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## Application of Restorative Justice in the Crime of Theft

**Maidin Gultom**

Lecturer, Department of Law, Santo Thomas Catholic University, Indonesia

**Henny Saida Flora**

Lecturer, Department of Law, Santo Thomas Catholic University, Indonesia

### **Abstract:**

*Restorative justice is the settlement of minor criminal cases carried out by investigators at the investigative stage or judges from the start of the trial by involving the perpetrator, victim, perpetrator/victim's family, and related community leaders to jointly seek a fair solution by emphasizing restoration to its original state. The application of the concept of restorative justice shows that it is more effectively used against crimes committed by children, minor theft crimes, and other minor crimes. Besides that, the use of this concept is also specifically intended as a suggestion to reduce the prison population, which is increasingly showing the excess capacity of detention houses or prisons.*

**Keywords:** Restorative justice, crime, theft

### **1. Introduction**

Indonesia is a state of law, a country that upholds a sense of justice and guarantees the rights of all citizens to have equal standing before the law without any exceptions. The law aims to bring prosperity and happiness to its people by administering justice and order. Justice is described as a form of balance that brings peace to everyone's heart. If he violates the law, it will cause anxiety and shock for him. The law seeks not only a balance between various conflicting interests but also a balance between the demands of justice and order or legal certainty.

In everyday life, humans are often faced with various urgent needs which arise because of the desire or pressure to maintain one's status. However, day by day, the prices of necessities of life are also increasing. Indonesia is a developing country where most of the population still lives in poverty. Therefore, often in meeting their needs, a person is determined to take actions prohibited by law, such as theft. The act of stealing or taking other people's property is certainly very troubling for the community. The criminal threat for the perpetrators of theft in the Criminal Code (KUHP) is in the form of imprisonment or fines. Justice that is achieved with a system of imprisonment or fines does not create a deterrent effect for the perpetrators of theft.

The justice that is achieved in the criminal justice system in Indonesia is retributive justice. The goal of retributive justice is the punishment of the perpetrators of the crimes committed. In a retributive justice system, more emphasis is placed on retaliation for the actions of perpetrators of law violations. This system is considered less effective in handling law violations due to the increasing number of overcrowded prisons or detention centers.

In judicial practice in Indonesia, judges at court have completed many criminal acts of theft through restorative justice, for instance, in the case of one crime of theft in court, whereby applying restorative justice, the judge seeks peace between the perpetrator and the victim.

### **2. Literature Review**

#### **2.1. Definition of Restorative Justice**

Restorative justice offers a process in which the parties involved in criminal or criminal acts, whether victims, perpetrators, families involved, or the wider community, are all required to have the opportunity to resolve problems that occur as a wise step to resolve legal and interrelated issues. Restorative justice means that it is a restoration of relations and redemption of mistakes that the perpetrators of criminal acts (their families) want to do to the victims of these crimes (their families). This can be resolved by reaching an agreement between the parties.

Restorative justice is the settlement of criminal cases that prioritizes recovery for victims, perpetrators, and society. The main principle of restorative justice is the participation of victims and perpetrators, the participation of citizens as facilitators in resolving cases so that there is a guarantee that the child or perpetrator will no longer disturb the harmony that has been created in society.

The concept of restorative justice is implemented in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. According to Article 1 point 6 of the Law on the Juvenile Criminal Justice System, restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to a state of return, and not retaliation.

The application of restorative justice in addition to being contained in Article 1 point 6 of the SPPA Law is also contained in Article 5 and Article 8 paragraph 1 of the SPPA Law and restrictions on the application of restorative justice

through diversion in Article 7 of the SPPA Law. According to Article 1 point 7 of the SPPA Law, diversion is the transfer of settlement of child cases from the criminal justice process to processes outside of criminal justice.

The SPPA Law becomes a legal umbrella for implementing restorative justice and diversion for children who are in conflict with the law. Penal mediation is a breakthrough as a restorative justice instrument that judges, prosecutors, and investigators can already carry out. The success of deliberations in penal mediation as a restorative justice instrument does not stop the judicial process for the perpetrators; it only impacts the demands of the public prosecutor and the judge's decision.

According to Stefanie Trankle, as quoted by Barda Nawawi Arief, the development of penal mediation starts from the following ideas and working principles:

#### 2.1.1. Conflict Resolution

The task of the mediator is to make the parties forget the legal framework and encourage them to be involved in the communication process. This is based on the idea that crime creates interpersonal conflict. Conflict is what the mediation process aims at.

#### 2.1.2. Process-oriented

Penal mediation is more oriented to the quality of the process than the results, namely relying on the perpetrator of the crime on his mistakes, conflict needs to be resolved, the victim calms down from fear, and so on.

#### 2.1.3. Informal Process

Penal mediation is an informal process that is not bureaucratic and avoids strict legal procedures.

#### 2.1.4. There Is Active and Autonomous Participation of the Parties

The parties (perpetrators and victims) are not seen as objects of criminal law procedures but rather as subjects who have personal responsibility and the ability to act. They are expected to act of their own free will.

At present, all law enforcement institutions in Indonesia, including the Supreme Court, the Attorney General's Office, the Indonesian National Police, and the Ministry of Law and Human Rights of the Republic of Indonesia, have adopted the principle of restorative justice as a way to resolve a criminal case. In 2012 these four institutions made a joint agreement, namely:

- The Memorandum of Understanding of the Chief Justice of the Supreme Court of the Republic of Indonesia,
- The Minister of Law and Human Rights of the Republic of Indonesia,
- The Attorney General of the Republic of Indonesia, and
- The Head of the National Police of the Republic of Indonesia

Number 131/KMS/SKB/X/2012, Number M-HH-07 HM.03.02 of 2012, KEP Number 06/E/EJP/10/2012 dated 17 October 2012, Number B/39/X/2012 dated 17 October 2012 concerning Implementation of the Implementation of Adjustments to the Limits of Misdemeanor Crimes and Total Fines, Quick Examination Procedures and the Application of Restorative Justice, which regulates the settlement of criminal cases through the principles of restorative justice. In this Memorandum of Understanding, the principle of restorative justice for the first time received a definition in Article 1 point 2 of the Memorandum of Understanding, namely:

Restorative justice is the settlement of cases of minor crimes carried out by investigators at the investigative stage or judges from the start of the trial by involving the perpetrator, victim, the families of the perpetrators/victims, and related community leaders to jointly seek a just solution by emphasizing restoration to its original state.

The Memorandum of Understanding limits the treatment of restorative justice, namely for minor crimes. However, in its development, it is not only minor crimes that the principle of restorative justice can resolve but also other crimes.

After agreeing on a Memorandum of Understanding, these institutions make further regulations for each institution as guidelines for settling criminal cases with the principles of restorative justice, namely:

- Circular of the Head of the National Police of the Republic of Indonesia Number SE/8/I/2018 concerning the Implementation of Restorative Justice in the settlement of criminal cases (SE Kapolri Number 8 of 2018),
- Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Investigation of Criminal Acts (Perkapolri Number 6 of 2019),
- Republic of Indonesia Attorney Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perja Number 15 of 2020), and
- Decision of the Director General of the General Courts of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020

The regulations made by each of these institutions regulate how the principles of restorative justice can be applied in settlement of criminal cases at every level of the criminal law enforcement process, namely:

- At the Investigation and Investigation Stage,
- At the Prosecution Stage, and
- At the Examination Stage in court hearings.

## 2.2. Principles of Restorative Justice

Some universally applicable principles inherent in the concept of a restorative justice approach in resolving criminal acts include:

- Principle of fair settlement (due process),
- Equal protection,
- Victims' Rights,
- The presumption is innocent, and
- The right to consult or legal advisory assistance

### 2.2.1. Principle of Fair Settlement (Due Process)

In the criminal justice system in Indonesia, suspects are given the right to know in advance about certain protective procedures when faced with prosecution or punishment. The judicial process (due process) must be considered as a form of protection to provide a balance for the state's power to detain, prosecute, and carry out punishment from a court decision.

### 2.2.2. Equal Protection

In the process of resolving crimes through restorative justice, justice must arise from a process of mutual understanding of the meaning and purpose of justice, regardless of ethnicity, gender, religion, national origin, and other social positions. There are doubts about the ability of the restorative justice system to resolve a problem and provide a sense of justice between different parties because one party may have excess economic, intellectual, political, or even physical strength, so there will be an inequality between the litigants.

### 2.2.3. Victims' Rights

In solving a problem through a restorative justice approach, the rights of victims need attention because victims are interested parties who should have a (legal) position in the settlement process.

The proportionality of the idea of justice in a restorative justice system is based on agreements that provide alternatives to solving problems. Without the consent of the victim, restorative justice cannot be implemented.

### 2.2.4. Presumption of Innocence

In criminal justice, in general, the state has the burden of proof to prove the guilt of the suspect. Since and until the burden of proof is carried out, the suspect must be presumed innocent. Unlike the case in the process of proving through restorative justice, which is a requirement for an admission of guilt, it is a condition for the continuation of the settlement of cases. In restorative justice processes, the rights of suspects regarding the presumption of innocence can be compromised in two ways, namely:

- The suspect has the right to end the restorative justice process, and
- The suspect refuses to admit that he is guilty

### 2.2.5. The Right to Consult or Legal Advisory Assistance

In the process of resolving crimes through restorative justice, legal advisors have a very strategic role in building the ability of offenders to protect their rights. In all stages of the informal process, suspects can be given information through the assistance of legal advisors regarding their rights and obligations, which can be used as considerations in making decisions.

According to Muladi, the characteristics of restorative justice are as follows:

- Crime is defined as the violation of one person against another and is seen as a conflict,
- The focus of attention on solving the problem of accountability and obligations for the future is normative in nature and built on the basis of dialogue and negotiation,
- Restitution as a means of the parties, reconciliation, and restoration is the main goal,
- Justice is defined as the relationship between rights, assessed on the basis of values and norms in society
- The focus of attention is directed at repairing social wounds caused by crime,
- The community is a facilitator in the restorative process,
- The role of victims and perpetrators is recognized both in determining problems and solving the rights of victims' needs,
- Perpetrators are encouraged to take responsibility
- The accountability of perpetrators is formulated as the impact of understanding actions directed to participate in making the best decisions
- Negative stigma can be eliminated through restorative justice

## 2.3. Obstacles of Implementation Restorative Justice

In the application of restorative justice, encountered obstacles are caused by several factors, namely:

- Community factor,
- Cultural factors, and
- Facilities and infrastructure factors

### 2.3.1. Community Factor

This obstacle occurs due to factors from the community who do not understand awareness of law enforcement. There are several indicators of legal awareness in society, namely:

- Legal knowledge: the community has conceptual knowledge about community actions that are regulated by law.
- Must understand: the public can interpret the rules contained in the articles, and
- Behavior: people are able to behave in accordance with applicable laws.

### 2.3.2. Cultural Factors

In addition to the factors of society, these obstacles also occur due to cultural factors. According to Soerjono Soekanto, culture is a system that basically includes the values that underlie applicable law, which are concepts about what is considered good and what is considered bad. The society still thinks that punishment is the best way to take action against criminal offenders, so the application of restorative justice in society is still difficult to accept.

### 2.3.3. Facility and Prasana Factor

The next obstacle that can hinder the implementation of the restorative justice process is the lack of regulations and limited facilities as facilities and infrastructure to support the restorative justice process. Without certain means or facilities, it is impossible for law enforcement to proceed smoothly. Therefore, the government needs to complete all existing deficiencies by coordinating with parties related to the implementation of the concept of restorative justice. Overcoming these existing obstacles will not be successful if it is not supported by all parties involved. All parties must coordinate with each other in the implementation of restorative justice so that it can run as expected.

## *2.4. Requirements for a Criminal Act of Theft to Be Tried by Restorative Justice*

Restorative justice is an alternative settlement of criminal cases in which the mechanism (criminal justice procedures) focuses on the process of dialogue and mediation. Dialogue and mediation involve several parties:

- The perpetrator,
- The victim,
- The perpetrator's family,
- The victim's family, and
- Community leaders

In general, the purpose of restorative justice is to create an agreement on the settlement of criminal cases. Besides that, another goal of restorative justice is to get a fair and balanced decision for both victims and perpetrators so that good relations are re-established in society.

Direct dialogue between perpetrators and victims allows victims to express what they feel and hopes for fulfilling their rights and desires from a settlement of criminal cases. With dialogue, it is also hoped that the perpetrators will be moved to self-correct, realize their mistakes, admit their actions and accept responsibility as a consequence of the crime they committed with full awareness. With this dialogue, the community can also participate in realizing the results of the agreement and monitoring its implementation.

When viewed from the aspect of resolving various conflicts, an important element in the definition of restorative justice is prioritizing reconciliation rather than retaliation. The application of the concept of restorative justice shows that it is more effectively used against crimes committed by children, minor theft crimes, and other minor crimes. Besides that, the use of this concept is also specifically intended as a suggestion to reduce the prison population, which is increasingly showing the excess capacity of detention houses or prisons.

Restorative justice as a step in solving the crime of theft is a very appropriate step to be taken as an effort to prevent detention centers or correctional institutions from being overloaded. The crime of theft, especially the crime of petty theft, is often a common problem in people's lives. If every perpetrator of a petty theft crime who is proven guilty must be in prison, then it is possible that the detention centers will be over-capacitated. This, of course, will cause many new problems, including the increasing number of criminal cases in the detention center itself, and will also burden state finances.

Settlement of minor theft crimes through restorative justice can be carried out provided that peace has begun to be implemented between the perpetrator, the victim, the perpetrator's family, the victim's family, the perpetrator's family, the victim's family and related community leaders who are in a case with or without compensation. In the trial, after the judge read out the indictment notes and asked the opinion of the defendant and the victim, the judge then sought peace in an effort to achieve restorative justice.

If the peace process is successful (restorative justice has been achieved), then the parties are asked to make a peace agreement which will then be signed by the defendant, victim, and other related parties. Furthermore, the peace agreement will be taken into consideration by the judge in making a decision if the peace agreement is not successful (restorative justice is not achieved). So the single judge continued the examination process by continuing to prioritize the concept of restorative justice in his decision.

During the trial process, a termination of prosecution based on restorative justice can be carried out with the conditions stipulated in Article 2 to Article 6 of the Prosecutor's Regulation of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution based on restorative justice (Perja Number 15 of 2020). Termination of prosecution can be carried out if there has been a restoration to its original state by the suspect. Return to its original state means that everything returns to its normal state before the crime is committed by the defendant.



Restorative justice does not apply to perpetrators who commit repeated (recidive) crimes. This is in accordance with the provisions in Article 5 paragraph (1) point a Perja Number 15 of 2020, that the requirements for a criminal act can be closed and the prosecution terminated based on restorative justice if the suspect is the first time to commit a crime. However, in its development, even though the perpetrator of a crime has committed a crime before, it does not rule out the possibility of carrying out restorative justice if there is a peace agreement between the perpetrator and the victim. In this case, the benchmark for the implementation of restorative justice is when the victim has forgiven the perpetrator's actions, and the perpetrator is willing to compensate for the losses caused by his actions. However, the perpetrator's apology does not necessarily free him from criminal prosecution because the peace agreement between the parties is taken into consideration by the judge in making a decision. Thus, restorative justice functions as an element that relieves the defendant, who can influence the demands of the public prosecutor and the judge's decision.

## 2.5. Obstacles of Implementing Restorative Justice in the Settlement of the Crime of Theft

Barriers to the application of restorative justice are as follows:

- Unwillingness of the parties to come to terms,
- Not all conditions can be returned to their original state,
- Lack of public understanding of the settlement of cases through restorative justice
- Society still thinks that the penal system with prison is better for making criminals aware of the actions they have committed.
- The absence of laws that explicitly regulate restorative justice and the limited facilities as facilities and infrastructure to support the running of the restorative justice process is a separate obstacle so that it can only be applied to perpetrators of criminal acts who admit their actions.

Overcoming these existing obstacles will not be successful if it is not supported by all parties involved. All parties must coordinate with each other in the implementation of restorative justice so that it can run as expected.

## 3. Conclusion

- The condition for an act of theft to be resolved through restorative justice is the crime of petty theft (Article 364 of the Criminal Code) with a loss value of not more than Rp. 2,500,000 (two million five hundred thousand rupiah) and carries a penalty of no more than 5 years in prison, and the defendant is the first time a criminal has committed a crime.
- Things that become obstacles to the application of restorative justice are the unwillingness or unwillingness of the parties to make peace. Not all conditions can be returned to their original state, the lack of public understanding of resolving cases through restorative justice, and the absence of laws and limited facilities as means and infrastructure in supporting the restorative justice process.

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