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


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).  

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.  

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 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 (incautia), 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.

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<th>No.</th>
<th>Case Number</th>
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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 good 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.\(^5\)

Theft in Arabic is used with the term saraqa, namely, people who take treasury secretly to control and possess.\(^6\) One major...

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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-Zuhalli as follows:

\[
\text{السرقة: هي أحد مال الغير من حوزة مال على الفحى} \\
\text{والأسرار.}
\]

“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 \(\text{nisab}\), done by a person who has reached \(\text{puberty}\) and \(\text{puberty}\), and he has no right to the stolen property; the method is done secretly. \(^10\)Syabah 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:

\[
\text{عَنْ عَائِشَةَ أَمَّا سَمَّعَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ} \\
\text{يَقُولُ لَّا تُقْطَعُ يَدُ السَّارِقِ إِلَّا فِي رَبعِ دِينَارٍ فَصَاعَداً}
\]

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. \(^13\)Secondary sources include laws and regulations, including the Criminal Code (KUHP) and Law Number 16 of 2011 concerning Legal Aid. \(^14\)Normatively, 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
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:


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

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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:

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\text{عنْ عَائِشَةَ أُمَّةً سَمَعَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ لَا تَطْعَمْ بَيْدَ السَّارِقِ إِلَّا يَا غَيْرُ دِينَارٍ وَسَلَّمَ أَنَََّّا سََِعَتْ رَسُولَ اللََِّّ صَلَّى اللََُّّ عَلَيْهِ وَسَلَّمَ}
\]

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’ishah, then the perpetrator must be punished by cutting off his hand.\(^{23}\) Excerpts from the article are listed below:


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, 23 the quote is as follows:

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. 24 The 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 Khaththab's actions which did not 25


24 Panji Adam, “EKSTENSI SANKSI PIDANA PENJARA DALAM JARĪMAH TA'ZĪR,” Tahkim 26

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 (KUHAP), 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.\(^{29}\)LBH 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.\(^{31}\)Therefore, 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

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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 Khaththab, 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 Khaththab in cases of crimes of beating, and not in cases of theft, it is just that Muhammad ibn `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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