to anihad or has his hand severed, the perpetrator is under no obligation to pay compensation, as the Koran only addresses the issue of sanctions just.¹⁶

However, the Hanafi school of thought holds that if a person whose property has been taken may seek the restitution of that property after serving a prison sentence, even if the property is still in the perpetrator's or another's hands, then the victim is a thief. have the right to seek restitution from the thief.

If a thief is found to have committed stealing and has accumulated nishab of one dinar or more, according to Imam Abu Hanifah, his right hand and left leg are severed. When the culprit commits the theft for the first time, his right hand is severed at the wrist; if the thief continues to steal another person's property for the second time, his left leg is severed at the wrist. Additionally, if the criminal continues his crimes or steals a third time, he will not have his hands cut off, but will be imprisoned or locked up indefinitely, till the end of his life or until his repentance is witnessed.¹⁷

Despite this disagreement, the experts believe that whether the stolen property is in the hands of a thief or another person, the criminal must return it. However, experts argue differently if the stolen object is no longer in the thief's possession. Whether a thief is condemned to have his hand amputated or is he still liable for compensation.

Regarding the case that has also been accepted by scholars, namely the duty to cut the hand must be eliminated if the perpetrator's hand is no longer present following the theft, in the sense that the perpetrator's hand cannot be cut twice or extend beyond the wrist. According to the scholars Imam al-Shafi'i and Imam Abu Hanifah, the boundaries for cutting hands and feet are from the wrist to the bottom, as well as the feet if they are cut. Because the palms and fingers of the hands and feet define the limbs. As a result, the cutting of the hand, which the Prophet also performed, occurred on the perpetrator's wrist.¹⁸

¹⁶ Berutu, *Fikih Jinayah.*, p. 50.

¹⁷ Mardani, "Sanksi Potong Tangan Bagi Pelaku Tindak Pidana Pencurian Dalam Perspektif Hukum Islam."

¹⁸ Djazuli, *Fiqh Jinayah (Upaya Menangulangi Kejahatan Dalam Islam).*, p. 80-84.

Punishment Against Thieves Who Return Stolen Items According to The al-Shafi'i and Hanafi Schools

1. Imam Abu Hanifah

According to Imam Hanafi, if a thief's activities are proven to be theft, he will face a hadd punishment. Imam Abu Hanifah's perspective on offenders who return stolen property in the following situations.

According to Imam Abu Hanifah, a thief who returns stolen property before the owner notices will avoid the penalty of having his hand cut off. However, if the owner of the stolen goods discovers the thief and desires to recover the stolen goods, the criminal cannot avoid the punishment of having his hand chopped off. Because Imam Abu Hanifa considers that the presence of anger or hatred is a necessary condition for theft, necessitating the severance of the hands. Thus, if a criminal return stolen things to the owner before the owner discovers them, no animosity or hostility exists. It alters again when the owner becomes aware of the circumstances that can result in enmity or hatred, because those circumstances are punished if they result in hostility or hatred.¹⁹

As to what happens if a thief returns stolen things to the owner before the competent authority/judge determines or the trial is submitted.²⁰ According to Imam Abu Hanifah, the thief is not punished and the punishment for severing his hand is obliterated. Similarly, when a thief returns stolen things after the penalty has been processed but not decided by a judge, the thief is neither condemned or the punishment is suspended, as Imam Abu Hanifah explained. A thief who returns stolen items to the owner after the owner becomes aware of the theft is plainly sentenced to have his hand cut off; additionally, a thief who does not return is sentenced to have his hand cut off as well. Additionally, Imam Abu Hanifah argues that when a thief's hand is severed, the thief is not entitled to compensation even if the stolen property is harmed as a result of the thief's hand being severed. His argument is that the Qur'anic ver²¹ses exclusively mention chopping hands.²²

¹⁹ 'Abdul Qadir 'Audah, *Al-Tasyri' Al-Jina'i Al-Islami; Muqaranan Bi Al-Qanun Al-Wadh'i, Jil. II*, II (Kairo: Maktabah al-Taufiqiyah, 2013)., p. 361.

²⁰ Supardin and Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 913–27, doi:<http://dx.doi.org/10.22373/sjkh.v5i2.9353>.

²¹ 'Audah, *Al-Tasyri' Al-Jina'i Al-Islami*, p. 362

2. Imam al-Shafi'i

As previously discussed, the sentence penalized on a thief who has been proven responsible for his conduct will include a cut off hand. The researcher will describe how the Imam al-Shafi'i scholars view a criminal who returns stolen goods to the owner in this discussion. According to Imam al-Shafi'i, an offender found guilty of theft and reaching the nishab must have his hand severed. Additionally, the thief must restore the stolen goods if it is in his possession; if it is not, it becomes his responsibility.²³

As previously discussed, the sentence imposed on a thief who has been proven responsible for his conduct will include a cut off hand. The researcher will describe how the Imam Syafi'i scholars view a criminal who returns stolen goods to the owner in this discussion. According to Imam Shafi'i, an offender found guilty of theft and reaching the nishab must have his hand severed. Additionally, the thief must restore the stolen goods if it is in his possession; if it is not, it becomes his responsibility.²⁴

Additionally, Imam al-Shafi'i thinks that the punishment for chopping hands and compensation are inextricably linked. Because the law of cutting hands and compensating is mandatory, because the perpetrator of the theft has performed an unlawful act that necessitates certain actions, namely having his hand cut off and presenting something of legal worth that must be replaced in every theft.²⁵

Conclusion

According to Imam al-Shafi'i, a criminal who returns stolen items after being proven for his treatment and reaching the limit or nishab must be punished by cutting off his hand. If a thief returns an object that has been taken or stolen in an unknown or known condition, Imam al-Shafi'i believes that the thief will still be condemned to cutting off his hand because, whether he knows it or not, the thief has taken property that does not belong to him. and has no right to own, transport items from their original storage location, and has broken two rights, namely Allah's and human rights. Then, on the issue of accountability for products or recompense, he believes

²² Ahmad Al-Hashari, *Al-Siyasah Al-Jinayah Al-Hudud Wa Al-Asyribah* (Beirut: Dar al-Jail, 1993)., p. 590.

²³ Djazuli, *Fiqih Jinayah (Upaya Menangkalangi Kejahatan Dalam Islam)*., p. 81.

²⁴ 'Audah, *Al-Tasyri' Al-Jina'i Al-Islami; Muqaranan Bi Al-Qanun Al-Wadh'i, Jil. II.*, p. 631.

²⁵ *Ibid.*, p. 620

that if the stolen items are still there or are not in the thief's hands, the thief is obligated to replace them even if his hand has been severed.

Meanwhile, according to Imam Abu Hanifah, when a thief returns stolen property before the owner becomes aware of it, he is not susceptible to a hand cut; nevertheless, this is not the case when the owner becomes aware of a missing item, provoking rage or animosity toward the perpetrator. He was ordered to have his hand amputated because of this hatred. Then, in terms of liability for the stolen goods, the criminal is under no need to compensate if he has been sentenced to prison.

Suggestion

Intended for all Muslims, let us all study the contents of the Qur'an and the traditions of the Prophet SAW, not only to become acquainted with but also to gain a thorough understanding of the regulations contained therein, so that no one believes Islamic law is cruel. If someone fully comprehends Islamic law, he or she will definitely be granted peace and tranquillity in this life and the next.

Additionally, if Ulil Amri or a country's leader is a Muslim individual, he should prioritize the needs and interests of his people by establishing regulations that cannot be divorced from Islamic law and enforcing them properly. By doing so, the country can achieve prosperity, peace, and prosperity for its citizens.

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