

Legal Analysis of The Criminal Act of Theft with Aggregation: Assessing Social Justice in Law Enforcement (Case Study of Case Number 1454/Pid.B/2024/Pn Sby)

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Abstract. *The Unitary State of the Republic of Indonesia (NKRI) is a state of law. Based on Article 1 paragraph 3 of the 1945 Constitution, it means that Indonesia is a state that is not based on power (maachstaat). All aspects of society, statehood, and government must be regulated by law. To realize a state of law, legal instruments are needed to regulate all aspects of people's lives to maintain justice and balance. Pancasila and the 1945 Constitution as a philosophical basis are used in national and state life, not only in terms of legislation, but also in all aspects of life. The approach method used in this study is the normative legal approach method. In the normative legal approach, legal research is carried out by examining library materials or secondary data as basic materials for research by conducting searches for regulations and literature related to the problems to be studied. The judge in this case applied a penal policy that prioritized sensitivity to the defendant's condition, including his socio-economic background, the losses that had been recovered, and a cooperative attitude during the legal process. This approach reflects the restorative and humanistic spirit that is also the spirit of national criminal law reform according to the thoughts of figures such as Muladi and Barda Nawawi Arief. Within this framework, Muladi emphasized that the criminal justice system should "not only be repressive and retributive, but must also have a rehabilitative and reintegrative dimension." Meanwhile, Barda Nawawi Arief is of the opinion that the Indonesian criminal justice system must take into account the values of justice that exist in society, because "criminal law does not only reflect legalistic values, but also developing moral and social values." This decision shows a progressive trend in criminal justice practices, emphasizing the importance of the function of law as a tool of social engineering that is adaptive to the dynamics of justice and morals in society. Thus, punishment does not merely function as retribution, but as a means of guidance, rehabilitation, and prevention.*

Keywords: *Legal Analysis; Law Enforcement; Theft Criminal Act.*

1. Introduction

The Unitary State of the Republic of Indonesia (NKRI) is a state of law. Based on Article 1 paragraph 3 of the 1945 Constitution, it means that Indonesia is a state that is not based on power (*maachstaat*). All aspects of society, statehood, and government must be regulated by law.¹ To realize a state of law, legal instruments are needed to regulate all aspects of people's lives to maintain justice and balance. Pancasila and the 1945 Constitution as a philosophical basis are used in national and state life, not only in terms of legislation, but also in all aspects of life.²

According to JCT Simorangkir and Woerjono Sastropranoto, law is a mandatory rule that determines human actions in society and is made by an official institution that is responsible for violations of the rules, which causes actions, such as giving punishment.³

The law is mandatory, so every society must obey the law because violations will be subject to sanctions. There are laws in force in Indonesia, including criminal law. According to Sudarsono, criminal law is a law that regulates crimes and acts that violate the public interest and these acts are threatened with criminal sanctions that cause suffering to him. Meanwhile, Professor Moeljatno explained that criminal law is one of the laws that apply in a country to:⁴

1. Determining which actions may not be carried out and are prohibited, then accompanied by threats or sanctions in the form of certain criminal penalties for anyone who violates the prohibition.
2. Determining when and in what cases those who have violated these prohibitions can be subject to or sentenced to the penalties that have been threatened.
3. Determining how criminal sanctions can be implemented if someone is suspected of violating the prohibition.

One of the phenomena in social life that often occurs in society today is aggravated theft. Criminal acts are acts that are strictly prohibited by law. Therefore, to protect society and perpetrators of such crimes can be punished based on applicable legal procedures. The crime of aggravated theft has caused significant negative consequences in the lives of our society, various methods used by law enforcement officers to eradicate it as well as appeals and appeals from religious leaders to the community so that it is not a crime of theft. Most thieves will do whatever they want to meet their needs for money or stolen goods.

The life of society is increasingly developing and always followed by changes, not only causing positive impacts but also causing negative impacts that often occur in society. In addition, society has difficulty in adapting, causing many conflicts and various problems. As a result, society behaves deviantly by committing various crimes for the benefit and satisfaction of itself without regard to the suffering of others.

¹Muntoha, *The Legal State of Indonesia after the Amendment to the 1945 Constitution*, Kaukaba Dipantara, Yogyakarta, 2013, pp. 1-2.

²Achmad Irwan Hamzani, *Initiating Indonesia as a Legal State that Makes Its People Happy*, Yustisia Journal, Edition 90, (September-December), 2014, p. 141

³CST Kansil, *Introduction to Indonesian Legal Science*, Rineka Cipta, Jakarta, 2011, pp. 33-34.

⁴Moeljatno, *Principles of Criminal Law*, Rineka Cipta, Jakarta, 2008, p. 1.

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Criminal acts are acts that violate the law and cannot be erased. It is still difficult for a criminal to defend himself by declaring himself not guilty by society because of the social stigma that the perpetrator will do it. repeat your actions and always harm others. Print and electronic media present certain actions that violate the law and disturb society, including theft.⁵

The impact of the current economic crisis is increasing, jobs are very scarce so that not everyone has them, such as jobs, happiness is the same, as a result unemployment is spread everywhere. People with low levels of happiness tend to ignore rules and regulations. To overcome this situation and meet needs, people tend to use all means to meet needs such as theft.

The crime of theft is regulated in Chapter 22 of Law Number 1 of 1946, Book 2 of the Criminal Code, Articles 362 to 367. Five types of theft are regulated, namely:

1. Ordinary theft (Article 362 of the Criminal Code);
2. Aggravated theft (Article 363 of the Criminal Code);
3. Petty theft (Article 364 of the Criminal Code);
4. Theft with violence (Article 365 of the Criminal Code);
5. Family Theft (Article 367 of the Criminal Code).

The classification of theft according to the Criminal Code is intended to facilitate categorization of criminal acts committed by an individual or group of people.

According to PAF Lamintang, the crime of aggravated theft (*gequalificeerde diefstal*) is theft which has elements of the act of theft in its basic form, which because it is added to by other elements, means that the threat of punishment becomes more severe.⁶

Theft as regulated in Article 363 of the Criminal Code includes "special theft", meaning theft in a certain way or under certain circumstances, so that it is more serious.⁷

The word theft in the formulation of the crime of theft with qualifications as regulated in Article 363 of the Criminal Code has the same meaning as the word theft as theft in its principal form. Aggravated Theft or Special Theft or Theft with Qualifications (*gequalificeerde diefstal*) regulated in Article 363 of the Criminal Code, is ordinary theft which in its implementation is accompanied by certain aggravating circumstances and has a risk of a more serious crime compared to ordinary theft.⁸

The crime of theft is regulated in Article 363 and Article 365 also means Qualification theft. Wirjono Prodjodikoro defines it as "special theft". Because theft is done in a certain way. Which is considered more appropriate to be discussed by R. Soesilo. His book (Criminal Code), namely "Aggravated Theft" for this reason stealing can be punished with a heavier sentence.⁹

⁵Andi Matalata, Compensation for Victims, (In JE Sahetapy), Victimology, An Anthology, Pustaka Sinar Harapan, Jakarta, 1987, p. 35.

⁶PAF Lamintang and Djisman Samosir, Special Crimes, (Bandung: CV. Nuansa Aulia, 2010), pp. 67-68.

⁷Sudrajat Bassar. 1986. Certain Criminal Acts in the Criminal Code. Second Printing. Bandung: Remadja Karya.

⁸Wirjono Prodjodikoro, Certain Criminal Acts in Indonesia, (Bandung, Eresco), 1986, p. 19.

⁹Hediati Koeswadji Hermien, Property Crimes, Principles, Special Issues and Problems, First Edition, Sinar Wijaya Surabaya: Law, 1984, p. 3.

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The crime of theft as regulated in CHAPTER XXIV of the New Criminal Code:

Article 477

(1) Anyone who commits:

- a. theft of religious sacred objects;
- b. theft of antiquities;
- c. theft of livestock or goods which are a person's main source of livelihood or income;
- d. theft during fire, explosion, natural disaster, shipwreck, stranding, aircraft accident, train accident, road traffic accident, riot, rebellion or war;
- e. theft at night in a house or in an enclosed yard where the house is located, committed by a person whose presence there is unknown or not wanted by the person entitled to do so;
- f. theft by means of damaging, dismantling, cutting, breaking, climbing, using fake keys, using fake orders, or wearing fake official clothing, to enter the place of committing the crime or to get to the goods taken; or
- g. joint and conspiratorial theft.

(2) If the act as referred to in paragraph (1) letter e is accompanied by one of the methods as referred to in paragraph (1) letters f and g, the punishment shall be a maximum prison sentence of 9 (nine) years.¹⁰

The types of theft crimes mentioned above which are called theft crimes in the main form are ordinary theft crimes (Article 362 of the Criminal Code). While other theft crimes are ordinary thefts accompanied by special circumstances. Theft crimes accompanied by special circumstances are called aggravated theft crimes.¹¹ In the criminal acts that the author researched, there were "aggravating" elements as regulated in Article 363 paragraph (1) 3 of the Criminal Code, namely:

"Theft at night in a house or an enclosed yard where a house is located, committed by someone whose presence there is unknown or not desired by the person entitled to do so."

The crime of theft is one of the crimes regulated by criminal law in Indonesia. Specifically, theft is defined in Article 362 of the Criminal Code (KUHP). According to this article, theft is the act of taking someone else's property with the intention of breaking the law. In the context of Indonesian criminal law, theft can be classified into several types, one of which is the crime of aggravated theft. This crime is regulated in Article 363 of the Criminal Code. Aggravated theft occurs when the perpetrator commits theft in certain ways that are considered more serious or dangerous.

Even though it has been clearly regulated in the Criminal Code along with the sanctions that will be imposed on the perpetrators, it does not deter the Indonesian people and prevent them from doing it. The proof is that this crime still often occurs, whether reported to the

¹⁰DPR-RI, New Draft Law, New Criminal Code FINAL, 2022.

¹¹Kusfitono, Umar Ma'ruf, Sri Kusriyah, Implementation of Constitutional Court Decision Number 130/PUU-XIII/2015 Regarding the Investigation Process of Aggravated Theft at the Kendal Police Criminal Investigation Unit, Khaira Ummah Law Journal, Vol. 12. No. 4 December, 2020, p. 37

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police or not. Many of these theft crimes are not fully revealed and it is not uncommon for this crime to not reveal who the perpetrator is.¹²

This research refers to the crime of theft with aggravated case number 1454/Pid.B/2024/PN Sby. That the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI Binti MURYADI on Friday, May 31, 2024 at around 20:00 WIB, or at least at some time in May 2024, or at least in 2024, at Matahari Dept. Store Tunjungan Plaza I Lt. 1 Jl. Basuki Rahmat Surabaya, or at least in a place that is still included in the jurisdiction of the Surabaya District Court, taking something, which is wholly or partly owned by another person, with the intention of possessing it unlawfully, carried out by two or more people in collusion, who in order to enter the place of committing the crime, or to get to the goods taken, did so by damaging, cutting or climbing, or by using a fake key, a fake order or fake official clothing, the actions were carried out by the Defendants in the following ways:

That at the time and place as mentioned above, the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI Binti MURYADI already had the intention to take goods unlawfully, then went to the Miniso Counter to buy food and household necessities, then went to Matahari Dept. Store through the 4th floor then to the Matahari store then down to the 3rd floor, after that the Defendant EKALIA SETYA ADI Bin EKO SULISTYO pretended to choose children's and adult women's clothes that were on the clothes display and then taken into the pass room to be tried on by the Defendant VIVI AYU WIDYAWATI Binti MURYADI, after that the Defendant EKALIA SETYA ADI Bin EKO SULISTYO took out a small cutting pliers then the Defendant EKALIA SETYA ADI Bin EKO SULISTYO cut the automatic sensor device on the clothes, then the Defendant VIVI AYU WIDYAWATI Binti MURYADI held the red bag and put it in the bag, after finishing putting the clothes in the bag, the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI Binti MURYADI went to the fitting room and some of the automatic sensor devices were placed on the glass of the pass room by The defendant EKALIA SETYA ADI Bin EKO SULISTYO and the rest were thrown in the trash near the Matahari Department Store.

That then the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI Binti MURYADI went back up to the men's area and the Defendant EKALIA SETYA ADI Bin EKO SULISTYO took an adult male shirt and took it to the pass room to try on, then the Defendant EKALIA SETYA ADI Bin EKO SULISTYO cut the automatic sensor device using pliers after that the clothes were put into a red cloth bag held by the Defendant VIVI AYU WIDYAWATI Binti MURYADI, then the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI

Binti MURYADI came out of the pass room while throwing the matc sensor device into the trash and went down the escalator to the 1st floor, but when she was in front of the Matahan Dept. Store It.l door, she was successfully secured by security officers after a search was carried out on the Defendant EKALIA SETYA ADI Bin EKO SULISTYO and the Defendant VIVI AYU WIDYAWATI Binti MURYADI, the items that had been taken were found, namely:

¹²Rezna Fitriawan, R. Sugiharto, The Role of the Criminal Investigation Unit in Revealing Aggravated Theft in the Jurisdiction of the Demak Police Resort, I Unissula Student Scientific Constellation (KIMU) 5, Journal of Sultan Agung Islamic University Semarang, March 23, 2021, p. 2

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- 1 (one) pair of adult men's shorts in green with the Nevada brand
- 1 (one) pcs of Minnie children's jacket in pink with Disney brand
- 1 (one) pcs purple children's dress with Little M brand
- 1 (one) pcs of children's dress in white - pitch with the My Melodi brand
- 1 (one) pcs of children's floral patterned trousers with the Little M brand
- 1 (one) pair of cream colored children's trousers with the Little M brand
- 1 (one) pcs adult women's dress in cream color with the Details brand
- 1 (one) pcs cream colored adult men's shirt with Nevada brand
- 1 (one) pcs of white and blue children's t-shirt with Nevada brand
- 1 (one) pcs of cream color adult women's clothing with the Conexion brand

That as a result of the actions of the Defendants, Matahari Dept. Store Tunjungan Plaza I suffered material losses of approximately Rp. 2,159,900,- (two million one hundred fifty nine thousand nine hundred rupiah) or at least more than Rp. 250,- (two hundred and fifty rupiah);

The Defendant's actions violate the provisions as regulated and are subject to criminal penalties in Article 363 paragraph (1) 4, 5 of the Criminal Code;

Based on the explanation that has been presented previously, the phenomenon of the crime of theft attracts the author's attention to conduct a more in-depth study. This study aims to analyze the Crime of Theft through a Thesis entitled "Legal Analysis of the Crime of Aggravated Theft: Assessing Social Justice in Law Enforcement (Case Study of Case Number 1454/Pid.B/2024/PN Sby)"

2. Research Methods

The approach method used in this study is the normative legal approach method. In the normative legal approach, legal research is carried out by examining library materials or secondary data as basic materials for research by conducting searches for regulations and literature related to the problems to be studied.¹³

3. Results and Discussion

3.1. Implementation of Criminal Sanctions Regarding the Crime of Aggravated Theft (Case Study of Case Number 1454/Pid.B/2024/PN Sby);

The crime of aggravated theft is a form of crime against property which is regulated in Article 363 paragraph (1) 4th and 5th of the Criminal Code (KUHP). This provision provides aggravation for theft which is carried out in special ways, such as at night, by two or more people in league, or by damaging, climbing, or using fake keys.¹⁴

¹³Soerjono Soekanto & Sri Mamudji, Normative Legal Research (A Brief Review), Rajawali Pers, Depok, 2019, pp. 13-14.

¹⁴R. Soesilo, Criminal Code (KUHP) and its Complete Commentaries Article by Article (Jakarta: Politeia, 1996).

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In case number 1454/Pid.B/2024/PN Sby, Defendant I on behalf of Ekalia Setya Adi and Defendant II on behalf of Vivi Ayu Widyawati were charged with violating the provisions of Article 363 paragraph (1) 4th and 5th of the Criminal Code. The crime occurred on Friday, May 31, 2024 at around 20.00 WIB at Matahari Department Store Tunjungan Plaza I Surabaya. Based on the trial facts, the two defendants were proven to have committed theft together without permission from the owner of the goods, and carried out in a public space that received legal protection.¹⁵

The stolen items were children's and adult clothing with a total loss of Rp2,159,900.00. The defendants were caught red-handed by security officers when they tried to take the items out without paying. Physical evidence and witness statements strengthen the fulfillment of the elements of an unlawful act committed in collusion¹⁶.

The Panel of Judges stated that all elements of Article 363 paragraph (1) points 4 and 5 of the Criminal Code had been fulfilled, namely:

1. The element of "whoever", namely the defendants as legal subjects;
2. The element of "taking another person's property with the intention of possessing it unlawfully", which is proven by possession of the goods without permission;
3. The aggravating element is that it was carried out by two people in collaboration in a protected public place.¹⁷

In making a verdict, the judge considered several mitigating factors, such as polite behavior during the trial, admission of guilt, and absence of previous legal history. This reflects a substantive justice approach that does not only emphasize repressive aspects, but also corrective and preventive aspects.¹⁸

The judge then sentenced each defendant to 10 months in prison, lighter than the Public Prosecutor's demand of three years in prison. This decision is in accordance with the principle of ultimum remedium, which positions criminal punishment as a last resort after considering other more proportional sanctions.¹⁹

The application of criminal penalties in this case shows that the court does not merely apply norms rigidly, but rather considers the value of social justice. The judge's considerations based on the principle of proportionality show that although the perpetrator's actions are classified as aggravated theft, the value of the loss is relatively light and the perpetrator has never been convicted before. Therefore, a sentence of 10 months is considered sufficient to provide a deterrent effect and provide an opportunity for the perpetrator to improve himself.²⁰

In addition, the judge also applies the principle of individualization of criminal law, namely adjusting criminal sanctions to the personal conditions of the perpetrator. The defendants' cooperative attitude during the trial, admission of guilt, and remorse are the basis for giving lighter sentences. This reflects the application of substantive justice, where the sociological

¹⁵Decision of the Surabaya District Court Number 1454/Pid.B/2024/PN Sby.

¹⁶Ibid

¹⁷Ibid

¹⁸Muladi & Barda Nawawi Arief, *Criminal Theories and Policies* (Bandung: Alumni, 2010).

¹⁹Andi Hamzah, *Principles of Criminal Law* (Jakarta: Rineka Cipta, 2005).

²⁰Romli Atmasmita, *Legal Reform, Human Rights and Law Enforcement* (Bandung: Mandar Maju, 2001).

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and psychological aspects of the perpetrator are also considered in the sentencing process.²¹

This decision also shows that judges are not absolutely bound by the prosecutor's demands. In the context of Article 363 of the Criminal Code, although the criminal threat is quite high, judges have the discretion to issue a decision based on legal and humanitarian considerations. The Supreme Court's jurisprudence in Decision Number 1806 K/Pid/2011 emphasized that in imposing a sentence, judges must consider the severity of the crime and the subjective condition of the perpetrator.²²

In Islamic criminal law, the crime of theft (*sariqah*) is included in the category of *hudūd* crimes which under certain conditions can be punished by cutting off the hand, as stated in QS. Al-Mā'idah [5]: 38:

Oh my God أَلْسَارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِّنْ اللَّهِ وَاللَّهُ عَزِيزٌ

Meaning: "As for the male thief and the female thief, cut off their hands (as) recompense for what they have earned and as a punishment from Allah. Allah is All-Mighty, All-Wise." (QS. Al-Mā'idah [5]: 38). However, *hudūd* sanctions can only be applied if a number of strict conditions are met, such as the stolen item reaches the *nisab*, is in a secure place, and the theft is not committed due to emergency or hunger.²³

If these conditions are not met, then theft is classified as *jarimah ta'zīr* تَعْزِير. In the case of Decision Number 1454/Pid.B/2024/PN Sby, the elements of *hudūd* were not fully met. Therefore, the *ta'zīr* تَعْزِير approach becomes relevant. *Ta'zīr* is a form of punishment determined at the discretion of the judge and the ruler for the sake of the public interest. The 10-month prison sentence in this case can be categorized as a form of modern *ta'zīr* تَعْزِير, which is in line with the principles of Islamic justice: providing punishment that educates the perpetrator, protects society, and still provides space for rehabilitation²⁴.

This view is reinforced by the opinion of Prof. Sri Endah Wahyuningsih who emphasized that in the Indonesian context, Islamic law can be implemented contextually through the principles of humanity and social justice.²⁵ This is based on the fact that Indonesia is a pluralistic country that upholds the values of Pancasila and the principle of a state of law, so that the application of legal norms, including those derived from religion, must consider aspects of pluralism and public welfare. Therefore, the application of Islamic law is not always textual normative, but can be adjusted to the social, cultural, and national legal structure contexts.²⁶

This contextual approach allows Islamic legal principles, such as *ta'zīr*, to be applied in the national criminal justice system as a more equitable alternative to sentencing. For example, in cases of aggravated theft that do not qualify for *hudūd*, Islamic law provides ample room for judges to impose sentences based on the public interest (*maṣlaḥah*) and the prevention

²¹Barda Nawawi Arief, *Legislative Policy in Combating Crime* (Jakarta: Prenadamedia Group, 2013).

²²Supreme Court of the Republic of Indonesia, Decision Number 1806 K/Pid/2011.

²³Wahbah al-Zuhaili, *Al-Fiqh al-Islāmī wa Adillatuhu*, Juz 6 (Damascus: Dār al-Fikr, 1989).

²⁴Ahmad Wardi Muslich, *Islamic Criminal Law* (Jakarta: Sinar Grafika, 2005).

²⁵Sri Endah Wahyuningsih, *Criminal Law Enforcement Model Based on Justice Values* (Semarang: University of August 17, 1945 Press, 2019).

²⁶Muladi. (2010). *Democracy, Human Rights and Legal Reform in Indonesia*. Jakarta: The Habibie Center.

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of crime (*siyāsah shar'iyah*).²⁷This shows that Islamic law has normative flexibility in responding to the dynamics of modern society without losing the substance of its justice. This concept is also in line with the idea of *maqāṣid al-sharī'ah*, which places the protection of life, property, reason, descendants, and religion as the main objectives of Islamic law.²⁸

Furthermore, Prof. Sri Endah also emphasized the importance of integrating universal Islamic values into the national legal system through a legal pluralism approach. In her view, Islamic law is not merely a religious normative system, but also contains ethical and social dimensions that can enrich the positive legal system, especially in realizing justice that is oriented towards restoration (restorative) and rehabilitation.²⁹The implementation of proportional punishment based on substantive justice values reflects this integrative effort, where humanitarian values are used as a reference in every judicial process.

Thus, the application of Islamic criminal law in the context of a nation state such as Indonesia should not be understood as an effort to formalize sharia, but rather as an ethical and normative contribution to strengthening a national legal system that is just, humanistic, and responsive to the needs of society.³⁰In this framework, the *ta'zīr* and restorative justice approaches can complement each other in achieving legal objectives, namely justice, benefit, and legal certainty.³¹

The restorative justice approach provides a new paradigm in handling criminal acts, by emphasizing the restoration of losses and the relationship between perpetrators, victims, and the community. Restorative justice aims to avoid the destructive effects of overly repressive punishment, especially in minor cases and committed by perpetrators who have never been convicted before.³²

The Regulation of the Republic of Indonesia National Police Number 8 of 2021 has opened up space for the application of restorative justice in certain cases, including theft, on condition that there is peace between the perpetrator and the victim, compensation for losses, and the willingness of the perpetrator to take responsibility. Although in this case the settlement was carried out through formal litigation, the light criminal decision from the judge can be seen as a form of adopting the spirit of restorative justice, namely providing space for social rehabilitation and preventing overcriminalization.³³

²⁷Nasution, H. (2019). *Islamic Criminal Law in the Course of History*. Jakarta: Prenada Media.

²⁸Auda, J. (2008). *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach*. London: International Institute of Islamic Thought (IIIT).

²⁹Wahyuningsih, SE (2022). "Restorative Justice in the Perspective of Islamic and National Criminal Law." *Journal of Islamic Law and Human Rights*, 6(2), 153–170.

³⁰Rahardjo, S. (2009). *Progressive Law Enforcement*. Jakarta: Kompas.

³¹Wiyono, A. (2020). *Restorative Justice in the Criminal Justice System in Indonesia*. Yogyakarta: FH UII Press.

³²Tony Marshall, "Restorative Justice: An Overview," Home Office Research Development and Statistics Directorate, 1999.

³³Regulation of the Republic of Indonesia National Police Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice.

3.2. Judges' Considerations in Handing Down Verdicts on Perpetrators of the Crime of Theft with Aggravation Based on Social Justice Values (Case Study Case Number 1454/Pid.B/2024/PN Sby)

In the case of aggravated theft involving two defendants, namely Ekalia Setya Adi and Vivi Ayu Widyawati, the Panel of Judges at the Surabaya District Court stated that all elements of the crime as referred to in Article 363 paragraph (1) 4 and 5 of the Criminal Code (KUHP) have been proven legally and convincingly. The defendants' actions were carried out by damaging or cutting as a means to enter the scene of the crime, and were carried out in collaboration, namely by two or more people, which is an aggravating element in the provisions.³⁴

The Panel of Judges assessed that the proof of the elements of the crime had been fulfilled through legally valid evidence, including witness statements, evidence, and the defendant's confession which was consistent and in accordance with the facts revealed at trial.³⁵ Thus, the judge considered that there was no legal doubt regarding the involvement of the defendants in the criminal acts charged.

In addition, the actions committed by the defendants are not only viewed from the formal legal side, but also examined from the social context and motivation behind the actions. In this case, even though the aggravating elements have been met, the Panel of Judges did not impose the maximum sentence, but rather considered mitigating factors, as a form of implementing corrective justice values that are in line with the principle of social justice in the national criminal law system.³⁶

1. Proof of Elements of Crime and Application of Positive Law

The Panel of Judges in the Surabaya District Court Decision Number 1454/Pid.B/2024/PN Sby systematically outlined the fulfillment of the elements of the crime as regulated in Article 363 paragraph (1) 4 and 5 of the Criminal Code.

a. The element of "whoever". Refers to the defendants as legal subjects who can be held responsible for the crimes committed.³⁷ In the context of Indonesian criminal law, this element is universal and is the initial element that must be proven, namely that the act was committed by a person who is legally competent and has criminal capacity.

b. The element of "taking goods", all or part of which belong to another person, with the intention of being owned unlawfully", which has been proven in court through the concrete actions of the defendants. They consciously and intentionally took a number of merchandise from Matahari Department Store without the right and without permission from the legal owner, which legally fulfills the element of intent (*dolus*) as a form of error in criminal law.³⁸

c. The aggravating elements in Article 363 paragraph (1) 4th and 5th of the Criminal Code are also fulfilled. The first aggravating factor refers to acts carried out in collaboration, namely by two or more people. In this case, the involvement of the two defendants shows

³⁴Decision of the Surabaya District Court Number 1454/Pid.B/2024/PN Sby, p. 4.

³⁵*Ibid.*, pp. 5–6.

³⁶Muladi. (2002). *Selected Chapters on the Criminal Justice System*. Semarang: Diponegoro University Publishing Agency, p. 34.

³⁷Decision of the Surabaya District Court Number 1454/Pid.B/2024/PN Sby, p. 3.

³⁸*Ibid.*, pp. 4–5.

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that there was cooperation in committing the crime. The second aggravating factor relates to the method of entering the scene of the crime by damaging or cutting, as evidenced by the use of a tool in the form of cutting pliers used to damage the shop's security.³⁹

With all elements of the crime proven, the Panel of Judges then sentenced each defendant to 10 months in prison. This decision also took into account the period of detention that had been served, so that the sentence imposed was proportional and did not exceed reasonable limits. This decision shows that the judge not only considered the formal legal aspects, but also paid attention to the principle of proportionality in sentencing, as adopted in the principle of substantive justice.⁴⁰

The decision can be seen as a form of application of positive law that is not only intended to provide a deterrent effect, but also considers corrective and humanitarian values in enforcing criminal law. Thus, the legal considerations used by the Panel of Judges reflect the application of the principle of legality (*nullum crimen sine lege*) and the principle of culpability (principle of fault) which are two fundamental principles in the Indonesian criminal law system. The principle of legality, which comes from the Latin adage *nullum crimen, nulla poena sine lege*, means that a person cannot be punished for an act unless there has been a criminal law provision that regulates the act before the act was committed.⁴¹

This view is in line with what was put forward by Sudarto, who stated that the principle of legality is a guarantee of legal protection for citizens from arbitrary power and functions as a limitation on the state's power in determining crimes and their sanctions.⁴² In the context of this case, the Panel of Judges has applied the provisions of Article 363 paragraph (1) 4 and 5 of the Criminal Code correctly, because the elements of the crime have been clearly regulated in the legal norms in force before the crime occurred.

Meanwhile, the principle of culpability or the principle of error is a principle that states that a person can only be punished if he commits the crime with a mistake (either in the form of intent or negligence). In Moeljatno's view, this principle of error emphasizes that punishment can only be imposed on people who are able to take responsibility and have a mental connection (mental element) to the crime committed.⁴³

These two principles are not only technical guidelines in enforcing criminal law, but also reflect the values of substantive justice in society. The emphasis on the fulfillment of the elements of crime (*actus reus*) and error (*mens rea*) shows that the criminal justice process must be carried out based on the principles of caution and justice, and avoid making subjective or discriminatory legal decisions.

By integrating the principles of legality and culpability in a balanced manner, the Panel of Judges in this decision has demonstrated its commitment to the principle of due process of law, namely a fair and impartial legal process. This is important to ensure that the

³⁹Ibid., pp. 5-6.

⁴⁰Muladi. (2002). *Selected Chapters on the Criminal Justice System*. Semarang: Diponegoro University Publishing Agency, p. 52.

⁴¹Andi Hamzah. (2008). *Principles of Criminal Law*. Jakarta: Rineka Cipta, p. 52.

⁴²Sudarto. (1983). *Law and Criminal Law*. Bandung: Alumni, pp. 70–71.

⁴³Moeljatno. (2002). *Principles of Criminal Law*. Jakarta: Rineka Cipta, pp. 80–81.

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criminalization of the accused is not merely an instrument of punishment, but also an instrument of upholding justice and protecting human rights.⁴⁴

2. Mitigating Considerations

In deciding this case, the Panel of Judges not only adhered to the legal-formal aspects, but also considered the social and personality dimensions of the defendants, as part of the modern criminal law approach that is oriented towards substantive justice. These considerations include several things that are considered to mitigate the sentence, namely:

- a. The defendants behaved politely during the trial process,
- b. Showing remorse and admitting mistakes,
- c. Never been convicted before (first offender), and
- d. There was no major loss because all the stolen goods were returned to their owners.

These considerations show that judges apply a corrective justice approach, which emphasizes the restoration of losses and repair of violations of norms, rather than only focusing on retaliation. This theory of corrective justice is rooted in Aristotle's view, which states that justice is not merely a balance between rights and obligations, but also corrects the inequality caused by violations of rights through proportional actions.⁴⁵

In addition, the Panel of Judges' attitude in considering the defendant's social and psychological background is in line with the concept of individualization of punishment, namely the imposition of sanctions that consider the character and personal situation of the perpetrator in order to encourage rehabilitative effects. Muladi stated that modern punishment must consider preventive and corrective goals, which are not just about avenging mistakes, but also encouraging social recovery and reintegration of prisoners into society.⁴⁶

The Panel of Judges' move also shows that criminal law is no longer based entirely on the retributive paradigm, but has transformed into a more humanistic and adaptive approach to the values of social justice. In this context, the decision can be considered a form of compromise between the need to enforce the law and protect the rights of the accused, especially in cases of non-violence and minimal permanent damage.

3. Social Justice Values in Judges' Considerations

The verdict handed down by the Panel of Judges in this aggravated theft case reflects the values of social justice that are integral to the Indonesian legal system. Although the criminal acts committed by the defendants fulfill the elements of aggravation as regulated in Article 363 paragraph (1) 4 and 5 of the Criminal Code, the judges did not immediately impose the maximum sentence. This shows sensitivity to the social context and legal morality, especially regarding the background of the perpetrators, the absence of violence, and the recovery of losses by the defendants.

⁴⁴Muladi. (2002). *Selected Chapters on the Criminal Justice System*. Semarang: Diponegoro University Publishing Agency, p. 75.

⁴⁵Aristotle. (2009). *Nicomachean Ethics* (Translation: W.D. Ross). Oxford: Oxford University Press, pp. 113–115.

⁴⁶Muladi. (1995). *Selected Chapters on the Criminal Justice System*. Semarang: Diponegoro University Publishing Agency, p. 89.

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This approach is in line with the constitutionality of the principle of justice, as stated in Article 28D paragraph (1) of the 1945 Constitution, which guarantees the right of every person to be treated fairly under the law.⁴⁷In practice, this principle demands that law enforcement is not carried out in a rigid and retributive manner, but rather pays attention to the dimensions of humanity and substantive justice that are contextual and proportional.

Furthermore, the judge's considerations can be linked to the concepts of distributive justice and corrective justice. Distributive justice, as proposed by John Rawls, emphasizes the importance of treating individuals fairly based on their social conditions and positions, taking into account the principles of equality and partiality towards vulnerable groups.⁴⁸Meanwhile, corrective justice focuses on efforts to repair or rebalance the relationship between the perpetrator and the victim after a violation of the law has occurred.

By integrating these two principles, judges not only function as law enforcers, but also as public moral distributors who consider social restoration and resocialization of perpetrators into society. This approach reflects the transformation of the criminal law paradigm from being merely repressive to being more adaptive, inclusive, and just.

4. Evaluation of Evidence and Legal Costs

The decision of the Panel of Judges in this case to return the evidence to its owner and set a minimum court fee reflects a criminalization approach that is not merely repressive, but also restorative and rehabilitative. This approach can be explained more deeply through the thoughts of Barda Nawawi Arief and Prof. Muladi, two key figures in national criminal law reform.

According to Barda Nawawi Arief, the criminal justice system should not only aim to provide a deterrent effect on perpetrators, but also restore social balance that is disturbed by criminal acts, by paying attention to victims, perpetrators, and society.⁴⁹In this context, the decision to destroy the tools of crime has a symbolic and educational function that the tools of crime should not be used again, while the return of stolen goods indicates the restoration of the victim's rights without having to prolong the perpetrator's suffering economically or socially.

Meanwhile, Prof. Muladi stated that the modern criminal justice system should be based on humanistic values and corrective justice, not just retaliating for wrongdoing. He emphasized the importance of the principle of proportionality and individualization of punishment, namely that punishment must be adjusted to the conditions and characteristics of the perpetrator.⁵⁰Therefore, the determination of very light court costs and the imposition of less than maximum sentences reflect the principle of individualization of criminal law and protection of socio-economically vulnerable perpetrators, which is in line with the spirit of the new Criminal Code reform which is more responsive to social justice.

⁴⁷1945 Constitution of the Republic of Indonesia, Article 28D paragraph (1).

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⁴⁸Rawls, J. (1971). *A Theory of Justice*. Cambridge, MA: Harvard University Press, p. 52–54.

⁴⁹Arief, BN (2010). *Anthology of Criminal Law Policy*. Jakarta: Kencana, p. 68.

⁵⁰Muladi. (1995). *Selected Chapters on the Criminal Justice System*. Semarang: Diponegoro University Publishing Agency, p. 87.

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These two thoughts strengthen the argument that the judge's policy in the case is not a form of legal leniency, but rather a manifestation of a balanced approach between legal certainty, utility, and justice, which has long been championed in Indonesian criminal law theory. In this framework, criminal law plays a role not only as a means of law enforcement, but also as a means of social control that is adaptive to humanitarian values and social justice.

In the development of modern criminal law, attention to victims is no longer merely symbolic or limited to restitution, but has developed into a comprehensive approach through victimology and restorative justice. In Indonesia, this approach has begun to be accommodated in various criminal law policies, including in the Draft Criminal Code (RKUHP) and implementing regulations such as the Republic of Indonesia Police Regulation (Perpol) No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice.

In this case, the return of evidence to the victim and the non-imposition of repressive compensation to the defendant demonstrate sensitivity to the interests of the victim that have been clearly met, namely through the recovery of stolen goods without incurring additional costs or processes that complicate the victim. This perspective is in line with the basic principles of victimology that victims have the **right to fair treatment, rapid recovery, and protection from detrimental secondary processes (secondary victimization)*.⁵¹

In addition, the imposition of minimal court costs and consideration of the perpetrator's social background reflect the principles of restorative justice, namely:

- a. Concrete restitution of the victim's losses (through the return of goods);
- b. Active participation of the perpetrator in resolving legal conflicts cooperatively;
- c. Preventive and educational efforts to avoid repeating criminal acts, such as confiscation and destruction of criminal instruments;
- d. Strengthening social relations and reintegration of perpetrators into society without the heavy stigma of criminal punishment.⁵²

In practice, this approach not only strengthens the legitimacy of criminal justice, but also shows the balance between law enforcement and social restoration. As emphasized by Barda Nawawi Arief, in the renewal of national criminal law, it is important to prioritize a punishment model that not only pays attention to perpetrators of crimes, but also prioritizes victims and social harmony as the main orientation.⁵³

Thus, the evaluation of the evidence and court costs in this decision can be seen as part of a new paradigm of criminal law enforcement in Indonesia, which is oriented towards restorative justice, victim protection, and social rehabilitation of perpetrators, in line with the values of Pancasila and the mandate of the constitution.

⁵¹Hagan, F.E. (2010). *Introduction to Criminology: Theories, Methods, and Criminal Behavior* (7th ed.). Thousand Oaks: Sage Publications, p. 240.

⁵²Zehr, H. (2002). *The Little Book of Restorative Justice*. Intercourse, PA: Good Books, p. 23–25.

⁵³Arief, BN (2013). *Criminal Law Reform in the Perspective of Restorative Justice*. Jakarta: Prenadamedia Group, p. 45.

5. Doctrinal Analysis and Legal Philosophy Approach

Doctrinally, the decision of the Panel of Judges in the case of aggravated theft by defendants Ekalia Setya Adi and Vivi Ayu Widyawati was based on the fulfillment of the elements in Article 363 paragraph (1) 4 and 5 of the Criminal Code (KUHP), which include the elements of "whoever", "taking goods", and the aggravating element in the form of actions carried out together and in a destructive manner. This approach reflects the application of positive law (legal positivism) which emphasizes written norms and formal structures in the formulation of elements of the crime.⁵⁴

However, the substance of justice in this decision contains a deeper dimension that reflects the ethical and corrective approach in legal philosophy. In the perspective of utilitarianism developed by Jeremy Bentham, the purpose of punishment is to maximize the greatest happiness for the greatest number of people (the greatest happiness principle), which in the context of criminal law means preventing crime and protecting society through educational and rehabilitative sanctions.⁵⁵ By giving a light sentence accompanied by social considerations, the judge not only punishes the perpetrator, but also seeks broader social recovery and integration.

In addition, the distributive justice approach as put forward by Aristotle is also very relevant in this context. According to Aristotle, justice is not identical to absolute equality, but must be based on proportionality and the concrete conditions of the legal subject. In his view, distributive justice demands that individuals obtain what is their right according to their role, contribution, or relevant needs.⁵⁶ Therefore, in this case, punishment that takes into account social background, non-involvement in violence, and the return of stolen goods reflects the implementation of distributive justice values.

Furthermore, this approach is in line with the idea of corrective justice which emphasizes on correcting inequality due to violations of the law, not just retaliation. This is where the relevance of progressive Indonesian criminal law thinking, as put forward by Muladi, which emphasizes that criminal law must function as a tool of social engineering and must be sensitive to the dynamics of social values and substantive justice.⁵⁷ This thought was reinforced by Barda Nawawi Arief, who emphasized that criminal law should not be trapped in narrow legalism, but should be directed at protecting human values and social justice. According to him, reform of Indonesian criminal law must reflect the justice that exists in society and pay attention to the nation's cultural and moral context.⁵⁸

Thus, the application of a doctrinal approach combined with the values of legal philosophy such as utilitarianism, distributive justice, and corrective justice, and linked to the progressive criminal law thinking of national figures, shows that this decision is not solely based on formal legality, but also seeks to integrate social ethics and utility in achieving the overall objectives of the law.

⁵⁴Hart, H.L.A. (1994). *The Concept of Law* (2nd ed.). Oxford: Clarendon Press.

⁵⁵Bentham, J. (1988). *An Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press.

⁵⁶Aristotle. (2009). *Nicomachean Ethics* (WD Ross, Trans.). New York: Oxford University Press.

⁵⁷Muladi. (1995). *Selected Chapters on the Criminal Justice System*. Semarang: UNDIP Publishing Agency.

⁵⁸Arief, BN (2008). *Anthology of Criminal Law Policy: Development of the Drafting of the New Criminal Code*. Jakarta: Prenada Media.

4. Conclusion

Based on the results of the analysis of Decision Number 1454/Pid.B/2024/PN Sby regarding the crime of aggravated theft, it can be concluded that the criminalization approach applied by the Panel of Judges is not only based on the principle of legality in positive law, but also considers the values of substantive and social justice. The elements of the crime in Article 363 of the Criminal Code have been proven legally and convincingly, but the punishment imposed shows an orientation towards corrective justice and the principle of proportionality, in line with the views of the legal philosophy of utilitarianism and the doctrine of distributive justice. The judge in this case applied a penal policy that prioritized sensitivity to the defendant's condition, including his socio-economic background, the losses that had been recovered, and a cooperative attitude during the legal process. This approach reflects the restorative and humanistic spirit that is also the spirit of national criminal law reform according to the thoughts of figures such as Muladi and Barda Nawawi Arief. Within this framework, Muladi emphasized that the criminal justice system should "not only be repressive and retributive, but must also have a rehabilitative and reintegrative dimension." Meanwhile, Barda Nawawi Arief is of the opinion that the Indonesian criminal justice system must take into account the values of justice that exist in society, because "criminal law does not only reflect legalistic values, but also developing moral and social values." This decision shows a progressive trend in criminal justice practices, emphasizing the importance of the function of law as a tool of social engineering that is adaptive to the dynamics of justice and morals in society. Thus, punishment does not merely function as retribution, but as a means of guidance, rehabilitation, and prevention. In addition, consideration of evidence and court costs also shows an orientation towards the principle of the best interest of the offender, where the criminal justice system not only punishes, but also pays attention to the sustainability of the perpetrator's social life after the verdict. This shows that the Indonesian legal system is moving towards a more restorative and inclusive direction, integrating social sensitivity and victimology in every verdict. From the perspective of criminal law theory, the application of punishment like this also reflects a paradigm shift from a retributive model to a corrective and rehabilitative model. This is in line with Barda Nawawi Arief's vision which states that "punishment is essentially to protect society in a humane and moral way." Thus, it can be concluded that the criminalization approach in this case not only fulfills the formal legal elements, but also reflects the application of the principles of restorative, corrective and proportional justice within the framework of modern Indonesian criminal law which is socially aware and oriented towards recovery.

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