

DEFENSE AGAINST CRIMINAL THEFT PERPETRATORS BASED ON ISLAMIC LAW

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Abstract: This study aims to describe the legality of the defense of suspected perpetrators of criminal acts of theft carried out by LBH SIKAP based on Islamic law. This study is a field research (empirical study), using the results of observations and interviews with LBH SIKAP Advocates of Dairi Regency and the people of Dairi Regency as primary sources. Secondary sources include laws and regulations, including the Criminal Code (KUHP) and Law Number 16 of 2011 concerning Legal Aid. The results of the study: The practice of efforts to defend suspects in the crime of theft carried out by LBH SIKAP by way of direct assistance when the perpetrators are still at the investigation level; LBH SIKAP will provide assistance until the file is brought to the prosecutor's office so that the prosecution is carried out immediately, to assist the person who has the status of a defendant before the Panel of Judges of the Sidikalang District Court. The defense carried out by LBH SIKAP was carried out based on a request from the perpetrator or the perpetrator's family after an arrest by the police. LBH SIKAP advocates studied the files; then, the family approached the perpetrators to provide protection and assistance. The defense of suspected perpetrators of the crime of theft carried out by LBH SIKAP based on Islamic law is not prohibited. In general, the defense carried out by LBH SIKAP is part of professionalism and has been guaranteed by law.

Keywords: *Islamic law, defense, perpetrators of criminal acts of theft*

Abstrak: Penelitian ini bertujuan untuk mendeskripsikan legalitas pembelaan tersangka pelaku tindak pidana pencurian yang dilakukan oleh LBH SIKAP berdasarkan hukum Islam. Penelitian ini merupakan penelitian lapangan (studi empiris), dengan menggunakan hasil observasi dan wawancara sebagai teknik pengumpulan data. Peneliti menjadikan masyarakat dan Advokat LBH SIKAP Kabupaten Dairi sebagai sumber primer. Sumber sekunder meliputi peraturan perundang-undangan, antara lain Kitab Undang-Undang Hukum Pidana (KUHP) dan Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum. Hasil penelitian: Praktek upaya pembelaan tersangka tindak pidana pencurian yang dilakukan oleh LBH SIKAP dengan cara pendampingan langsung pada saat pelaku masih dalam tahap penyidikan; LBH SIKAP akan memberikan pendampingan hingga berkas tersebut dibawa ke kejaksaan agar segera dilakukan penuntutan, mendampingi pihak yang berstatus sebagai terdakwa di hadapan Majelis Hakim Pengadilan Negeri Sidikalang. Pembelaan yang dilakukan oleh LBH SIKAP dilakukan atas permintaan dari pelaku atau keluarga pelaku setelah dilakukan penangkapan oleh pihak kepolisian. Para advokat LBH SIKAP mempelajari berkas tersebut; Kemudian, pihak keluarga melakukan pendekatan kepada pelaku untuk memberikan perlindungan dan pendampingan. Pembelaan terhadap tersangka pelaku tindak pidana pencurian yang dilakukan oleh LBH SIKAP berdasarkan hukum Islam tidak dilarang. Secara umum, pembelaan yang dilakukan oleh LBH SIKAP merupakan bagian dari profesionalitas dan telah dijamin oleh undang-undang..

Kata Kunci: *hukum Islam, pembelaan, pelaku tindak pidana pencurian*

Introduction

The topic studied in this research is the problem of theft. The theft in the three divisions previously listed is included in the category of hudud finger, a crime whose sanctions have been specifically determined by Allah SWT in the Koran. In Indonesia, the law that applies and regulates theft is contained in In Indonesia, the criminal act of theft has been regulated in the Criminal Code (KUHP).¹

The previous explanation explained how the theft received serious attention, both from the point of view of Islamic law as well as from the existing laws and regulations in Indonesia. There are differences in the sanctions given; if, in Islamic law, the perpetrators of theft (to a certain degree) are sentenced to amputation, this kind of punishment is not known in Indonesia. The law for the perpetrators of thieves that has been described previously, only covers a certain period of time in prison, and even life imprisonment, up to the death penalty, if there is a victim who dies as a result of the theft committed.²

LBH SIKAP Dairi Regency is one of the institutions that provide advocacy and protection for perpetrators or those suspected of having committed the crime of theft. However, this institution does not specifically deal with and advocate or provide legal assistance for theft; many other areas become the focus of assistance provided. provided by LBH SIKAP. LBH SIKAP, Dairi Regency, often directly defends the defendant for the theft, which is being processed at the Sidikalang District Court. Legal defense and advocacy efforts provided by LBH SIKAP are non-commercial and specifically for people experiencing poverty.

LBH SIKAP's advocacy movement is part of a humanitarian act, and this sense of humanity is currently rare and not a concern. The community they do not deny that their

family has committed a crime of theft, but at least there should not be attempts by individuals trying to ask for certain money to solve the problem because they are asking for legal certainty within a short time.

Uniquely, many of the advocates at LBH SIKAP are Muslims, while it is known that the people of Dairi Regency are Christians (Catholic and Protestant). LBH SIKAP, on many trips, provides legal assistance regardless of a particular religion to defend; for every party who wants legal assistance from LBH SIKAP, LBH SIKAP advocates assist with open arms. The form of legal assistance is usually when a family member reports to LBH SIKAP, when a family member is arrested or detained by the police, or when a suspect has been charged before a panel of judges at the Sidikalang District Court.

LBH SIKAP defended the theft case in Dairi Regency, so there are many opinions or perceptions regarding the existence of a defense carried out by this non-commercial legal aid institution. Stigma and negative assumptions also emerged and could not be avoided, even though the suspect in the theft crime could not be said to be guilty until a decision was issued from the Sidikalang District Court after examining evidence and witnesses to the incident being complained.

Below are some cases that have been decided by the Sidikalang District Court and have permanent legal force (*incracht*), whose case assistance was carried out by an LBH SIKAP Advocate. The District Court's decision for 2021 is one case; in 2022, one case will be reviewed individually in this research.

Table 1.1. Theft Case Decided by the Sidikalang District Court in 2021

| No. | Case Number |
|-----|------------------------------|
| 1. | Number 23/Pid.B/2021/PN-Sdk. |
| 2. | Number 66/Pid.B/2021/PN-Sdk. |

Source: LBH SIKAP Dairi Regency.

¹ Reni Surya, "Klasifikasi Tindak Pidana Hudud dan Sanksinya dalam Perspektif Hukum Islam," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 2, no. 2 (May 29, 2019): 530–547.

² Nairazi Az, "RELEVANSI JARIMAH HUDUD DAN HAM INTERNASIONAL DALAM IMPLEMENTASI DI ERA MODERN;," *Legalite : Jurnal Perundang Undangan dan Hukum Pidana Islam* 1, no. 2 (2016): 1–20.

Table 1.2. Theft Case Decided by the Sidikalang District Court in 2022

| No. | Case Number |
|-----|-------------------------------|
| 1. | Number 10/Pid.B/2022/PN-Sdk. |
| 2. | Number 133/Pid.B/2022/PN-Sdk. |

Source: LBH SIKAP Dairi Regency.

Theft has been strictly prohibited, as stated in the Koran and the hadiths of the Prophet SAW. The prohibition is emphasized again, with the presence of threats for the perpetrators of theft, even though in many schools of thought, they have *ijtihad* regarding the process of carrying out punishment for the perpetrators of the theft. This means that the agreement of the scholars from arguing with authentic sources regarding the prohibition of acts of theft has been known, but the process of carrying out the punishment, as well as the content of the object and the motive for theft, often differs from the results of the *ijtihad* of the scholars in convicting the perpetrators of the crime of theft.³

The defense of the perpetrators of the theft crime is difficult to find references to, in contrast to studies on theft itself, which former and contemporary scholars have widely discussed. Because of this, legal assistance, the defense implemented by Legal Aid Institutions, such as those carried out by LBH SIKAP, needs to be analyzed more fully and completely.

This research wants to see how the views and perspectives of Islamic law are given the defense carried out by LBH SIKAP against suspects in the crime of theft that occurred in Dairi Regency. So that it can be seen whether the defense carried out is

following the rules and norms contained in Islamic law. As a complement, this research will be compared with the laws and regulations concerning advocates and legal aid agencies in carrying out the professionalism of each law enforcer against criminal acts of theft in Dairi Regency.

Observing the above, it is necessary to conduct research related to the defense of the perpetrators of the crime of theft at LBH SIKAP from the perspective of Islamic law so that it is more comprehensive in providing a legal description related to the crime of theft committed by elements of the people of Dairi Regency who carried out the trial process at the Sidikalang District Court. So that the judge in deciding the case is sure and cannot be doubted (*beyond reasonable doubt*)

Literature Review

Crimes often occur in society, thus requiring attention from the state and government as legal servants, with the aim that crime does not increase. Then, the various forms of crime are categorized as unlawful acts and must be sanctioned or punished, including theft.⁴

This is what al-Jurjawi mentioned: the existence of crime has a negative effect and can disturb the peace in society, it is the authorities must resolve the problem wisely, and every party wronged can be saved and helped. It is true what Hamami said, a good⁵ lawyer is a law that sees the future (*forward-looking*), so the existence of sanctions that feel "cruel," for example, is functioning for the sake of a better future and people's lives.⁶

Theft in Arabic is used with the term *saraqa*, namely, people who take treasury secretly to control and possess.⁷ One major

³ Fathuddin Abdi, "Keluwasan Hukum Pidana Islam Dalam Jarimah Hudud (Pendekatan Pada Jarimah Hudud Pencurian)," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 14, no. 02 (2014): 369–392.

⁴ M. Said Jamhari, "Efektifitas dan Efisiensi Hukuman Had Tentang Zina dalam Pidana Islam dan Hukuman Penjara Pada Hukum Pidana Positif," *Al-'Adalah* 10, no. 1 (2012): 291–300.

⁵ Ali Ahmad al-Jurjawi, *Hikmah at-Tasyri' wa Filsafatuh*, Juz II, (Egyptian: Jam'iyah al-Azhar al-'Scientific, 1961), p. 264.

⁶ Taufiq Hamami, *Religious Civil Procedure Law*, (Jakarta: PT. Tatanusa, 2004), h. 24-25.

⁷ Beni Ahmad Saebani and Mustofa Hasan, *Islamic Criminal Law Fiqh Jinayah; Complemented by the National Criminal Law Study*, (Bandung: Pustaka Setia, 2013), cet. 1, p. 329. See also

difference between theft and robbery is that theft is done secretly, whereas robbery is done openly and by coercion.⁸ Theft is defined by az-Zuhaili as follows:

السَّرَقَةُ: هِيَ اخْذُ مَالٍ غَيْرٍ مِنْ حَرَزِ الْمِثْلِ عَلَى الْخَفِيَّةِ
وَالْإِسْتِتَارِ.

“Theft is taking other people's property, how to hide and cover up the theft process”.⁹

Al-Jaza'iri explained that theft is taking the property of another person with a minimum rate of one *nisab*, done by a person who has reached *puberty* and *puberty*, and he has no right to the stolen property; the method is done secretly. ¹⁰Syaibah mentioned that theft is included in a fairly strict matter because you have to pay attention to the condition of the thief, the time of the theft, and the number of stolen goods. This means that many things should be considered before a thief actually has his hand cut off.¹¹

The limitations of the law of cutting hands, there is a hadith from `A'ishah *radhiallahu `anha*, as follows:

عَنْ عَائِشَةَ أَنَّهَا سَمِعَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
يَقُولُ لَا تُقَطَّعُ يَدُ السَّارِقِ إِلَّا فِي رُبْعِ دِينَارٍ فَصَاعِدًا
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Meaning: From `A'ishah, she actually heard the Prophet SAW say, do not cut off a thief's hand unless (it has reached the size) or the value of the object stolen is a quarter of a

dinar or even more. (HR. An-Nasa'i)

Method

This study is a field research (*empirical study*) using the results of observations and interviews with LBH SIKAP Advocates of Dairi Regency and the people of Dairi Regency as primary sources. ¹³Secondary sources include laws and regulations, including the Criminal Code (KUHP) and Law Number 16 of 2011 concerning Legal Aid. ¹⁴Normatively, this study wants to analyze related to the defense of LBH SIKAP against the alleged perpetrators of the crime of theft, which is analyzed using an Islamic law approach. Therefore the norm to be examined is to examine and analyze references to fiqh books (especially the Shafi'i school) which review the defense of suspects in the crime of theft, both classical and contemporary fiqh books.¹⁵

Result and Discussion

Defense Efforts against Suspects of the Crime of Theft

The Criminal Code (KUHP) describes theft as taking another person's property either partially or completely by way of breaking the law. Even Article 362 Chapter XXII Theft of the Criminal Code (KUHP) stipulates threats of sanctions against the

Marsum, *Jinayat: Islamic Criminal Law*, (Yogyakarta: UII Press, 2012), p. 64-95.

⁸Ahmad Wardi Muslich, *Islamic Criminal Law*, (Jakarta: Sinar Graphic, 2018), cet. 3, p. 83.

⁹ Ali Mutowif Mutowif, “Gugurnya Had Jarimah Pencurian Sebab Taubat Perspektif Jamal Al-Banna,” *Al-Jinayah: Jurnal Hukum Pidana Islam* 1, no. 2 (December 1, 2015): 270–277.

¹⁰Abdurrahman al-Jaz a 'iri, *Kitab al-Fiqh `ala al-Mazhab al-Arba`ah*, Juz IV, (Turki: Dar ad-Da`wah, 2014), h. 755.

¹¹Muhammad ibn Muhammad Abu Syaibah, *al-Madkhal li Dirasah al-Qur'an al-Karim*, (Kairo: Maktabah as-Sunnah, 1976), h. 204.

¹²Ahmad ibn Syu'aib ibn `Ali ibn Sinan ibn Bahrain ibn Dinar Abu `Abdurrahman al-Khurrasani an-Nasa'i, *Sunan an-Nasa'i*, Juz XV,

(Riyadh: Maktabah al-Ma`arif, 1990), h. . 107. Hadith ke-4851.

¹³ Kusdiyana, Samsudin, and Muhammad Wildan Nur Akmal, “Accuracy of Qibla Direction Mosque at Rest Area Toll Road on the Qibla Jurisprudence Perspective,” *NUSANTARA: Journal Of Law Studies* 2, no. 1 (March 19, 2023): 31–39.

¹⁴ Robi Musthofa Al Ghazali, “Boarding House Rent Refunds During Covid 19 Based On Sharia Economic Law,” *Journal of Nusantara Economy* 1, no. 1 (December 10, 2022): 38–47.

¹⁵ Desy Maryani et al., “A Model of Implementing Restorative Justice Perspective of Trong Yowari Traditional Jurisdiction, Jayapura Regency,” *NUSANTARA: Journal Of Law Studies* 2, no. 1 (March 27, 2023): 40–51.

perpetrators of the crime of theft, as follows: "Whoever takes goods, which are wholly or partly owned by another person, to be owned unlawfully, be punished for theft, with a maximum imprisonment of five years, or a maximum fine of nine hundred rupiahs."¹⁶

In addition to Article 362, stated above, theft is also regulated in other articles in the Criminal Code (KUHP), among which are contained in Article 363, Article 364, and Article 365. There are variations in threats due to variations in the model of the theft committed so that prison terms can sometimes be decided by a panel of judges with a prison sentence of seven years (Article 363), a prison term of nine years (Article 365), or even as stated in Article 365 paragraph (2), that the prison sentence for the perpetrators of theft can be up to a prison term of twelve years. In addition, there are other penalties, namely life imprisonment and even the death penalty, if the theft is carried out with violence, namely, the victim suffers serious injury or death (Article 365 paragraph 4).¹⁷

The practice of efforts to defend suspects/defendants who commit the crime of theft is carried out by LBH SIKAP; defense efforts are carried out by direct assistance when the perpetrators are still at the investigation level; LBH SIKAP will assist until the files are brought to the prosecutor's office so that prosecutions can be carried out immediately, to assist individuals who have the status of defendants before the Panel of Judges of the Sidikalang District Court.

LBH SIKAP carried out the defense process for the accused perpetrator of the theft crime at the Sidikalang District Court; the defense carried out by LBH SIKAP was based on a request from the perpetrator or the perpetrator's family after an arrest by the police. LBH SIKAP advocates studied the files, then, with the family, approached the perpetrators to provide protection and

assistance and obtain clearer information. Analysis of the case is carried out carefully so that it is true that the person is the real perpetrator, or is it just an unfounded accusation, then things that can be mitigated are also seen, and in the end, is that the person involved is getting legal certainty with a decision from the Panel of Judges in Sidikalang District Court.

The Legality of Defense against Suspects of Criminal Acts of Theft from the Perspective of Islamic Law

In the hadith, the Prophet SAW sneered at officials and dignitaries in the community, that they were easily released from the punishment or *limitation* of theft, whereas the punishment was quickly carried out against the poor, the hadith is listed below:

عَنْ عَائِشَةَ أَنَّ قُرَيْشًا أَهَمَّهُمْ شَأْنُ الْمَرْأَةِ الْمَخْزُومَةِ
الَّتِي سَرَقَتْ فَقَالُوا مَنْ يُكَلِّمُ فِيهَا رَسُولَ اللَّهِ صَلَّى اللَّهُ
عَلَيْهِ وَسَلَّمَ قَالُوا وَمَنْ يَجْتَرِئُ عَلَيْهِ إِلَّا أُسَامَةُ بْنُ زَيْدٍ
حُبُّ رَسُولِ اللَّهِ فَكَلَّمَهُ أُسَامَةُ فَقَالَ رَسُولُ اللَّهِ صَلَّى
اللَّهُ عَلَيْهِ وَسَلَّمَ أَتَشْفَعُ فِي حَدٍّ مِنْ حُدُودِ اللَّهِ ثُمَّ قَامَ
فَاخْتَطَبَ فَقَالَ يَا أَيُّهَا النَّاسُ إِنَّمَا هَلَكَ الَّذِينَ مِنْ
قَبْلِكُمْ أَنَّهُمْ كَانُوا إِذَا سَرَقَ فِيهِمُ الشَّرِيفُ تَرَكُوهُ وَإِذَا
سَرَقَ فِيهِمُ الضَّعِيفُ أَقَامُوا عَلَيْهِ الْحَدَّ وَاللَّهُ لَوْ أَنَّ فَاطِمَةَ
بِنْتَ مُحَمَّدٍ سَرَقَتْ لَقَطَعْتُ يَدَهَا.¹⁸

Meaning: From 'A'ishyah, the Quraish tribe was once shaken by a woman from the al-Makhzumah tribe who had stolen. (The companions also) said to each other, who will complain about this matter to the Messenger of God? Some answered yes, and someone was willing, except Usamah ibn Zaid, so the face of the Messenger of God SAW changed when Usamah complained about the theft. Then the Messenger of God SAW said, do you

¹⁶The Criminal Code (KUHP). Yustisia Library, Civil Code (Civil Code); Criminal Code (the Criminal Code); KUHP (Book of Criminal Procedure Code , (Jakarta: Pustaka Yustisia, 2013), pp. 575-577.

¹⁷ Andri Sinaga and Ainal Hadi, "Tindak Pidana Pencurian," *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana* 2, no. 1 (February 10, 2018): 31-41.

¹⁸Ibn Majah Abu 'Abdullah Muhammad ibn Yazid al-Qazwani, *Sunan Ibn Majah* , Juz XI, (Riyadh: Maktabah al-Ma'arif, 1998), p. 442. .

want to help someone so that he is not punished from the law that Allah SWT has determined?, then the Messenger of God SAW stood up and continued his words, O people, that destruction has befallen those who came before you, when someone among their elders commits theft, they ignore it, on the other hand when a perpetrator is a weak person, they immediately enforce the law on the weak person. By God, if my daughter Fatimah were the daughter of Muhammad who stole, I would have cut off her hand. (HR. Ibn Majah)

The magnitude of the sin for the crime of theft, the *had*, and the sanctions have been confirmed in the world by Allah SWT, so the perpetrators are subject to the sanction of cutting off their hands. As stated in the following verse: Meaning: Men and women who steal cut off their hands (as) recompense for what they do and as punishment from Allah, and Allah is Mighty, Most Wise. (QS. Al-Ma'idah/5:38)¹⁹

The problem is, can this verse be executed immediately in every case of theft? That is why many arguments and references are needed so that the practice of the verse about theft is not misguided, and even when someone carries out the verse, it can be contrary to the Prophet's orders. There is never a conflict between the commands of Allah SWT and the orders of the Prophet Muhammad; that is, there will be no conflict between the arguments and verses of the Koran and authentic hadiths; it is just that in carrying them out in practice, mistakes often occur, resulting in the wrong practice of

Allah's commands and shari'ah.²⁰

Judging from the verses of QS. Al-Ma'idah/5:38, there is one hadith from the history of 'A'isyah, that not necessarily the perpetrators of the crime of theft can be punished by cutting off their hands; there must be a certain level required in the event, which is used as a standard of permissibility in executing cutting off the hand. This is what must be observed, and one of the arguments for the hadith regarding this matter, is found in the hadith of An-Nasa'i originating from 'A'isyah regarding the words of the Prophet SAW, the hadith reads as follows:

عَنْ عَائِشَةَ أَنَّهَا سَمِعَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
يَقُولُ لَا تُقَطَّعُ يَدُ السَّارِقِ إِلَّا فِي رُبْعِ دِينَارٍ
فَصَاعِدًا.²¹

Meaning: From 'A'ishah, he heard the Messenger of God say, do not one of you cut off the hand of a thief when the object of the theft is a quarter of a dinar or more. (HR. An-Nasa'i)

There is a writing from Musthafa Zaid in his book *al-Mashlahah at-Tasyri' al-Islami*, which is quoted by the article ar-rahman. It is mentioned in the article that 'Umar released the sentence against the perpetrators of the crime of theft who were clearly proven to have committed the crime.²² According to the verse, of course the perpetrator of theft when he has exceeded the nishab of the stolen as narrated by 'A'ishyah, then the perpetrator must be punished by cutting off his hand.²³ Excerpts from the article are listed below:

¹⁹ Firqah Annajiyah Mansyurah, "Hand Cut Sentence for Corruptors (Thematic Study of Tafsir Ahkam Surah Al-Maidah Verse 38)," *Syariah: Jurnal Hukum dan Pemikiran* 19, no. 2 (November 27, 2019): 159–170.

²⁰ Moh Zainuddin Arif, "PENCURIAN DALAM PERSPEKTIF HUKUM ISLAM," *Department of Syariah*, no. 0 (July 16, 2010), accessed April 9, 2023, http://student-research.umm.ac.id/index.php/departement_of_syariah/article/view/7188.

²¹ Ahmad ibn Syu'aib ibn 'Ali ibn Sinan ibn Bahrain ibn Dinar Abu 'Abdurrahman al-Khurrasani an-Nasa'i, *Sunan an-Nasa'i*, Juz XV,

(Riyadh: Maktabah al-Ma'arif, 1990), h . 107. 4851 Hadith.

²² Muhammad Irkham Firdaus, "CRITICISM ANALYSIS OF THE EFFECTIVENESS OF INDONESIA'S ECONOMIC CRIMINAL POLICY IN THE PERSPECTIVE OF ISLAMIC LAW," *JCH (Jurnal Cendekia Hukum)* 8, no. 1 (September 30, 2022): 85–102.

²³ Rusmiati Rusmiati, Syahrizal Syahrizal, and Mohd Din, "Konsep Pencurian Dalam Kitab Undang-Undang Hukum Pidana dan Hukum Pidana Islam," *Syiah Kuala Law Journal* 1, no. 1 (2017): 339–352.

وَلَمْ يَقْطَعْ يَدَ سَارِقٍ أَوْ سَارِقَةٍ فِي عَامِ الْمَجَاعَةِ لِأَنَّهُ
رَأَى أَنَّ هَذِهِ السَّرْقَةَ كَانَتْ لِحِفْظِ الْحَيَاةِ، وَحِفْظِ الْحَيَاةِ
مُقَدَّمٌ عَلَى حِفْظِ الْمَالِ، هَذَا مَعَ أَنَّ آيَةَ الْقِصَاصِ
صَرِيحَةٌ فِي أَنَّ النَّفْسَ بِالنَّفْسِ، وَآيَةَ حَدِّ السَّرْقَةِ صَرِيحَةٌ
فِي الْأَمْرِ بِقَطْعِ يَدِ السَّارِقِ وَالسَّارِقَةِ دُونَ قَيْدٍ.

Meaning: And he ('Umar) did not enforce the law of cutting off the hands of the perpetrators of theft, which was carried out during the lean season (*majma'ah*) because, in his opinion, the perpetrators actually carried out theft to defend his life while protecting life (*hifz al-hayah*) takes precedence over protecting assets. The existence of this event has been confirmed in verse regarding the *qhisash* case; there is the recompense of the soul for the soul, while the verse concerning the punishment for the perpetrator of theft cuts off his hand (whether he is a male or female thief, without any restrictions in that verse).

History states, 'Umar did not cut his hands and released the perpetrators of theft because the theft crime was committed during a famine. Then 'Umar made a proposition of the Qur'an QS—Al-Baqarah/2:173, which confirms that something forbidden may be done, on the grounds of compulsion to maintain life.²⁴The verses are listed below.

Meaning: Verily, Allah only has forbidden for you carrion, blood, pork and animals that (when slaughtered) are called (names) other than Allah, but whoever is forced to (eat) while he does not want it and does not (also) exceed the limit, then he does not there is a sin for him. Indeed Allah is Forgiving, Most Merciful. (QS. Al-Baqarah/2:173)

Ahmad Amin also explained in his book *Fajr Islam*, regarding his comments relating to 'Umar ibn al-Khattab's actions which did not

punish the crime of theft as part of 'Umar's opinion (*ra'yu*) in viewing and deciding a case, outside the general text, and prioritizing the benefit,²⁵ the quote is as follows:

وَلَمْ يَقْطَعْ يَدَ سَارِقٍ أَوْ سَارِقَةٍ فِي عَامِ الْمَجَاعَةِ لِأَنَّهُ
رَأَى أَنَّ هَذِهِ السَّرْقَةَ كَانَتْ لِحِفْظِ الْحَيَاةِ، وَحِفْظِ الْحَيَاةِ
مُقَدَّمٌ عَلَى حِفْظِ الْمَالِ، هَذَا مَعَ أَنَّ آيَةَ الْقِصَاصِ
صَرِيحَةٌ فِي أَنَّ النَّفْسَ بِالنَّفْسِ، وَآيَةَ حَدِّ السَّرْقَةِ صَرِيحَةٌ
فِي الْأَمْرِ بِقَطْعِ يَدِ السَّارِقِ وَالسَّارِقَةِ دُونَ قَيْدٍ.

Meaning: It is clear to me (according to Amin's view in his book *Fajr Islam*) that 'Umar has used his opinion to expand the meaning (about theft) t. Because of this, 'Umar used *ra'yu* when there were no texts in both the Koran and hadith (which explain the law in situations such as theft during a famine). Therefore, we think, 'Umar saw that the case of theft during the famine period was far from the existing texts, so he made *ijtihad* by looking at the *mashlahah* aspect he saw from the verse to judge cases of theft during the famine period.

The above is related to the existence of a direct defense made by 'Umar ibn al-Khattab against the perpetrators of the theft, not only accompanying 'Umar immediately gave a clear decision and acquitted the perpetrators even though they had been proven to have committed a crime of theft. The theft crime, which was committed during the famine period, was why 'Umar did not apply the law of abattoirs because he saw *dharuriyah* as a way of protecting the soul, so he committed theft.²⁶

The above writing is part of a well-known history about the existence of a defense carried out by people who are highly respected in the Islamic world, so in this case, LBH SIKAP Advocates in assisting perpetrators of criminal acts of theft should

²⁴ Wahyu Abdul Jafar, "Legality Of Halal Food Certification On Maslahah Mursalah Perspective," *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, dan Keagamaan* 9, no. 1 (August 16, 2022): 95–108.

²⁵ Panji Adam, "EKSISTENSI SANKSI PIDANA PENJARA DALAM JARÎMAH TA'ZÎR," *Tahkim*

(*Jurnal Peradaban dan Hukum Islam*) 2, no. 2 (October 25, 2019): 39–66.

²⁶ Asriaty Asriaty, "Penerapan Mashlahah Mursalah Dalam Isu-Isu Kontemporer [Application of Maslahah Mursalah in Contemporary Issues]," *Madania: Jurnal Kajian Keislaman* 19, no. 1 (June 13, 2015).

be part of emulating the actions of predecessors from other people. People who understand the essence of law and know how to practice law properly, in accordance with the instructions implied by the Koran verses and the Prophet SAW's hadith.

Throughout this research, no other source could be found explaining the opinion of the clergy regarding the legal defense or assistance of the perpetrators of the theft crime; only history could be found, as previously stated. As for the verses of the Koran which prohibit helping each other in doing evil, as well as the opinion of al-Qardhawi, which prohibits helping and facilitating the way in crimes, they cannot be used as a basis for prohibiting the actions of LBH SIKAP Advocates in defending criminal acts of theft perpetrators in Dairy District.

Returning to the main issue, what is the perspective of Islamic law regarding the defense of suspected perpetrators of the crime of theft carried out by LBH SIKAP? In general, the defense carried out by LBH SIKAP is part of professionalism and has been guaranteed by law. Judging from some literature, both from the Koran and hadith, it is not permissible to help commit a crime; al-qardhawi himself emphasized in his book that assisting with something that is haram, then that act is also forbidden.²⁷

LBH SIKAP's defense of perpetrators of the crime of theft is not defending the crime itself; LBH SIKAP is present in order to ensure the methods and procedures carried out by authorized officials, whether they are following existing rules or not, namely as contained in the Book of Laws Criminal Procedure Code (KUHP), as well as other

regulations. LBH SIKAP advocates never once provided certainty and guaranteed the release of perpetrators who were truly proven guilty, but in the context of providing protection and assistance so that the rights of the accused should not be ignored, one of their many rights is to be processed immediately and obtain legal certainty.²⁸

Islam provides ample space for a person to defend his rights, even though it is not right for someone guilty to defend his guilt.²⁹LBH SIKAP's defense needs to be further researched to determine whether the defense practices carried out are in accordance with Islamic religious principles, as stated in QS. Al-Maidah/5:2 commands that humans help each other in the context of goodness and achieving piety, not committing sins and enmity.³⁰

These principles should continue to exist in protecting and defending every criminal case, including theft cases.³¹Therefore, the defense of LBH SIKAP Advocates against the crime of theft is something that has no conflict at all with the Koran and Hadith of the Prophet SAW, so LBH SIKAP's defense is part of the goal of Islamic law, namely protecting the soul of *hifz an-nafs*, in the sense of protecting the soul of *hifz an-nafs*. Get justice and legal certainty from the decision of the Sidikalang District Court.

Conclusion

It can be said that the defense against the perpetrators of the crime of theft is difficult to find, both in the Koran and in the traditions of the Prophet SAW. Strictly speaking, it is found in the verses of the Koran QS. Al-Ma'idah/5:2, regarding the

²⁷ Muhammad Iqbal and Novia Novia, "Uqubat Denda Bagi Pegulangan Pencurian Ringan Oleh Anak-Anak Di Bawah Umur," *Legitimasi: Jurnal Hukum Pidana dan Politik Hukum* 8, no. 2 (December 28, 2019): 181–203.

²⁸ Rama Darmawan and Andri Wahyudi, "Tindak Pidana Pencurian Dalam Hukum Islam Dan Hukum Pidana Indonesia," *Jurnal Pendidikan Tambusai* 6, no. 2 (August 4, 2022): 16208–16215.

²⁹ Muhammad Adnan Lutfi et al., "Studi Perbandingan Tentang Penetapan Sanksi Pidana Pencurian Berdasarkan Hukum Pidana Positif

Indonesia Dan Hukum Pidana Islam," *Borobudur Law and Society Journal* 1, no. 1 (January 13, 2022): 20–30.

³⁰ Mardani Mardani, "Sanksi Potong Tangan Bagi Pelaku Tindak Pidana Pencurian Dalam Perspektif Hukum Islam," *Jurnal Hukum IUS QUIA IUSTUM* 15, no. 2 (2008), accessed April 9, 2023, <https://journal.uui.ac.id/IUSTUM/article/view/66>.

³¹ Ahmad Syarif Abdillah, "Hukuman Bagi Pelaku Tindak Pidana Pencurian Dengan Kekerasan," *Al-Jinayah: Jurnal Hukum Pidana Islam* 1, no. 2 (December 1, 2015): 252–269.

prohibition of helping one another in acts of sin and enmity, is also contained in the opinion emphasized by al-Qardhawi in his book entitled *al-Halal wa al-Haram fi al-Islam*, that if something is prohibited in Islam, then the path leading to the unlawful act is also prohibited. It's just that the arguments and opinions above cannot be used as a reference in prohibiting defending the perpetrators of the crime of theft carried out by LBH SIKAP. Other sources regarding the theft case are contained in several well-known stories, starting from the acquittal of the perpetrators of theft that occurred at the time of `Umar ibn al-Khattab, which released the punishment for the perpetrators of theft because a hungry person carried out the theft and was not cared for by his master, and there was in lean times. In addition, assistance is also found in history from the story of Muhammad ibn `Amr ibn al-`Ash, who became Governor of Egypt under the government of `Umar ibn al-Khattab in cases of crimes of beating, and not in cases of theft, it is just that Muhammad ibn ` direct assistance Amr ibn al-`Ash against his son who abused Egyptians who won horse races. Judging by the rule of law, in non-religious cases, the defense of the perpetrators of the crime of theft carried out by LBH SIKAP is permissible because this is the public domain and has nothing to do with worship. On the other hand, the defense carried out by LBH SIKAP is not defending evil, namely the crime of theft, but what is being defended is the rights of the perpetrator which cannot be denied, even though he has been proven to have committed the crime of theft. The point is that the rights of the perpetrators are legal certainty, not intimidated, may not be charged for what is not their actions, as well as other elements that enable the fulfillment of the rights of the perpetrators of the crime of theft. So it is clear, the defense carried out by LBH SIKAP against the perpetrators of the crime of theft is an permissible case, because there is no argument against it, there are even good things to do, namely legal certainty for the perpetrators of the crime of theft, and obtaining legal relief when there are rules that mitigate criminal acts of theft

committed by unscrupulous people in Dairi Regency.

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