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FORCED DEFENSE OF THE CRIME OF THEFT ACCORDING TO THE KUHP FROM THE PERSPECTIVE OF ISLAMIC LAW

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Abstract

The purpose of this study is to reveal self-defense according to Islamic law and the Criminal Code article as well as the view of Islamic law on forced defense from the crime of theft based on the Criminal Code. This research is qualitative, the type of research is library research. The data collection method used is a literature study. The results showed that; 1) Islamic law views theft as a serious crime with strict hudud sanctions, while in the Indonesian Criminal Code, theft is regulated by imprisonment or fines according to the severity of the case. 2) Forced defense in the context of theft is recognized by both legal systems, with Islam emphasizing the obligation to defend oneself from arbitrariness, and the Criminal Code allowing self-defense with proportional action. 3) Forced defense regulated in the Criminal Code Article is largely per Islamic law, the person who defends himself gets legal protection, the defense must be proportional and the defense is carried out if there is no other way to avoid danger.

Keywords: Forced defense, Criminal Code, Islamic Law

Abstrak

Tujuan penelitian ini untuk mengungkap pembelaan diri menurut hukum islam dan pasal KUHP serta pandangan hukum islam tentang pembelaan terpaksa dari tindak pidana pencurian berdasarkan KUHP. Penelitian ini merupakan penelitian kualitatif, jenis penelitian adalah library research. Metode pengumpulan data yang digunakan adalah studi literatur. Hasil penelitian menunjukkan bahwa; 1) Hukum Islam memandang pencurian merupakan kejahatan serius dengan sanksi hudud yang ketat, sementara dalam KUHP Indonesia, pencurian diatur dengan hukuman penjara atau denda sesuai beratnya kasus. 2) Pembelaan terpaksa dari tindak pidana pencurian Pembelaan terpaksa dalam konteks pencurian diakui oleh kedua sistem hukum, dengan Islam lebih menekankan kewajiban mempertahankan diri dari kesewenang-wenangan, dan KUHP memperbolehkan pembelaan diri dengan tindakan proporsional. 3) Pembelaan terpaksa yang diatur dalam Pasal KUHP secara garis besar sesuai dengan syariat hukum islam, orang yang melakukan pembelaan diri mendapat perlindungan hukum, pembelaan yang dilakukan harus proporsional serta pembelaan yang dilakukan apabila tidak ada jalan lain untuk menghindari bahaya.

Kata kunci: Pembelaan terpaksa, KUHP, Hukum Islam

PENDAHULUAN

Self-defence is an action taken to protect oneself, others, or property from an unlawful attack or threat, recognized in various legal systems including Islamic law and the Indonesian Criminal Code. In Islam, self-defense is strictly regulated to ensure that the action does not go beyond reasonable limits, following the Qur'an and hadith. The Indonesian Criminal Code also regulates self-defence with the provision that the action must be proportionate to the threat. Killing in self-defense, known as *noodweer excess*, is regulated in Article 49 paragraph (1) of the Criminal Code, which emphasizes that this act must meet criteria such as the defense of property or honor, the existence of an imminent threat, and an unlawful attack (Budimansyah dkk., 2022).

In Islamic law explained in Fiqh jinayah, the act of self-defense is known as 'default sail,' which means guarding or protecting oneself. The basic principle of Islam was first revealed to protect the life that revolves on this earth. When we discuss the legal aspect, it cannot be separated from Islamic sharia law which has certain objectives, known as *maqashid sharia*. *Maqashid sharia* refers to the basic purpose or intention of Islamic laws, which includes the protection of five main interests, namely religion, soul, offspring, intellect, and property (Susanti & Meduri, 2023).

This research aims to find out the provisions of the Article in the Criminal Code (KUHP) on self-defence as well as the views of Islamic law on it, and also make a comparison between the two. Theoretically, this research is expected to provide additional insight and knowledge into the application of punishment for people who commit forced self-defense. This research is also expected to be useful as a reference for other studies related to self-defense in criminal law (Susanti & Meduri, 2023). Practically, this research is expected to increase the knowledge of law students, especially those who study Islamic law, and contribute to understanding and solving legal problems related to self-defense, especially in cases of murder committed in self-defense. With the comparison between Islamic law and positive law, this research is expected to provide a new perspective that is useful in solving legal problems more comprehensively.

According to Faaza, (2022) in Indonesian positive law, self-defence is regulated in Article 49 of the Criminal Code. This article states that a person cannot be punished if the action taken is a forced defense carried out to protect oneself, others, honor, or property from the threat of an unlawful attack. This provision provides legal protection to individuals who are forced to take certain actions to defend their rights from harmful threats. Meanwhile, in Islamic law, the concept of self-defense is also known and allowed. Islamic law recognizes the right of every individual to protect themselves, their family, and their property from unjust attacks. Self-defence in the Islamic perspective is based on the principles of justice ('adl) and the benefit of the people. Acts of self-defense are considered legitimate as long as they are carried out within reasonable limits and are not excessive. The arguments underlying self-defense in Islamic law can be found in the Qur'an, hadith, and the opinions of scholars.

Although positive law and Islamic law have similarities in recognizing a person's right to self-defense, there are differences in the details of its application. In positive law, self-

defence is more structured as it is regulated in detail in the Criminal Code, including the elements that must be fulfilled for an act of self-defence to be legally justified. On the other hand, Islamic law is more flexible and considers the intention of the perpetrator as well as the context of the situation holistically. This difference shows the unique approach of the two legal systems.

METHOD

This research is qualitative research with the type of *library research* or literature study. The data collection method used is a literature study, namely by examining various sources relevant to the research topic (Hermawan, 2019). The literature that becomes the focus of study in this research includes the Criminal Code (KUHP), references to Islamic criminal law, as well as literature related to forced defense (*noodles*) and the crime of theft. The Criminal Code is used as the legal basis for analyzing the crime of theft and forced defense from the perspective of positive law in Indonesia. On the other hand, Islamic criminal law references were studied to understand the Islamic Shari'ah's view on the same issue, so that this research can offer a comparative analysis between the two legal systems. Additional literature that discusses forced defense and the crime of theft is also used to enrich the perspective of the analysis.

Data processing in this research was conducted by content analysis of the collected literature. Each relevant document or source was examined in depth to find concepts, theories, or legal rules relating to the case of forced defense in the crime of theft. This analysis is conducted systematically to ensure that the data obtained can support the research objectives. The results of the research are expected to provide a comprehensive understanding of how forced defense in the crime of theft is regulated in positive criminal law and Islamic law. In addition, this research also aims to explain the suitability and differences between the two legal perspectives, so that it can be a reference in the development of relevant legal studies. With this approach, it is hoped that the research can make a useful academic contribution to the field of criminal law.

RESULT AND DISCUSSIONS

Self-defense of Victims of the Crime of Theft Under the Criminal Code Articles

Theft is a criminal offense that involves the taking of another person's property without their permission or consent. The goods in question can be tangible, such as money or objects. Theft is a common crime that occurs frequently and can be financially and emotionally damaging. The law recognizes two main elements of theft. Firstly, the goods taken must belong to another person or entity and secondly, the thief has the intention to deprive the owner of the goods in other words the thief intends to take permanent possession of the property (Baihaqi & Surbakti, 2023). The act of defending oneself from the crime of theft is also a right that has been regulated by articles of the Criminal Code. This defense is regulated in Article 49 paragraph (1) of the Criminal Code which reads: 'Not punishable shall be the person who commits an act of forced defense of himself or another person, of the honor of morals or his own or another's property, because of an

attack or threat of attack which is unlawful at that time or the danger of attack which is very close at that time.’

Then Article 49 paragraph (2) of the Criminal Code reads: ‘Excessive forced defense, which is directly caused by severe mental shock due to the attack or threat of attack, shall not be punished.’ Meanwhile, the latest Criminal Code is regulated in Articles 34 and 43 of Law 1/2023:

Article 34 of Law 1/2023

‘Any person who is forced to commit a prohibited act shall not be punished, if the act is committed in defense against an unlawful instantaneous attack or threat of attack against himself or another person, honor in the sense of decency, or his own or another person's property.’

Article 43 of Law 1/2023

‘Any person who makes an excessive forceful defense which is directly caused by a violent mental shock due to an unlawful instantaneous attack or threat of attack, shall not be punished.’

If we look at Article 49 of the Criminal Code and Article 34 of Law 1/2023, then the forced defense can be carried out if the following elements are met:

1. There must be an unlawful attack or threat of attack that is instantaneous;
2. The defense is made because there is no other way (subsidiarity) to repel the attack;
3. The defence can only be made against interests that are determined in a limitative manner, namely the legal interests of oneself or others, honor in the sense of morality, property; and
4. The balance between the defense made and the attack received (proportionality) (Limbong & Sukiati, 2024).

If these elements are met, then victims of theft who commit self-defense cannot be convicted. However, it should be noted that self-defense must be carried out proportionally and must not exceed the limit of the need/requirement to avoid the attack or threat of attack. The defense must be balanced between the interests being defended and the attack or threat received (Setyo, 2023).

Case example:

A woman is walking alone at night when suddenly attacked by a man who tries to snatch her bag. The woman feels that her life is in danger, so she decides to fight back and use self-defense techniques to stop the man's attack. The woman manages to knock out her attacker with a few punches and runs away.

Analysis:

1. Legitimate attack: The woman faced a real attack on her safety, which was an attempted robbery.
2. Proportionality: The action taken (using self-defense techniques to immobilize the attacker) was appropriate to the threat faced.

3. Good intention: The woman acted intending to protect herself from harm.
4. Emergency: The incident happened at night when there was no one else around who could help.
5. Without provocation: The woman did not provoke the attack; she was the victim of an unlawful seizure attempt.

In this case, the woman's actions would most likely be considered lawful self-defense, and she would not be prosecuted or punished for her actions to protect herself from the grabbing attack.

Self-defense of Victims of the Crime of Theft According to Islamic Law

Theft (*sariqah*) is taking someone's property by stealth and deceit. Islamic law considers the offense of theft to be a dangerous criminal offense. Therefore, the punishment has been determined by Shara', namely the punishment of cutting off the hand (Nugroho dkk., 2023). Islamic law views that the act of theft is a dangerous act. Therefore, victims of theft have the right and obligation to defend themselves. Self-defence is an obligation that each individual has to fortify themselves and other individuals, the authority they have to fortify themselves from those who make unjustified attacks. Self-defence is a way for a person to protect themselves from harm from both humans and animals, to protect their lives, property, and honor.

Self-defence in Islam is also known as *daf'u al-shail*. *Daf'u as-sail* linguistically consists of two words: *daf'u* means to reject and defend oneself, while *as-sail* means arbitrariness and attack. In terms, *daf'u as-sail* is a person's effort to avoid or defend himself from all forms of the arbitrariness of others against himself (soul), family, and property or honor in accordance with his abilities and not exceeding the limit.

The basis of self-defense is explained in the words of Allah Subahanahu wa Ta'ala in QS Al-Baqarah/2 194.

الشَّهْرُ الْحَرَامُ بِالشَّهْرِ الْحَرَامِ وَالْحُرُمَتِ قِصَاصٌ ۚ فَمَنْ أَعْتَدَى عَلَيْكُمْ فَأَعْتَدُوا عَلَيْهِ بِمِثْلِ مَا أَعْتَدَى عَلَيْكُمْ ۖ وَاتَّقُوا اللَّهَ
وَأَعْلَمُوا أَنَّ اللَّهَ مَعَ الْمُتَّقِينَ (١٩٤)

It means:

‘Unlawful month for unlawful month, and on anything worthy of honor, the law of mishmash applies. Therefore, whoever attacks you, attacks him in proportion to his attack on you. Fear Allah and know that Allah is with those who fear.’ (Lajnah Pentashihan Mushaf al-Qur'an, Agency for Research and Training, Ministry of Religious Affairs of the Republic of Indonesia & Language Development and Development Agency, Ministry of Education and Culture of the Republic of Indonesia, 2019)

Islam recognizes a concept called *Ikrah* (الإكراه) which refers to a situation where a person is forced to perform an act under serious threat. When applied in the context of self-defense from thieves, the rule of *ikrah* provides an understanding of how defensive actions taken under threat can be considered lawful or not legally liable.

Applications of *Ikrah* in Self-Defence:

1. **Real Threats:** If a person is attacked by a thief who threatens his life or safety, the defensive action taken to protect oneself can be considered valid. For example, if a thief attacks with a weapon, and the victim defends himself by injuring the thief, the act can be justified as it was done under a real threat.
2. **Proportionality of Action:** The act of self-defense must be proportionate to the threat faced. If the threat from the thief is not life-threatening or serious safety, excessive defensive actions, such as killing an unarmed thief, may not be justified.
3. **Intention of Defence:** The action must be based on the intention to protect oneself or others from harm. If the intention is to seek revenge or do unnecessary damage, the action will not be considered legitimate self-defense.

Case Example:

Example 1: An armed burglar enters a home and threatens the life of the homeowner. The homeowner, in an attempt to protect himself and his family, uses force against the burglar, which results in a fatal outcome for the burglar. In this situation, the homeowner's actions can be considered lawful as they were done under a real and proportionate threat.

Example 2: An unarmed thief attempts to steal goods from a shop. The shopkeeper catches the thief and, without threat to his life, uses excessive force to cause serious injury to the thief. This action may not be justified as it is disproportionate to the threat faced.

The rule of *ikrah* in the context of self-defence from thieves suggests that defensive action may be justified if it is undertaken under a real and serious threat, is proportionate to the threat, and is based on the intention to protect oneself or others. These principles help ensure that self-defense is carried out justly and following the values of Islamic law, eliminating legal liability for actions forced under threat.

Based on the explanation above, it can be concluded that self-defense by victims of theft can be allowed when the conditions of self-defense are met. Suggests that there are several conditions for *Daf'u al-shail* (self-defense) in Islamic law, namely:

1. There is an attack or unlawful act, the attack that befalls someone must be an unlawful act.
2. The attack occurs immediately, the attack must occur at that time. If the attack is not instantaneous, then one's action cannot be considered an act of self-defense but is considered an unlawful act.
3. There is no other way to avoid the attack
4. Self-defence is carried out with the necessary force, carried out per the degree of the attack.

Islamic View on Forced Defence in the Case of Theft under the Criminal Code Article

The view of Islamic law related to forced defense regulated in the Criminal Code Article is largely per Islamic law, namely: First, both in Islamic law and the Criminal Code Article, self-defense is justified only if there is a real and urgent threat, Second, Islamic law and the Criminal Code Article underline the importance of proportional action in

response to threats. Excessive use of force may be considered an act of overreaching, third, self-defense is justified if there is no other safer or less damaging way to avoid the danger, therefore it can be explained as follows:

The concept of self-defense

Forced self-defense in Indonesian criminal law is considered an act in the context of being forced to protect oneself from theft. This is by the provisions of Article 49 of the Criminal Code paragraphs (1) and (2) then Article 34 of Law 1/2023 and Article 43 of Law 1/2023. The Criminal Code article above explains that acts committed due to forced defense are not subject to criminal law, because there are emergency conditions that threaten to carry out forced defence (Sukoco & Junaidi, 2024). The forced defense described in the Criminal Code article is also found in the view of Islamic criminal law. Criminal law contains a provision known as 'forced defense' or 'daf'u as-sho'il' which allows a person to act against a threatened situation. Daf'u as-sail is a person's effort to avoid or defend himself from all forms of the arbitrariness of others against himself (soul), family, and property or honor under his abilities and not exceeding the limit.

Daf'u as-sail is the right (obligation) of a person to defend (protect) himself or herself or others, defend his or her own or others' property, with the necessary force from any unlawful attack. Defense by force or daf'u as-sail cannot be separated from the objectives of sharia (maqashid sharia). According to Imam Ash-Syatiby, the maqashid sharia that must be maintained is divided into five forms, namely hifdzu din (protecting religion), hifdzu nafs (protecting the soul), hifdzu aql (protecting the mind), hifdzy mal (protecting property), and hifdzu nasab (protecting offspring).

The basis of self-defence is explained in QS Al-Baqarah/2: 194. Allah Subahanahu wa Ta'ala says:

الَّذِينَ هُمْ بِالْحَرَامِ وَالْحَرَامِ الْقَصَاصِ ۚ فَمَنْ أَعْتَدَىٰ عَلَيْكُمْ فَأَعْتَدُوا عَلَيْهِ بِمِثْلِ مَا أَعْتَدَىٰ عَلَيْكُمْ ۚ وَأَتَّقُوا اللَّهَ
وَأَعْلَمُوا أَنَّ اللَّهَ مَعَ الْمُتَّقِينَ (١٩٤)

It means:

'Unlawful month for unlawful month, and on anything worthy of honor, the law of mishmash applies. Therefore, whoever attacks you, attacks him in proportion to his attack on you. Fear Allah and know that Allah is with those who fear.' (Lajnah Pentashihan Mushaf al-Qur'an, Research and Training Agency of the Ministry of Religious Affairs of the Republic of Indonesia & Language Development and Development Agency of the Ministry of Education and Culture of the Republic of Indonesia, 2019).

Right of self-defense

The forced defense carried out by victims of theft based on positive law and Islamic law both view that victims have the right to protect themselves from attacks or threats received. This is reinforced by articles and other arguments that state that self-defense is justified. Article 48 of the Criminal Code states that 'Whoever commits an act due to the influence of force, shall not be punished'.

Article 34 of Law No. 1 Year 2023 also provides legal protection for individuals who commit acts that are generally prohibited, if the act is carried out in defence of self, others,

honor, or property from an attack or threat of attack that is unlawful and instantaneous. This article confirms that defensive actions taken in emergency and forced conditions cannot be punished, provided that the actions are proportional and carried out intending to protect self, honor, or property. Meanwhile, Article 43 of Law No. 1 Year 2023 provides legal protection for individuals who carry out excessive self-defense if the action is carried out in conditions of great mental shock due to attacks or threats of attacks that are against the law and occur immediately. This article recognizes that in emergencies and under extreme emotional stress, an individual may not be able to control his or her defensive actions proportionally, and therefore, such overreaching is not punishable.

Islamic criminal law considers that every human being has to defend his or her life and property from the attacks of others. This is explained in the word of Allah swt. in QS As-Syura: 26: 39.

وَالَّذِينَ إِذَا أَصَابَهُمُ الْبَغْيُ هُمْ يَنْتَصِرُونَ

Meaning:

‘And (for) those who, when they are wronged, defend themselves’ (Lajnah Pentashihan Mushaf al-Qur'an, Research and Education Agency, Ministry of Religious Affairs of the Republic of Indonesia & Language Development and Development Agency, Ministry of Education and Culture of the Republic of Indonesia, 2019).

Proportionality

Forced defense under the Criminal Code and Islamic criminal law considers that defense is carried out by proportional limits. However, in positive criminal law, if the victim makes an excessive forced defense caused by mental shock due to an attack or threat received to protect himself, he will not be punished. Article 49 of the Criminal Code does not sufficiently explain the requirements of forced defense normatively. This is also explained in Article 42 of Law 1/2023: ‘Every person who commits a criminal offense shall not be convicted because: 1) Forced by forces that cannot be restrained; or 2) Forced by a threat, pressure, or force that cannot be avoided’ (Mulloh dkk., 2023).

Islamic criminal law considers that when a person goes beyond the necessary defense, he must be held accountable for his actions. If a person commits a criminal offense in a state of anger, his anger cannot be considered a justification for committing the offense and he will still be punished. Therefore, the defense should be as light as possible, as long as it is a light defense, then a heavier defense is not justified. If a person can defend himself with only threats, and then he beats himself, he must be held accountable for the beating. If a person can defend himself by only wounding, but then he commits murder, he must be held accountable for his murder. If the attacker runs away after injuring him, then he pursues his attacker and injures him a second time, then he is liable for the second injury.

The application of Article 49 of the Criminal Code to the forced defense of victims of theft can be accepted if the conditions of forced defense are fulfilled. The conditions of emergency defense are: 1) The act committed must be forced to defend (defense). The defense must be very necessary, it can be said that there is no other way. There must be a certain balance between the defense and the attack. To defend an insignificant interest, for example, one may not kill or injure another person. 2) The defense must be made only

against the interests mentioned in the article, namely the body, honor, and property of oneself or another. 3) There must be an attack that is against the right and threatens suddenly or at the same time.

Meanwhile, the conditions for excessive force defense in the Explanation of Article 43 of Law 1/2023 are: 1) the defense exceeds the limit or is disproportionate to the attack or threat of attack immediately; and 2) caused by great mental shock due to the attack or threat of attack immediately.

For example, there is a sudden explosion on a ship so the passengers must immediately save themselves. A lucky passenger finds a wooden plank that is only enough to accommodate one person. Then, another passenger arrives who also needs a means to float. This second passenger tried to take the wooden plank, but the first passenger pushed him to sink and die. In this emergency, the first passenger's actions cannot be punished because he was in a compelling situation to save himself.

The conditions for forced defense carried out by victims of theft are also explained in Islamic criminal law. It is stated that there are several conditions for *Daf'u al-shail* (self-defense) in Islamic law, namely:

- a. The existence of an attack or unlawful act
- b. The attack occurs immediately
- c. There is no other way to avoid the attack
- d. Self-defense is carried out with the necessary force

CONCLUSIONS

Islamic law views theft as a serious crime with strict hudud sanctions, while in the Indonesian Criminal Code, theft is punishable by imprisonment or a fine according to the severity of the case. Forced defense against theft is recognized by both legal systems, with Islam emphasizing the obligation to defend against all forms of abuse, and the Indonesian Criminal Code allowing for proportionate self-defense. The forced defense regulated in the Criminal Code Article largely follows Islamic law, the person who defends himself gets legal protection based on the arguments of the Qur'an and hadith and the Criminal Code Article, the defense must be proportional and not excessive and the defense can be done if there is no other way to avoid danger.

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