

## Restorative Justice Model through the Imposition of Compensation Punishment as the Main Punishment in Crimes Against Property

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### ABSTRACT

**Background.** Efforts to resolve cases of crimes against property that have been carried out by imposing imprisonment have turned out to be unable to recover the losses suffered by victims.

**Purpose.** Through restorative justice approach, the judge should be given the option to impose compensation to the victim as a main punishment which has not been regulated either in the Criminal Code or Criminal Code Bill.

**Method.** The research method used is normative juridical with the approach of legislation, concept, and comparison.

**Results.** The result of this research discussion provides an alternative solution or law enforcement of crimes against property by proposing the imposition of compensation to the victim as the main punishment that must be imposed by the judge as a new mechanism in the Indonesian legal system.

**Conclusion.** This concept is different from the application of restorative justice that has been applied in Indonesia or abroad which applies it at the level of investigation and prosecution.

### KEYWORDS

Compensation Crime, Property Crim, Restorative Justice

### INTRODUCTION

The concept in criminal law related to the protection carried out by the state against its citizens by forming a system called the criminal justice system which consists of investigators, prosecutors as public prosecutors and judges as examiners in the trial (O'Brien & Nygreen, 2020). The procedure for the operation of the legal system underlies the procedural law, namely the Criminal Procedure Code, to regulate how material law can be enforced, the procedure for conducting investigations, public prosecutors to carry out prosecutions and how judges hear cases and decide and prosecutors as public prosecutors to carry out executions (Praditya dkk., 2019). KUHAP also regulates the rights of suspects and victims, in this case there is an imbalance between the rights of victims and the rights of suspects, the rights of suspects are regulated in several articles from Article 50 of KUHAP to Article 68 of KUHAP in addition to other articles scattered in KUHAP (Kanungo & Paromita Chatteraj, 2021). In contrast to the

**Citation:** Yudhatama, F. C., Pangestika, Q. E. (2024). Restorative Justice Model through the Imposition of Compensation Punishment as the Main Punishment in Crimes Against Property. *Rechtsnormen Journal of Law* 2(2), 156–163. <https://doi.org/10.55849/rjl.v2i2.712>

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**Received:** June 12, 2024

**Accepted:** June 15, 2024

**Published:** June 25, 2024



rights of victims, which are only a few articles, namely in Article 99 to Article 100 of the Criminal

Procedure Code, this is because the Criminal Procedure Code was born after the inquisitorial period which considered the perpetrator as the object of examination, so that the Criminal Procedure Code was suspect-oriented (Zhang & Xia, 2021). Perpetrators and victims of crime should have the same rights to receive legal protection from the state (Adepoju dkk., 2019). Provision of legal protection. The provision of legal protection is actualized in legal instruments that regulate rights and obligations.

Criminal law is public law, so that its law enforcement is carried out by the state by adhering to the criminal law enforcement system as mentioned above using the criminal justice system in the sense that the settlement of criminal cases must go through litigation (Yan dkk., 2023). Starting from the investigation conducted by the investigator, the public prosecutor until it is decided by the court judge and executed by the prosecutor (Light dkk., 2020). The series is very long in tiring and costly with a process that is not simple.

Restorative justice is one of the solutions to cut the length of bureaucracy in the criminal justice system, as well as a means for victims to ask for compensation for losses suffered due to crimes committed by the perpetrator (Budilaksono dkk., 2020). Restorative justice is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair settlement by emphasizing restoration to the original state and not retaliation (Kanungo & Paromita Chatteraj, 2021). Normatively, there are not many restorative justice arrangements only in the juvenile criminal justice system through diversion. Diversion is the transfer of the settlement of juvenile cases from the criminal justice process to a process outside the criminal justice system (Barbasch dkk., 2020). This definition emphasizes that diversion is only used by the settlement of cases committed by children, so that the settlement of cases outside the children's case cannot be resolved by diversion.

The Indonesian Criminal Code regulates crimes against property, one of which is regulated from Chapter XXII to Chapter XXX, which aims to ensure that the interests of the property owner are not disturbed by anyone (Pan dkk., 2023). These crimes include theft, extortion and threatening, embezzlement, fraud, and destruction and damage to property, as well as extortion (Zhang, 2021). In crimes against property, what is sought to be guaranteed is the non-infringement of citizens' property rights, which if disturbed are threatened with criminal sanctions (Stuart dkk., 2019). Criminal sanctions in this case are actually only warnings, not really intended to be applied. People who are victims of criminal acts against property want their property back, not to send the perpetrators to prison (Roy dkk., 2021). Although from the state's perspective, such behavior is seen as a crime that must be avenged for the victim, it is not important at all.

To implement the material criminal law, including in this case against property crimes, is carried out using criminal procedural law (Hazrati & Heffron, 2021). Criminal procedural law is tasked with implementing material criminal law, meaning that it provides regulations on how the state, using its tools, can implement material criminal law realizing its authority to convict or acquit. From the perspective of punishment, the punishment that can be imposed on perpetrators of theft, embezzlement and fraud ranges from 4 to 5 years.

Even though the perpetrator has been sentenced to imprisonment, the victim may not necessarily get what they want by reporting the case.<sup>7</sup> In the case of theft, the stolen goods can be returned to the victim after the goods are used as evidence in court, provided that the goods have not been sold or have not been used up or have not been damaged (Brambilla dkk., 2020). However, in cases of fraud, embezzlement, vandalism or extortion, the goods that are the object of the crime can no longer be owned by the victim (Tammenlehto, 2022). The perpetrator is considered to have

taken responsibility for his actions by serving a prison sentence (Ben Hounet, 2021). If the victim wants to get his property, the victim must take the civil law route by filing a lawsuit against the perpetrator (Roskoski, 2020). Even that is not necessarily successful (Kirubanantham dkk., 2022). Criminalization or law enforcement against perpetrators of fraud and embezzlement does not achieve what is the purpose of punishment and does not even succeed in achieving the objectives of criminal law itself.

Punishment of compensation itself is not a new thing in criminal law (Dragone dkk., 2019). Punishment of compensation is already known in corruption crimes where the state is considered as a victim of crime (Tillyer dkk., 2021). Similarly, the punishment of restitution is theoretically known in the customary society and also compiled in the Draft Criminal Code, but unfortunately it has not been regulated explicitly and concretely so it is expected to be difficult to implement. Studies related to compensation for victims of property crimes have been conducted several times, but none of these studies relate the provision of compensation as a form of punishment imposed in court.

The author focuses on the form of compensation arrangements as a form of punishment that must be imposed by judges at the court level in the form of basic and mandatory punishment formalized in the form of a court decision, not just an out-of-court settlement (Yakubovich dkk., 2019). This concept is different from the application of restorative justice so far in Indonesia or abroad which applies it at the level of investigation and prosecution (Schmuck dkk., 2023). This study aims to analyze the various models of settlement that have been practiced so far and propose fundamental changes in the form of basic punishment against perpetrators of crimes against property.

## RESEARCH METHODOLOGY

This research uses a normative juridical approach method. Normative juridical research is legal research conducted by examining library materials or secondary data only analytical descriptive (Song dkk., 2020). The data used is secondary data, in the form of primary legal materials and secondary legal materials, namely laws and regulations, books, journals which are the results of research by legal academics (Davison dkk., 2022). The data collection technique in this research was carried out by studying the literature and using a statutory approach (Kirkwood & Hamad, 2019). This is done to examine the effectiveness of laws that are already in force.

## RESULT AND DISCUSSION

The current Criminal Code, which is a legacy of the Dutch East Indies, does not recognize the existence of compensation punishment or state recovery punishment (Hobson dkk., 2021). The form of punishment which object is in the form of property of the perpetrator is fine and forfeiture of certain goods. Fines are one of the main types of punishment regulated in Article 10 of the Criminal Code (Gholson & Robinson, 2019). The applicable Criminal Code based on Law No.1 Year 1946 j.o. Law No. 73 Year 1958 is derived from *Wetboek van Strafrecht voor Nederlands Indie* which came into force in Indonesia on January 1, 1918. Meanwhile, the punishment of confiscation of certain goods is regulated as an additional punishment.

The settlement of crimes against property that has been carried out by imposing imprisonment cannot recover the losses suffered by the victim, because the victim does not get back his rights that were seized by the perpetrator (Fisher & Devlin, 2020). Three previous studies proposed the provision of compensation at the pre-trial stage, or focusing only on other criminal offenses that are not crimes against property and by applying the provisions of Article 98 only.

These three alternatives are less effective because they rely more on the goodwill of prosecutors and police rather than requiring it. In some countries, the criminal fine system recognizes daily fines such as Finland and Denmark (Xiong & Zheng, 2022). In Finland, the fine is calculated using the daily salary or wage earned by the convict. In terms of the form of fine, this punishment is closest to compensation in corruption offenses. However, in corruption offenses, both fines and compensation are handed over to the state (Ali Al-Hassani, 2021). This is understandable because the victim in the crime of corruption is the state, so what must be recovered by the perpetrator is state losses.

The same applies to the crime of money laundering (Maglione, 2019). The Law on Money Laundering has recognized the obligation to recover assets for perpetrators, asset recovery does not reach victims (Gregory dkk., 2021). The perpetrator's obligation to recover losses is deposited to the state, not to the victim. According to Tania Irwan, Ideally, the process of asset recovery is the recovery of the victim's losses, not just declared confiscated to the state, but returned to the rightful owner.

The forfeiture system in the Law on Money Laundering is referred to as *in personam* forfeiture, which is asset forfeiture of assets associated with the conviction of a convicted person. Asset forfeiture is attached as a criminal sanction (Lodi dkk., 2021). In addition, asset forfeiture is also possible civilly, called *in rem* forfeiture, which is a forfeiture carried out without criminalization. The third, administrative asset forfeiture, is a forfeiture carried out by the government without a court decision. One of the most shocking verdicts of money laundering and fraud cases is the First Travel case where the judge imposed a verdict on the seizure of goods for the state, while the victims did not get back their rights that were seized by the perpetrators. From January 2015 to June 2017, First Travel promoted umrah packages at quite low prices. There were 93,295 prospective pilgrims who had deposited their money. Of the 93,295, there were 63,310 prospective pilgrims who had paid in full but were unable to depart. The money that has been deposited by pilgrims in the amount of around Rp 905,333,000,000, - (nine hundred and five billion three hundred and thirty-three million rupiah) is not returned.

During the trial, the public prosecutor demanded that the defendant return the evidence in the form of money that had been deposited by the congregation to the victim. The Panel of Judges of the Depok District Court rejected this demand on the grounds that it was difficult to determine who was entitled to receive the return of the evidence and feared that the victims would fight over the confiscated assets if they were returned to the victims. To prevent legal uncertainty over the assets, the judges considered it fair that the confiscated assets be forfeited to the state. With this decision, the judges ignored the actual victim of the crime, namely the prospective pilgrims. However, Rasidi and Afandi assessed that the decision in the First Travel case was correct because the settlement of asset returns should be submitted to the civil court. That is the general view of law enforcement in Indonesia so far. There is a firm view to separate civil and criminal cases. The settlement is carried out through their respective chambers. The result is the length of the settlement carried out by the court in providing a sense of justice to the community. This view is not in line with the principle of criminal procedure law, which is fast, simple and cheap. The elucidation of Article 2 paragraph (4) of the Judicial Magistrates Law states that what is meant by "simple" is that the examination and settlement of cases is carried out in an efficient and effective manner. What is meant by "light cost" is the cost of cases that can be reached by the community. However, the principles of simplicity, speed, and low cost in the examination and settlement of cases in court do not override the thoroughness and accuracy of the judicial process.

in the search for truth and justice.

More or less the same cases occur in many places in Indonesia. One of the umrah fraud cases that occurred in Pekanbaru was carried out by PT M, which had defrauded hundreds of victims. The director of PT M on behalf of J has been sentenced by the Pekanbaru District Court, but until now the victims still do not get their rights. Normatively, there is a way out of this problem, but it is rarely practiced. The solution is regulated in Article 98 of the Criminal Procedure Code.

A case of the application of Article 98 occurred recently in Tangerang District Court. The judges of Tangerang District Court granted the merger of compensation claims filed by victims of the Rp1 trillion ponzi scheme. In its verdict, the panel of judges stated that the defendant Budi Hermanto was legally and convincingly proven to have committed the crime of fraud and money laundering and imposed a sentence of 13 years, and a fine of Rp. 2 billion in lieu of 6 months imprisonment. In addition, the panel of judges ordered the defendant to pay compensation of Rp53 billion to 8 victims who sued.

The presence of Article 98 of KUHAP is unique because it combines criminal charges with civil charges. The KUHAP actually still does not accommodate compensation for victims as a form of sanction that should be imposed on perpetrators as in corruption crimes or money laundering crimes. The issue of victims' losses that are not recovered in criminal offenses against property is not a formal legal issue, but actually a matter that should be regulated in material criminal law. Ideally, criminal law regulates that the punishment that can be imposed on the perpetrators of crimes against property is compensation or restoration of conditions for victims, either as an alternative punishment that can be chosen between corporal punishment or compensation punishment, or even as a cumulative punishment where the perpetrator is required to undergo corporal punishment as well as compensation to victims as is the case in corruption crimes. What victims want to achieve in modern society is not much different. In the case of property crimes where the loss suffered is material, the compensation is the return of the victim's lost property. For the victim, it is not important whether the perpetrator is imprisoned or not. Both penal and non-penal crime prevention are aimed at suppressing or reducing the occurrence of crime. According to G. Pieter Hoefnagels, criminal policy in crime prevention can be carried out through influencing thoughts about punishment, the application of punishment, and the implementation of criminal law law and prevention without victimization. The success of a law depends on its application and enforcement.

The obstacle found in practice is that the defendant is unable to pay the compensation suffered by the victim. Thanks to this, in a global perspective, based on the International Congress at the 7th UN congress "Prevention of crime of the treatment of offenders", Milan (Italy) in 1985 it is recommended that member countries always pay attention to victims on several matters including: Access to justice and fair treatment; Payment of restitution by the perpetrator to the victim, his family or other people whose lives depend on the victim. It is even emphasized that this compensation should be formulated in the form of criminal sanctions in the applicable legislation; and the most important thing in this case is that if the perpetrator is unable to pay it, the state is expected to pay financial compensation to the victim, his family or those who are dependent on the victim.

From the theoretical perspective according to the science of victimology, the imposition of restitution or compensation punishment, both as an independent punishment and as an alternative to imprisonment is in line with the purpose of punishment that criminal sanctions are not only oriented towards the perpetrators of crime but also oriented towards the victims of crime. It will also be easier to eliminate the conflict between the two and will relieve the guilt of the perpetrator towards the victim as the purpose of punishment outlined in the Draft Criminal Code. In the perspective of



victimology, justice is interpreted as a process of finding solutions to problems that occur in a criminal case where the involvement of victims, the community and the perpetrator is important in an effort to improve the situation caused by the perpetrator's actions. The restorative justice concept approach seeks to restore the victim's security, personal respect, dignity, and more importantly, sense of control. The concept of restorative justice emerged as a criticism of the application of the criminal justice system with imprisonment which is considered ineffective in resolving conflicts even though it has shifted from a retributive paradigm to a more rehabilitative one.

Restorative justice is sometimes understood to be the same as non-punitive case handling, which is a method of preventing crime by not using criminal law (prevention without punishment). Whereas the two are two different things. Non-penal law enforcement is the enforcement of social order by preventing crime, not by using legal means. In restorative justice, criminals are directed to be responsible for restoring the harm they have caused. Those who have suffered harm should be the center of attention in decision-making. Restorative justice is a holistic philosophy that has become increasingly popular in reformist criminal justice debates and criminological research. However, there is some debate about whether its programs adequately meet the needs of victims. Braithwaite argues that one model of restorative justice that could be implemented is using a reintegrative shaming model. For its implementation, restorative justice will be successfully implemented in the community if it is in line with the norms that exist in the community in particular.

The unclear regulation of the concept of restorative justice (in Islam called *Islah*/*Al Afwu*), in the Indonesian criminal justice system, puts law enforcers in a difficult position and dilemma because so far the settlement of cases in Indonesian criminal cases is very formalistic and legalistic. Therefore, this concept must be given an integrated legal framework in the criminal law (KUHP) and formal criminal law (KUHAP). Restorative justice has successfully resolved criminal cases in many countries. In Europe, for example, victims in restorative justice are officially recognized as individuals entitled to the rights of recognition, assistance and protection. The concept of restorative justice has also been accommodated in the Criminal Code Bill. Restoration of victims' rights is regulated as an additional punishment. Additional punishment as referred to in paragraph (1) may be imposed in the event that the imposition of main punishment alone is not sufficient to achieve the purpose of punishment. Additional punishment as referred to in paragraph (1) may be imposed in 1 (one) or more types.

Judging from the provisions of the Draft Criminal Code, it can be seen that the punishment of deprivation of certain goods and payment of compensation is still an additional punishment. Making it as an additional punishment, it is clear that the thinking of the drafter of Criminal Code is still oriented to punishment in the form of In fact, in crimes against property, what the victim wants is not to imprison the perpetrator, but the return of losses incurred as a result of the perpetrator's actions. With this arrangement, it is estimated that it will remain difficult for judges to impose compensation for victims, especially in the case of crimes against property. Judges will tend to impose imprisonment as the most likely main punishment.

Judging from the process in court, the idea of imposing compensation as the main punishment is similar to the concept of *diyat* in Islamic criminal law. However, it differs in the object of the case where in the concept of *diyat*, the case that may be compensated is a murder case, while in this idea, a *diyat*-like concept is applied to crimes against property. However, the imposition of compensation does not necessarily eliminate the imprisonment of perpetrators of crimes against property. If imprisonment is completely eliminated, it will reduce the deterrent effect for perpetrators of crimes against property. They will think that this crime can be easily committed

because it can be easily redeemed. There should be an exception to the application of compensation as the main punishment. For cases of recidivism, or crimes against property that are large in amount, premeditated, jointly committed, or where the victim is an incapacitated person, the imposition of imprisonment is still necessary.

## CONCLUSION

The application of restorative justice by making compensation as the main punishment in the settlement of crimes against property should be considered to be included as a form of punishment in the Draft Criminal Code. The application of restorative justice by making compensation as the main punishment is more in line with the objectives of modern punishment and can better fulfill the sense of justice for victims in addition to overcoming overcapacity in correctional institutions. This idea is different from the application of restorative justice that has been applied at the investigation and prosecution level as it is applied at the court level.

## AUTHORS' CONTRIBUTION

Author 1: Validation; Writing - review and editing.

Author 2: Conceptualization; Project administration.

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