Malaysian Journal of Syariah and Law
مجلة الشريعة والقانون بماليزيا

Vol. 12, No. 2, pp. 436-445 | AUGUST 2024
DOI: https://doi.org/10.33102/mjsl.vol12no2.663

THEFT PUNISHMENT IN ISLAMIC LAW AND INDONESIAN CRIMINAL LAW: INITIATIVE FOR HARMONIZATION FROM THE PERSPECTIVE OF SHARUR'S BOUNDARY THEORY

[i,*]Aroma Elmina Martha, [i]Agus Triyanta & [i]Bayu Mogana Putra,

[i]Faculty of Law, Universitas Islam Indonesia Jl. Kaliurang KM 14,5 Sleman 55584, Yogyakarta, Indonesia

*(Corresponding author) e-mail: aroma@uii.ac.id

Article history:
Submission date: 12 Dec 2023
Received in revised form: 11 March 2024
Acceptance date: 23 April 2024
Available online: 31 August 2024

Keywords:
Theft punishment, Islamic law, Indonesian criminal law, Sharur

Funding:
This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Competing interest:
The author(s) have declared that no competing interests exist.

Cite as:
Martha, A. E., Triyanta, A., & Putra, B. M. (2024). Theft punishment in Islamic law and Indonesian criminal law: Initiative for harmonization from the perspective of Sharur's limit theory. *Malaysian Journal of Syariah and Law*, *12*(2), 436-445. https://doi.org/10.33102/mjsl.vol12no2.663

ABSTRACT

This study seeks to find a formula on how Islamic law contributes to Indonesian criminal law reform, particularly in the imposition of theft, by utilizing Sharur's Boundary Theory (*Naẓariyyah al-Ḥudūd*). This field of research is considered imperative because the implementation of Supreme Court Regulation Number 2 of 2012 concerning Adjustments to the Limits on Misdemeanor Crimes and the Number of Fines in the Criminal Code (Misdemeanor Crimes) is felt to have not been maximized. This study uses normative juridical research methods, with descriptive-qualitative analysis. It can be deducted from this study that the theory of the boundaries of the *ijtihad* area determines the punishment in Islamic. The punishment for the crime of theft, the amputation of the hands mentioned in the Qur'an, is the maximum form of punishment. Thus, it is possible that there are punishment in other forms that fall under the category of cutting off one's hand, based on several verses of the Qur'an, including in Al-Māʾidah 5:38, al-Isrāʾ 17:33, al-Baqarah 2:178, and al-Nisāʾ 4:92. Even though this opinion may raise objections, for the purposes of reforming Indonesian Criminal Law, it is suggested that this opinion is still relevant for consideration. The study emphasizes the significance of understanding and considering Sharur's boundary theory for judges to make informed decisions in Sentencing.

Introduction

The crime of theft is one that often occurs in society. This crime is very serious that the Indonesian Supreme Court issued Supreme Court Regulation Number 2 of 2012 concerning the Settlement of Limits for Minor Crimes and the Amount of Fines in the Criminal Code. In essence, this Supreme Court Regulation was intended to resolve the interpretation of the monetary value of a misdemeanor in the Criminal Code. The Supreme Court Regulation Number 2 of 2012 not only provides relief to Supreme Court Court Judges in their work but also makes theft of under IDR2,500,000 unsustainable. In the context of minor crimes, this provision provides instructions that can be processed for crimes of theft which nominal loss is above IDR5,100,000 five million one thousand hundred. With the issuance of Law Number 1 of 2023 concerning the Criminal Code, as a renewal of the new Criminal Code, the regulations in criminal law are undergoing reforms. Even though it is still valid for three more years, this brings new hope regarding the regulation of criminal acts in Indonesia. So far, the Criminal Code has regulated the provisions on the crime of theft, namely in Articles 362, 363, 364, 365, 366, and 367 of the Criminal Code, while the newly inserted provisions are Articles 476, 477, 478, 479, and 480 of the Criminal Code.

The implementation of Supreme Court Regulation Number 2 of 2012 concerning the adjustment of the Limits on Misdemeanor Crimes and the Amount of Fines in the Criminal Code (Minor Crimes) is deemed to not be optimal. This is because several minor criminal cases handled by the police and the prosecutor's office are still being processed with the usual procedures up to the cassation level at the Supreme Court. As a result, perpetrators of minor crimes still crowd correctional institutions. This certainly does not reflect the actualization of the existence of a Memorandum of Understanding between the Supreme Court and the Police, the Attorney General's Office, and the Ministry of Law and Human Rights regarding the implementation of the existing Supreme Court Regulation Number 2 of 2012. One of the expected agreements is to reduce the accumulation of inmates in correctional institutions and detention centers, which have always been operating at overcapacity.

Such a situation requires a harmonious, consistent, and integrated system of laws and regulations, inspired by Pancasila, and sourced from the 1945 Constitution of the Republic of Indonesia, to create order, guarantee certainty, and provide legal protection. This means that harmonization between laws and regulations is very necessary and urgent. In this regard, legal harmonization of the system of laws and regulations in an integrated manner emerges as a necessity and an inevitability.

The large number of cases of theft, especially petty theft, are very inappropriate if charged under Article 362 of the Criminal Code. Cases of petty theft should be included in the category of minor crimes (*lichte misdtijven)*, which would make it more appropriate to use Article 364 of the Criminal Code as the basis for the indictment. Judges, as the last carriage in the criminal justice process, have the authority to distort outdated written provisions so that they are no longer able to fulfill the sense of justice in society by including clear and sharp legal considerations by considering various aspects of legal life.

The right to a court hearing and decision free from bias and improper influence is one of the definitions of justice under Encyclopedia Americana. Another definition is the right to a court hearing and that the decision be free from bias and improper influence. From this understanding, what is referred to as a right for the accused is a manifestation of efforts to fulfill justice for him, such as the existence of Supreme Court Regulation Number 2 of 2012, which, in addition to minimizing the accumulation of cases within the Court, provides justice for the accused to immediately obtain a simple and speedy trial process, and at a low cost (Baried, 2017).

The spirit of renewal of criminal law that occurs with the reformation of criminal sanctions, especially in minor theft crimes, gives judges the freedom to make a fair decision according to the crime committed. In determining the law, judges must pay attention to and prioritize legal certainty. The correlation of legal determinations made by judges in deciding cases can be harmonized through the Boundary Theory put forward by Sharur (Kirana et al., 2022). The concept of minimums and minimum limits in this theory can be used as an initiation for judges in deciding cases as an alternative method of determining the law in dealing with criminal offenders, especially minor theft crimes. This is based on the provision of sanctions in the Criminal Code, which is also strengthened by Supreme Court Regulation Number 2 of 2012, and the new Criminal Code which will be implemented in the coming year. Thus, judges must be cautious in

making judicial decisions. The concept of determining the law through the Sharur Boundary Theory presumably has an appropriate interconnection in deciding cases of petty theft.

On the basis of the aforementioned description, in this scientific work, the main issue to be discussed is how Islamic law contributes to the reform of Indonesian criminal law, especially in the imposition of the crime of theft, by utilizing the Boundary Theory proposed by Sharur.

Methodology

The research method used in this study is normative juridical research using qualitative descriptive analysis. This scientific work is based on a research study of legal materials that systematically form the framework of the norms and principles of law that apply in society. Primary legal material, which is the main source in this study, was obtained from tracing laws and regulations and judicial decisions. In addition, secondary material also supports this research, which includes library materials, both books and journals, related to the study of the main issues in this scientific work, literature in the form of books, journals and other literature materials that discuss and research related to Sharur's Boundary Theory.This study uses the qualitative descriptive research analysis method. Qualitative descriptive analysis is a test on non-numeric data and the interpretation of observations with the aim of finding the meaning and pattern of a relationship (non-numerical examination and interpretation of observations for the purpose of discovering the underlying meaning and pattern of a relationship). This analysis was carried out by first identifying and describing the criminal sanctions for theft in Islamic law and Indonesian National Law. The next step undertaken was an analysis of legal boundaries in Sharur's thinking to determine the punishment that is considered ideal to apply. Upon the completion of the analysis, the researchers carried synthesized the data. In order to begin and harmonize the application of criminal sanctions for theft in accordance with the Boundary Theory developed by Sharur, it is hoped that a thorough study can be achieved (Babbie, 1998).

Discussion

The Sharur Boundary Theory

The background to the construction of Sharur's thought is built on two main ideas: views on the reality of contemporary society and views on the traditions of previous scholars. In relation to the reality of contemporary society, Sharur sees several problems that occur. Among them is first, there is no methodological guidance in thematic scientific discussions on the interpretation of the holy verses of the Qur'an that were revealed to the Prophet Muhammad (PBUH). This is caused by the fear and doubt experienced by Muslims when studying the Qur'an, even though the main requirement in a scientific study is an objective view of something without excessive pretension and sympath. Second, there is the use of past legal precedents to be applied to contemporary issues. Third, there is no utilization and interaction of humanistic philosophy (*al-falsafah al-insānīyah*). This results from the dualism in science, specifically Muslims and non-Muslim. The absence of such interaction has resulted in infertility in Islamic thought.

In addition, Sharur also saw the polarization of society into two groups. First, those who are strictly guided by the literal meaning of tradition, with the assumption that what was suitable for the early generations of Muslims is also suitable for the current generation of people. Second, those who call for secularism and modernity, which reject all Islamic thought including the Qur'an, for example Marxists, Communists, and some Arab Nationalist figures.

These two groups failed to meet the challenges of the problems that are currently prevalent. This failure then gave birth to a third group, to which Sharur belongs, namely those who call back to *al-Tanzīl*, the original text revealed by Allah SWT to the Prophet Muhammad (PBUH) in a new paradigm of understanding (Nadhifuddin, 2018).

The issue of the application of Islamic punishment (*ḥudūd*), although it is contained in the *nas* (al-Qur'an and Hadith), has different opinions regarding its application. According to Sharur, Allah's commands expressed in the Qur'an and Hadith, especially concerning law, contain maximum and minimal limits. The theory of limits consists of a lower limit (*al-ḥadd al-adnā* or minimum) and an upper limit (*al-ḥadd al-aʿlā* or maximum) (Wahab, 2019).

Sharur's *Ḥudūd* Theory has made a major contribution to the development of the methodology for interpreting the Qur'an, especially regarding legal verses. First, with the *ḥudūd* theory, legal verses that have been considered *qaṭʿī al-dalālah* (verses which interpretation is certain, without any other alternative), have the possibility of new interpretations, and Sharur is able to explain methodologically and apply them in his interpretation, through the approach of trigonometry theory in mathematics (*al-mafhūm al-riyāḍī*). Second, with the theory of *ḥudūd, mufassir* is able to maintain the sacredness of the text, without losing his creativity in carrying out creative *ijtihād* to open up possibilities for interpretation that are still in the realm of *ḥudūdullāh* (Kirana et al., 2022).

Sharur divided *ḥudūd* into two parts. First, *al-ḥudūd fī al-ʿibādah* (limitations related to pure ritual worship), in which case there is no field of ijtihad. Things that are *al-syaʿāʾir* (verses that regulate ritual worship) are simply taken for granted, and their understanding has remained from the time of the Prophet until now. For Sharur, the concept of *ijtihad* only applies to legal issues that have been mentioned in the text of the Qur'an, which contains *ḥudūdullāh*. Meanwhile, *ijtihād* does not apply to legal verses that contain *al-syaʿāʾir*, bearing in mind that they are *ta'abbudī* in nature, so doing *ijtihad* in that case is actually *bid'ah*. Thus, matters of a ritual nature are simply taken for granted as doctrine. Likewise, *ijtihad* according to Sharur does not apply to verses that contain moral guidelines, such as lying (*kidhb*), hypocrisy (*nifāq*), pitting one against the other (*namîmah*), and so on. Due to the fact that all of this is morally objectionable and has been forbidden in the Qur'an, so there is no need for *ijtihād* (Kirana et al., 2022).

Second, *al-ḥudūd fī al-aḥkām* (limits in law). In this case, Sharur divides it into six types (Yuhendri, 2019). In its application of the hudud theory offered by Sharur, it uses a mathematical analysis approach (*al-taḥlīl al-riyāḍī*). Genealogically, this theory was developed by the renowned scientist, Isaac Newton, especially regarding the function equation, which is formulated by Y = F (X) if it has only one variable and Y + F (X,Z) if it has two variables or more (Billah, 2019). The division of boundaries in law put forward by Sharur includes (Mustaqim, 2017):

i. First, *ḥālat al-ḥadd al-aʿlā*, (legal provisions that only have an upper boundary), namely where the range of the function equation Y = F (x) is in the form of a downward-facing curved line (closed curve), which only has one maximum turning point, coincides with a straight line and is parallel to the X axis. *Halah hadd al-a`la* only has a maximum limit, so the stipulation of the law may not exceed the maximum limit but may be below it or remain on the maximum line or limit that Allah SWT has determined.

ii. Second, *ḥālat al-ḥadd al-adnā* (legal provisions that only have lower limits). The functional equation in this position has a result area in the form of an open curve (parabola), which has one minimum turning point, located parallel to the X-axis. In this position, a legal decision may be made above the minimum limit specified in the Qur'an or at the minimum limit set but may not exceed the minimum limit.

iii. Third, *ḥālat al-ḥadd al-aʿlā wa al-adnā maʿan* (legal provisions that have upper and lower limits at the same time), where the resulting area is a wave curve that has a maximum and minimum turning point. The two turning points coincide in a straight line parallel to the X axis. This is called a trigonometric function. In this case, the determination of the penalty is carried out between the two limits. In some hudud verses, there are those that have a maximum limit as well as a minimum limit, so that law enforcement can be made between the two limits.

iv. Fourth, *ḥālat al-mustaqīm* (legal provisions whose lower limit and upper limit are at one point, in other words, straight line position) The result area at this position is a straight line parallel to the X axis. In this graph, the value Y = f(X) is constant for all values of X. In other words, the maximum value and minimum value do not exist because the minimum value, maximum value, and the other Y values are the same. Thus, the equation Y=N1 is obtained with a horizontal straight-line graph. In this condition, the hudûd verse does not have a minimum or maximum limit, so there is no alternative result of applying the punishment other than what is stated in the verse. In other words, the law does not change even though times change.

v. Fifth, *ḥālat al-ḥadd al-aʿlā dūna al-mamās bi al-ḥadd al-adnā abadan* are legal provisions that have upper and lower limits, but these two boundaries cannot be touched because touching them means that they have fallen into God's prohibition, namely the maximum limit position without touching the minimum limit line at all. At this position, the resulting area is an open curve with endpoints that tend to approach the Y axis and meet at infinity (*'ala la nihayah*). Meanwhile, the starting point, which lies in the infinity area, will coincide with the X axis..

vi. Sixth, *ḥālat al-ḥadd al-aʿlā mujab mughlaq lā yajūz tajāwuzuhu wa al-ḥadd al-adnā* the cross of *yajūz tajāwuzuhu*, is a legal provision that has an upper and lower limit, where the upper limit is positive (+) or cannot be exceeded while the lower limit is negative (-) or may be exceeded. Specifically, the position of the maximum positive limit that must not be exceeded and the minimum negative limit that may be exceeded. The result area at this position is a wave curve with the maximum turning point in the positive area and the minimum turning point in the negative area. Both coincide with a straight line parallel to the X axis. (Sofyan and Suleman, 2020)

In simple terms, the *ijtihad* method conceptually and applicatively in *hudud* theory (limit theory), is a new paradigm that provides dynamic, creative, and dialectical space where the important thing is that legal products are still in the area between *al-ḥadd al-adnā* limits (minimum limits) and *al-ḥadd al-aʿlā* (maximum limits) and do not violate hududullah.

Conceptually, Sharur's *Ḥudūd* Theory is completely different from what conventional Islamic scholars have so far understood. If conventional *Ḥudūd* theory tends to be static, rigid, textual, and only concerns legal threats (*al-ʿuqūbāt*), then this is not the case with Sharur's *Ḥudūd* Theory that tends to be dynamic-contextual and does not only concern legal threats (*al-`uqubat*) (Kirana et al., 2022).

The Importance of Legal Harmonization

Etymologically, the term harmonization comes from the basic word *"harmony"*, which refers to a process that originates from an effort to lead to or realize a system of harmony. Gandhi draws elements of the formulation of the notion of harmonization from the explanation in the Collins Cobuild Dictionary and Van Dale Groot Woordenboek, namely the existence of things that are proportionally contradictory in order to form an interesting whole, as part of that one system, or society, and create an atmosphere of friendship and peace.

Starting from the elements in the formulation above, it can be concluded that the meaning of harmonization is both in its effort and in its process, defined as an effort or process that intends to overcome differences, contradictions, and irregularities. Efforts or processes to realize harmony, suitability, harmony, fit, and balance between various factors in such a way that these factors produce unity or form a noble whole as part of a system (Sulistyawan, 2019).

Systematic steps to harmonization of national law are based on the Pancasila paradigm and the 1945 Constitution of the Republic of Indonesia, which gave birth to a constitutional system with two fundamental principles, namely the principle of democracy and the principle of the rule of law, which is idealized to create a national legal system with three components, namely legal substance, legal structure, and institutional and legal culture. On the one hand, these systematic steps can be translated into the harmonization of laws and regulations and, on the other hand, implemented in the context of law enforcement.

Through the harmonization of laws and regulations, a legal system will be formed that accommodates demands for legal certainty and the realization of justice. Likewise, in terms of law enforcement, harmonization of the law will be able to avoid overlapping between judicial bodies that exercise judicial power and government agencies that are authorized to carry out judicial functions according to statutory regulations (Slamet, 2004).

Rudolf Stammler put forward the concept that the principles of just law include harmonization between the aims, objectives, and interests of individuals and the aims, objectives, and interests of the public (a just law aims at harmonizing individual purposes with those of society) (Ridwan & Sudrajat, 2020). According to Radbruch, the main task of law is to achieve justice because the three interests of living together are the three basic values of law, namely justice, benefit, and legal certainty. According to John Rawis, justice is a value that embodies a balance between parts of a unit, between personal goals and common goals.

To improve legal unity, legal certainty, justice, comparability, and the usefulness and clarity of law without obscuring or undermining legal pluralism (Ridwan & Sudrajat, 2020), L.M. Ghandi defined legal harmonization as changes to laws, executive orders, judicial decisions, the legal system, and fundamental legal principles.

Through the harmonization of the law, a legal system will be formed that accommodates demands for legal certainty and the realization of justice. Likewise, in terms of law enforcement, harmonization of the law will be able to avoid overlap between judicial bodies that exercise judicial power and government agencies that are authorized to carry out judicial functions according to statutory regulations. The basis and orientation in every step of harmonization of law is the goal of harmonization, the values, and principles of law, as well as the goal of the law itself, namely harmony between justice, legal certainty, and conformity to goals. In the end, the implementation of law enforcement needs to pay attention to the actualization of the values contained in the constitution and the principles of good law enforcement (Arliman, 2015).

Sanctions for the Criminal Act of Minor Theft in Indonesian National Law

In the Indonesian legal system, the crime of theft is regulated in Chapter XXII, Articles 362 to 367 of the Criminal Code. In Article 362 of the Criminal Code, it is explained that what is meant by theft is,

> "Whoever takes an object that partly or wholly belongs to another person with the intention to control the object unlawfully, because he is guilty of committing theft, shall be punished with a maximum imprisonment of five years or a maximum fine of nine hundred rupiahs".

Sanctions for the Criminal Act of Minor Theft based on the Criminal Code

The provisions for light theft are regulated in the provisions of Article 364 of the Criminal Code which determines the actions described in Article 362:

> "Anyone who takes something, wholly or partly belonging to another person, with the intention of illegally possessing it, is threatened with theft, with a maximum imprisonment of five years or a maximum fine of nine hundred rupiahs".

Article 363 point 4 states the law on *"Theft committed by two or more persons"*, whereas Article 363 point 5 is related to *"[t]heft to enter the place of committing a crime, or to arrive at goods taken, carried out by destroying, cutting or climbing, or by using fake keys, fake orders or fake official clothes".* If these offences are not done in a house or closed yard where there is a house and if the price of the stolen goods is not more than two hundred fifty thousand rupiahs, the the perpetrator shall be punished for light theft with a maximum imprisonment of three months or a maximum fine of IDR900,000.

Thus, there are several possibilities for minor theft. First, ordinary theft as regulated in Article 362, plus a mitigating element, namely the value of the object stolen, is not more than IDR250. Second, the item being stolen has a maximum value of IDR250, and theft is secondarily committed by two or more people working together. Third, theft committed by entering the place where the crime was committed by means

of: dismantling, damaging, climbing, using fake keys, fake orders, or fake official clothes, plus the value of the stolen objects is not more than IDR250.

Provisions related to the amount of fines imposed in Article 364 relating to the crime of petty theft were amended through Supreme Court Regulation Number 2 of 2012 because the values in the article were considered to no longer be relevant; therefore, Article 364 of the Criminal Code is included as one of the Articles of Crime. The fines referred to in the article, namely the provision *"two hundred and fifty rupiahs" were changed to "two million five hundred thousand rupiahs"*. Regarding theft, in accepting the delegation of cases from the Public Prosecutor, the Chief Justice is also obliged to pay attention to the value of the goods or money that is the object of the case. If the value of the goods or money is not more than IDR2,500,000, the Head of the Court shall immediately appoint a single Judge to examine, hear, and decide on the case in accordance with the regulated in Articles 205 to 210 of the Criminal Procedure Code.

Sanctions for the Crime of Minor Theft based on Law Number 1 of 2023 Concerning the Criminal Code

On December 6, 2022, the House of Representatives and the Government approved the draft Criminal Code to become law. Then, it was passed into Law Number 1 of 2023 concerning the Criminal Code, which was stipulated by the President on January 2, 2023. This law may thereupon be referred to as the Criminal Code in accordance with the provisions of Article 623. However, this law will only come into effect after three years from the date of promulgation in accordance with the provisions in Article 624, which took place in January 2, 2023, which means the new Criminal Code will take effect on January 2, 2026.

In connection with the provisions for the crime of theft, it is regulated in Article 476, which states that,

> "Anyone who takes an item that partly or wholly belongs to another person, with the intention of unlawfully possessing it, is convicted of theft, with a maximum imprisonment of five years or a fine of category V at most".

The provisions on Misdemeanor Theft in Law Number 1 of 2023 are contained in Article 478 which stipulates that if the crime as referred to in Article 476:

> "Any person who takes an item which is partly or wholly owned by another person, with the intention of being illegally owned, shall be punished for theft, with a maximum imprisonment of five years or a maximum fine of category V)".

Article 477 paragraphs (1)(f) *("Theft by breaking, dismantling, cutting, breaking, climbing, using fake keys, using fake orders, or wearing false official clothes, to enter the place of committing a crime or to the goods taken"*), and (g) (*"Theft jointly and in partnership"*) are not carried out in a closed house or yard where there is a house, and the price of the goods stolen not more than IDR500,000 shall be punished for petty theft, with a maximum fine of category II i.e. IDR10,000,000 in accordance with Article 79.

Application of Criminal Sanctions Against the Crime of Theft as a Misdemeanor Crime in Indonesia

The court as a legal institution, in carrying out its authority to pass court decisions, must pay attention to the principles of legal certainty, justice, and expediency. The authority of a judge in deciding a case gives the judge a big responsibility to ensure that his decision will not undermine the authority and credibility of the judiciary in the eyes of society. One of the judge's decisions that has received more attention from the community is related to minor crimes. In practice, the principle of justice still cannot be realized in court decisions, especially those related to minor theft crimes.

One of the court decisions related to petty theft that needs to be examined more deeply in relation to the criminal sanctions imposed is Decision Number: 590/Pid.B/2019/PN.Sim regarding the case of rubber latex theft. The defendant was charged with the second alternative charge, namely Article 107(d), of Law Number 39 of 2014 concerning Plantations. This decision stated that the Defendant had committed a crime because he took 1.9 kilograms of rubber latex without permission. As penalty for his actions, the Judge ordered him to be criminally sanctioned for two months and four days and a pay a fee of IDR5,000.

In principle, the theft of rubber latex by the defendant met the criteria for the crime of theft according to Article 362 of the Criminal Code. The legal element, which is the violation of the law had been fulfilled. The element of intent to take other people's goods was evident when the defendant deliberately and without permission took 1.9 kilograms of rubber latex. In this case, it had been proven that the defendant was not the party who had the right to take the latex because he was not authorized to do so.

If viewed in terms of the amount or value of goods taken by the defendant, namely the monetary value of 1.9 kilograms of rubber latex, which is estimated at IDR17,480,000 Seventeen Million Four Hundred and Eighty Thousand. it can be said that this amount is a much smaller amount than the minimum amount according to Article 364 of the Criminal Code Regarding Minor Theft and Supreme Court Regulation Number 2 of 2012, which is IDR2,500,000. Looking at it from that perspective, the rubber latex theft case should not be an ordinary theft case but should be included in the category of minor theft crimes.

If an analysis is carried out, the defendant should rightfully be charged with Article 364 of the Criminal Code concerning petty theft. The basis for the use of this article is related to the place of occurrence of the case and the value of the stolen goods. The amount of stolen goods is also estimated at IDR17,480,000 Seventeen Million Four Hundred and Eighty Thousand, much less than IDR2,500,000, which is the maximum limit for petty theft. Additionally, if seen from the point of view of the place where the incident occurred in the plantation area, it occurred outside the house or in a closed yard,

There is also a Court Decision Number: 102/Pid.B/2015/PN.Nga related to theft of a rooster, which was jointly carried out by two defendants. Based on the indictments prepared by the prosecutor, the panel of Judges applied Article 363 paragraph (1) 4 of the Criminal Code in making its decision. The article states that the theft is punishable by imprisonment for a maximum of seven years because it was committed by two people. In principle, the theft of a rooster committed by Defendant I and Defendant II met the criteria as a criminal act of theft according to Article 363 paragraph (1) 4 of the Criminal Code. The element of intent to take other people's belongings had been fulfilled when Defendant I and Defendant II, in partnership, deliberately and without permission, took a rooster that was in the victim's yard.

As a result of the actions committed by Defendant I and Defendant II, the victim suffered a loss estimated at IDR250,000. When viewed in terms of the amount or magnitude of the losses suffered, namely the monetary value of one rooster taken by Defendant I and Defendant II, it can be said that this amount is much lesser than the minimum amount according to Article 364 of the Criminal Code concerning Minor Theft and Supreme Court Regulation Number 2 of 2012 i.e. IDR2,500,000. When viewed from that perspective, the case of stealing a rooster should not have been a case of theft committed by two people as charged by the court according to the provisions of Article 363 paragraph (1) 4 of the Indonesian Criminal Code, but rather included in the category of petty theft.

Contribution of Islamic Law to Reforming Indonesian Criminal Law

In constructing forms of theft, in principle, the formulation put forward by Sharur is no different from previous scholars. Sharur's thoughts are more about enforcing sanctions, meaning that according to Sharur, the punishment of cutting off a hand is the maximum punishment. The philosophical meaning of Sharur's thought is a form of criticism of the punishment of cutting off the hand for a crime of theft in Islamic law. When viewed in terms of sanctions, it is divided into two categories: theft, which is punishable by *hadd,* and theft, which is punishable by *ta'zīr*.

First, *a* theft that is subject to a penalty is a theft in which the conditions for the imposition of a penalty has been entirely fulfilled. Theft, which is punishable by *hadd* is divided into two categories: petty theft (*sarīqah sughrā*) and major theft (s*arīqah kubrā*). Petty theft is taking other people's property openly or by force. Between petty and major theft, there is a difference in the element of theft. In petty theft, there are two conditions that must be met: taking property without the owner's knowledge and taking it without the owner's consent. While the elements of major theft are the involvement of blatant or violent acts, even if no property is taken.

Second, theft that is subject to a *ta'zīr* penalty is a theft where the conditions for impose are incomplete, so this theft is not subject to a *had* penalty but *ta'zir* punishment. The *ta'zir* penalty is also divided into two categories, namely: one, theft that carries a *had* penalty but does not meet the requirements to be able to carry out *had* because there is doubt, (for example, taking the child's own property or joint property).

The other type is to take property with the owner's knowledge, but not based on the owner's willingness, or use force, for example, someone taking a watch in the owner's hand with the owner's knowledge and taking it away; another example is embezzling deposited money (Moch. As'at Sa, 2012).

In the Qur'an, *al-Māʾidah* verse 38, according to Sharur, Allah gives the maximum or highest punishment for thieves by cutting off their hands (*al-'uqubah al-quswa*). Thus, a judge may pass a sentence under the penalty of cutting off a hand, or decide to pardon the perpetrator. According to Sharur, the punishment for theft in to this verse is a *hudūdīyah* punishment, meaning that the punishment has flexible legal boundaries and many forms of punishment. It is not *haddīyah* in nature or only has one form of punishment (Moch. As'at Sa, 2012). Notably, it is forbidden to exceed the limit of cutting hands as it is the highest punishment for thieves. This means that alternative punishments that are lesser can be applied depending on the circumstances (Juliansyahzen, 2022).

This is in line with the issuance of Supreme Court Regulation Number 2 of 2012, which provides a wider discretion for judges in deciding cases. Because the maximum limit set is higher than the Criminal Code, decisions in cases of theft, especially light theft, will be better adjudicated in accordance with the losses incurred as long as they do not exceed the maximum limit regulated by criminal provisions. The implementation of this legal instrument is expected to be able to provide justice to suspects or defendants involved in the misdemeanour cases so that they do not have to wait for the trial to drag on to the cassation stage. This Supreme Court Regulation is also expected to facilitate judges so that they are able to more quickly provide a sense of justice for the community, especially for the settlement of Tipiring in accordance with the weight of the crime (Madari, 2013).

Conclusion

It appears from the explanation above that the issuance of Supreme Court Regulation Number 2 of 2012 is a breakthrough in the Indonesian criminal justice system. The Supreme Court Regulation provides for a maximum limit for light theft at IDR2,500,000, so any theft below this nominal amount need not be detained. However, regrettably, judges continue to sentence people to prison for theft in a number of cases even though the value of the stolen goods is relatively low (under IDR2,500,000). In this case, it is obvious that these judges do not understand the intent of Supreme Court Regulation Number 2 of 2012 in the context of encouraging fair decisions. Moreover, there is an opportunity to devise a better application of theft punishment based on Sharur's Boundary Theory. The urgency of Sharur's Boundary Theory in criminal law reform is that, criminal sanctions for theft can be decided more justly because five years in prison is only the maximum penalty, hence various cases of theft that are of relatively small value, or those that occur due to various *"compelling"* conditions, can be given a more proportional punishment below the maximum period of imprisonment. Under Sharur's Boundary Theory approach, judges will be able to exercise a more flexible spectrum of decision making. Again, from the perspective of Islamic law reform globally, it is clearly apparent that Sharur's Boundary Theory can form introductory steps to prove that *ijtihād* in the area of Islamic criminal law is possible to implemented, since it used to be assumed that Islamic criminal matters are very rigid in nature. This study recommends the need to integrate the understanding of Sharur's Boundary Theory into legal discovery by judges so that the quality of justice in judges' decisions can be upheld and enhanced.

References

Arliman, L. (2015). *Penegakan hukum dan kesadaran masyarakat*. Deepublish.

Babbie, E. R. (1998). *The practice of social research*. Wadsworth Publishing Company.

Baried, R. R. (2017). Hubungan penerapan Peraturan Mahkamah Agung Republik Indonesia Nomor 2 Tahun 2012 dengan keadilan bagi terdakwa (kajian terhadap putusan pengadilan mengenai perkara pencurian ringan). *Jurnal Yuridis, 4*(1), 84-97.

Billah, M. (2019). Pendekatan bahasa dalam teori Muhammad Syahrur. *TA'LIMUNA, 9*(1), 71-85.

Juliansyahzen, M. I. (2022). Rekonstruksi nalar hukum Islam kontemporer Muhammad Shahrur dan kontekstualisasinya. *Al-Mawarid Jurnal Syariah dan Hukum (JSYH), 4*(1), 57–74.

Madari, M. S. K. (2013). Penyesuaian batasan tindak pidana ringan dan jumlah denda dalam KUHP terhadap perkara tindak pidana pencurian (Analisis Peraturan Mahkamah Agung Nomor 2 Tahun 2012 tentang penyesuaian tindak pidana ringan dan jumlah denda dalam KUHP). *Jurnal Cita Hukum, 1*(2), 235-250.

Moch. As'at Sa. (2012). Teori Batas Hukuman Terhadap Tindak Pidana Pencurian Dalam Pemikiran Muhammad Syahrur. *IN RIGHT: Jurnal Agama dan Hak Asasi Manusia, 1*(2), 495-516.

Mustaqim, A. (2017). Teori hudud Muhammad Syahrur dan kontribusinya dalam penafsiran Alquran. *Al-Quds: Jurnal Studi Alquran dan Hadis, 1*(1), 1-26.

Nadhifuddin, A. (2018). Tindak pidana pencurian menurut Muhammad Syahrur dan relevansinya di era modern. *Al-Jinayah: Jurnal Hukum Pidana Islam, 4*(2), 268-300.

Ridwan, J., & Sudrajat, A. S. (2020). *Hukum administrasi negara dan kebijakan layanan publik*. Penerbit Nuansa Cendikia.

Slamet, K. G. (2004). Harmonisasi hukum dalam perspektif perundang-undangan. *Jurnal Hukum, 11*(27), 81-96.

Sofyan, & Suleman, Z. (2020). *Ushul fiqh: Dari nalar kreatif menuju nalar progresif*. Inteligensia Media.

Sulistyawan, A. Y. (2019). Urgensi harmonisasi hukum nasional terhadap perkembangan hukum global akibat globalisasi. *Jurnal Hukum Progresif, 7*(2), 171-181.

Vyver, J. D. van der. (2010). Prosecuting terrorism in international tribunals. *Emory International Law Review, 24*(2), 527-548.

Wahab, A. J. (2019). *Islam radikal dan moderat: Diskursus dan kontestasi varian Islam Indonesia*. Jakarta: PT Elex Media Komputindo.

Yuhendri, E. (2019). Muhammad Syahrur: Theory of limit (teori batas). *Tajdidukasi: Jurnal Penelitian & Kajian Pendidikan Islam, 9*(1), 29-34.

Zuyyina, C. K., Aswadi, & Muchasan, A. (2022). Kontribusi Pemikiran Muhammad Syahrur Tentang Teori Hudud Dalam Pembaruan Pemikiran Islam. *Salimiya: Jurnal Studi Ilmu Keagamaan Islam, 3*(4), 73-85.