

Penal Mediation by Police Investigators on Fraud and Embezzlement Cases in the Integrated Criminal Justice System

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Abstract

In Indonesia, investigators act as mediators in resolving criminal cases, and investigators perform this role purely based on their discretion but consider the need for this institution to be formalized. This institution was formalized in the Head of the Indonesian National Police's Telegram Letter No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009, regarding Case Handling Through Alternative Dispute Resolution (ADR) (STR Kapolri 3022/2009), that the use of ADR in resolving criminal cases can occur if the litigants (victim and perpetrator) agreed. The settlement will only be carried out under professional and proportional legal procedures if the parties have no agreement. STR Kapolri 3022/2009 limits what crimes can be resolved through ADR, so the following problems arise. How is the power of law and legal certainty in applying penal mediation in cases of fraud and embezzlement carried out by police investigators? How should penal mediation be realized in an integrated criminal justice system? This research uses normative juridical or doctrinal law research, systematically expounds on specific legal categories' regulations, and analyzes the relationship between several principles. Then from the study results on the components of the legal structure, penal mediation in an integrated criminal justice system is realized by: (i) establishment of a penal mediation institution; (ii) synchronization of law enforcement and courts in carrying out penal mediation. (iii) Finally, the legal culture component needs to be reformulated by adjusting the penal mediation to each region's prevailing culture and values.

Keywords: *Penal Mediation, Police Investigators, Fraud and Embezzlement.*

A. INTRODUCTION

In Indonesia, investigators have acted as mediators in resolving criminal acts. Investigators carry out this role purely based on their discretion but consider the need for this institution to be formalized (Efferin & Hopper, 2007). This institution was formalized in the Telegram Letter of the Indonesian National Police No Chief. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009, regarding Case Handling

Through Alternative Dispute Resolution (ADR) (STR National Police Chief 3022/2009).

In STR National Police Chief 3022/2009, the use of ADR in resolving criminal cases can occur when the litigants (victim and perpetrator) agree. If the parties have no agreement, the settlement will only be carried out under existing legal procedures professionally and proportionally (Marcus, 2019). STR National Police Chief 3022/2009 limits what crimes can be resolved through ADR for minor offenses.

The concept underlying the settlement of criminal cases through the ADR mechanism is restorative justice, an approach to problem-solving outside the formal process that actively involves victims, perpetrators, and communities affected by criminal acts and is generally assisted by a facilitator (Schormair & Gerlach, 2020). The rationale of the concept of restorative justice is that criminal acts are about breaking the law and harming victims and society. Therefore, dealing with criminal acts (as far as possible) must involve the perpetrator and the injured parties, providing the assistance and support needed by the victim and the perpetrator (Hewitt et al., 2020). The problem-solving process in the concept of restorative justice is more focused on recovering the losses suffered by the victim by holding the perpetrators accountable and involving the community in solving existing problems. The involvement of all parties in this process emphasizes relationship development, reconciliation, and discussion of agreements regarding the expected outcomes between victims and perpetrators (Hughes, 2018).

In the Indonesian legal system, the concept of restorative justice is formalized, for example, in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (Law No. 11/2012). Article 1 number 6 translates restorative justice as the settlement of criminal cases involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly obtain a fair settlement method by emphasizing recovery back to its original state, not retaliation (Suharto & Ma'ruf, 2021). The mechanism used in Law no. 11/2012 is the diversion, penal mediation, but it is not expressly recognized, hence the name diversion. Implicitly, this concept is also accommodated in Law no. 32 of 2009 concerning Environmental Protection and Management, Article 84, which opens the possibility of voluntary settlement of environmental disputes by the disputing parties outside the court (Klein, 2021).

Institutionally, the Indonesian National Police in 2018 issued Circular Letter No. SE/8/VII/2018 of 2018 concerning the Application of Restorative Justice in settlement of Criminal Cases (SEPOLRI No. 8/2018). SEPOLRI No. 8/2018 states that restorative justice is an effort to restore the balance that has been shaken due to the occurrence of a crime. The balance is restored by burdening the obligations of the perpetrators of the crime with their awareness of admitting mistakes, apologizing, and returning the damage and losses to the victims to fulfill the victim's sense of justice.

Based on the background as stated above, several problems can be formulated as follows:

1. How are the power of law and legal certainty in the application of penal mediation to cases of fraud and embezzlement carried out by Police investigators?
2. How should penal mediation be realized in an integrated criminal justice system?

B. METHOD

The research method used in this study is a normative juridical research method or doctrinal legal research, which conducts a systematic exposition of the regulations governing specific legal categories, analyzes the relationship between several principles, explains the location of difficulties, and predicts future developments.

C. RESULT AND DISCUSSION

1. Application of Penal Mediation to Cases of Fraud and Embezzlement Carried Out by Police Investigators

The restorative justice approach is justice for all parties in settlement of criminal cases. This approach discusses the function of repairing the damage caused by the payment of criminal cases and discusses justice (Ryman-Tubb et al., 2018). Justice contains two meanings, justice in an ethical perspective and justice in a juridical view.

First, ethical justice refers to the concept of equity and fair trial, which refers to the moral balance of right and wrong, the benefits and burdens of the parties. This balance is manifested in an obligation imposed on the perpetrator in the corrective justice approach (Benjamin et al., 2021). A form of responsibility for the damage caused by the crime he committed. While in the restorative justice approach, balance is realized through efforts to improve in the form of compensation or other compensation to heal or repair the losses caused by the crime he committed (Van Ness, 1993).

Second, legal justice (juridical) is generally equated with guarantees or legal certainty (legality). The implementation of restorative justice must respect the applicable law, including the results of the existing process and its performance (Sloth-Nielsen & Mwambene, 2010). The integral justice approach cannot be implemented if it conflicts with the legal system and legislation. The legitimacy is essential because the process's results and guarantees will depend on the rules that form the basis for legal guarantees and certainty (Gonzalez & De Hert, 2019).

Restorative justice should be embodied in legislation and incorporated into the criminal justice system. This legal justice brings us to the subsequent discussion on the principle of certainty in penal mediation (Marshall, 1996).

In the classical criminal justice system paradigm, the primary victim of a crime is the state and not the victim in the real sense. The real victims sometimes have to be sacrificed again for the sake of proof in the criminal justice process. The concept of restorative justice fills this void and at the same time gives the perpetrator direct responsibility to the victim in various forms and various mechanisms in which the focus is on the benefit of the victim. However, based on ethical justice, penal mediation must restore balance through repairs made by compensation to cure the crime committed. Compensation and restitution through compensation are vital components of the disciplinary mediation process. With compensation, the victim's interests as the party who suffered the loss became the main focus. What is important here is that the compensation itself must be balanced with the suffering sustained by the victim. This means that penal mediation should not be a means for victims to blackmail the perpetrators.

Society needs legal certainty as a clear and precise reference so that everyone can know their position in the community. Legal certainty can be traced to the Weberian view of the socio-legal system that distinguishes between formal and informal law and rational and irrational systems. Weber explained that the proper and sensible system only developed in the Western world due to the choice of the police who had capitalist needs. Legal certainty has become one of the essential principles in legal theory in various parts of the world. Concerning all the explanations regarding legal certainty above, there are at least some signs given by the principle of legal certainty in penal mediation. The first signs are that penal mediation must be regulated in statutory regulation. The regulation of penal mediation in statutory law is an absolute prerequisite for the birth of the principle of legal certainty. The rule of penal mediation in a statutory regulation will have a binding force on all members of society. It doesn't just stop at the practice in-laws and regulations. Penal mediation must also be well integrated into the criminal law enforcement process. Penal mediation must have its place so that it has certainty that it will be implemented.

Second, penal mediation must produce consistent outcomes in its application. The consistency of the application of penal mediation certainly has its challenges considering that its implementation depends on the discretion of law enforcement officials. In principle, every action taken by an investigator in the context of resolving a crime must have a legal basis. To anticipate conditions that require the legislation, the investigator has the discretion of investigator to take action, but the effort has not been explicitly regulated.

2. Penal mediation is realized in an integrated criminal justice system

Provisions for the implementation of penal mediation are contained in the internal regulations that apply to the Indonesian National Police, the Indonesian Attorney General's Office, and the Supreme Court (Riyadi et al., 2020). Unfortunately, each institution uses different requirements in its institutional regulations. The conditions for the implementation of penal mediation by the Indonesian National Police are regulated in PERPOLRI No. 8/2021:

- a. Does not cause unrest and/or rejection from the public;
- b. Does not cause social conflict;
- c. Does not have the potential to divide the nation; Not radicalism and separatism;
- d. Not a repeat offender of a criminal act based on a court decision; and
- e. It is not a crime of terrorism, a crime against state security, corruption, and a crime against people's lives (Amoore & De Goede, 2005).

These conditions are different from the requirements for the implementation of penal mediation imposed by the Attorney General's Office of the Republic of Indonesia in PERJARI No. 15/2020, that is:

- a. The first time the suspect has committed a crime;
- b. The crime is punishable by a fine or is threatened with imprisonment of not more than 5 (five) years;
- c. A criminal act is committed with the value of evidence or value of the loss caused due to an illegal act of not more than Rp. 2,500,000.00 (two million five hundred thousand rupiahs)
- d. Not a crime against state security, the dignity of the President and Vice President, friendly countries, heads of friendly governments and their representatives, public order and morality;
- e. The community responded positively
- f. Criminal acts that are punishable by a minimum criminal threat;
- g. Narcotics crime;
- h. Environmental crime; dan
- i. Criminal acts committed by corporations (Budianto, 2020).

These requirements also differ from the Guidelines for the Directorate General of General Courts of Restorative Justice, which regulates penal mediation in the Supreme Court, which applies only to minor offenses and not to repeat offenses (Bazemore & Umbreit, 1995).

The difference in implementing penal mediation shows different views of law enforcement institutions in Indonesia regarding which crimes can be resolved through penal mediation. This difference of opinion shows that the criminal justice system in Indonesia is not yet integrated (Glubwila et al., 2021). As previously

explained, the integrated criminal justice system should have sub-systems that are interconnected and mutually support each other as part of the stages of the case settlement process (Kersbergen & Waarden, 2004).

Penal mediation can benefit the parties more than the judicial process that leads to punishment. Therefore, the researcher proposes the following conditions in the disciplinary mediation process (Weiner et al., 1997). These conditions are divided into 2 (two) formal and material requirements. First, settlement through penal mediation will produce an outcome more in line with the parties' will. That way, the losses suffered by the community due to criminal acts can be more replaced (Umbreit et al., 2004). This is different from the criminal justice process in which the outcome still leaves a grudge between the victim and the perpetrator. Second, punishment in the form of compensation will directly restore the losses suffered by the victim. Such payment can be more valuable than criminal penalties or fines imposed in court decisions without compensating the victim (Becker & Stigler, 1974).

The principles of justice, certainty, and expediency as described above show how penal mediation as a form of restorative justice is compatible with criminal acts of fraud and embezzlement (Centes et al., 2018). The compatibility of penal mediation with criminal acts of fraud and embezzlement can be viewed from its side, the process, and its objectives. First, if viewed from his perspective, penal mediation is an appropriate approach to criminal acts of fraud and embezzlement. In a refreshing justice approach, one of which is penal mediation, the key to the settlement process is the parties involved, especially the perpetrators and victims, where the settlement of cases is expected to restore the balance between them and social relations (Kozziarski & Lee, 2020). In criminal acts of fraud and embezzlement, especially those originating from agreements, the perpetrator and the victim initially trust each other. The criminal acts committed by the perpetrators then damage the partnership and trust relationships (Manning & Kowalska, 2021).

Problem-solving focused on perpetrators and victims is therefore very important. Of course, the hope is that the trust lost can be restored, and the contractual relationship between the two can be resumed.

It is undeniable that if the perpetrator and the victim only carry out the settlement, then the possibility of a settlement is very low. Therefore, a facilitator needs to direct both party members in the restorative justice approach.

The settlement of criminal acts of embezzlement (Article 372 of the Criminal Code) and fraud (Article 378 of the Criminal Code) through penal mediation will provide justice to the victim. Settlement of criminal acts of embezzlement (Article 372 of the Criminal Code) and fraud (Article 378 of the Criminal Code) if processed normatively, namely the defendant is processed through the criminal justice system and therefore sentenced to a crime, legally it must be considered to have provided justice. However, the victim does not feel this feeling of justice because there is no

protection for the victim's rights. In fact, in its development, the law should pay attention to victims of criminal acts, who, in the perspective of public law, are also victims of the state's failure to ensure protection for themselves.

In addition, they were taking into account that the characteristics of fraud and embezzlement crimes are more economically motivated. The victim also refers to individual interests. Then the possibility of using a settlement method with a restorative justice approach is wide open.

Second, let's look at the process. It can be seen that the process of dialogue-oriented penal mediation provides benefits for the parties involved in the crime of fraud and embezzlement. In this dialogue, it is hoped that all relevant parties can speak from heart to heart. For the perpetrator, this dialogue is a forum for him to explain why he committed a crime, how he realized his mistake, and how he would improve the situation. For the victim, this dialogue is an opportunity to see the perpetrator's point of view, tell how the crime affected him, and forgive the perpetrator.

This dialogue in civil law can undoubtedly be seen as a negotiation, although it is not entirely business aspects discussed. With such an in-depth dialogue, of course, the hope is that both parties can better understand each other and build a better cooperative relationship in the future. Means of dialogue that are not as contentious as the trial are more conducive to restoring relations between victims and perpetrators. Thus, penal mediation can provide benefits for the parties to achieve restoration of the original situation.

In addition to emphasizing dialogue, the penal mediation process also prioritizes strengthening the victim's position. In the settlement process through a justice approach, the victim's post will be stronger than if the settlement is carried out through the courts. The position of fraud and embezzlement victims, like victims of other criminal acts, is fragile. Victims are not directly involved in fighting for their rights in every criminal justice process.

The above conditions are inversely proportional to the settlement process through a restorative justice approach. In this approach, victims are expected to actively participate in fighting for their rights that have been violated. This means that the victim becomes the subject in resolving the crime of fraud and embezzlement, and the interests of the victim are an essential part that determines the outcome.

Third, by reviewing its objectives, it can be seen that the purpose of implementing penal mediation is to realize restorative justice. This is done by restoring balance in social relations by restoring conditions damaged by committing a crime. The perpetrator will take active action either by compensating the victim or taking other measures to recover the situation in criminal acts of fraud and embezzlement, especially those originating from agreements. So, of course, initially, the parties agreed so that both of them could mutually benefit. However, with the existence of a

crime, one of the parties becomes a victim and, therefore, has to bear the loss instead of getting profit.

Penal mediation is expected to make the perpetrator return the loss suffered by the victim, which is an essential aspect for the victim. And with the rebuilding of trust through dialogue, of course, it can be expected that both of them can continue the contract between them and therefore can again achieve the original goal, namely jointly benefiting.

D. CONCLUSION

Based on the research results, penal mediation applied by Indonesian National Police investigators has legal force that binds the parties involved in it and provides legal certainty for dispute resolution based on restorative justice. From the research conducted, the researcher found that penal mediation is one embodiment of a robust justice approach that is very suitable to be applied to criminal acts of fraud and/or embezzlement. This match was found from the analysis of the objectives of the two crimes that put forward the pursuit of material gain, which means that it causes material losses. Therefore the restoration of conditions can be genuinely appropriate before the crime. Recovery of infections is also a preferred goal to be carried out in criminal acts of fraud and/or embezzlement, especially those originating from the agreement because initially, the parties to the contract. This is then transformed into the perpetrator, and the victim is people who already know each other and are contractually connected. Therefore recovery of losses is also expected to restore trust between the two. Besides being suitable to be applied in criminal acts of fraud and embezzlement, settlement through penal mediation at the investigation level has been covered by PERPOLRI No. 8/2021, which provides certainty from the outcome of the disciplinary mediation process in the form of stopping the investigation for legal reasons. Thus, penal mediation in fraud and embezzlement cases has legal force and can provide legal certainty for the reporting party and the reported party.

Based on the research conducted, the embodiment of penal mediation in an integrated criminal justice system can be viewed from the three components of the legal system as described by Friedman. In the legal substance component, penal mediation in an integrated criminal justice system is realized by: (i) uniformity of material requirements for penal mediation; (ii) penal mediation arrangements in the Criminal Procedure Code; (iii) victim protection in the penal mediation process; (iv) the penal mediation process is carried out based on informed consent. In the legal structure component, penal mediation in an integrated criminal justice system is realized by: (i) establishing a penal mediation institution; (ii) synchronization of law enforcement and courts in carrying out penal mediation. Finally, the legal culture component needs to be reformulated by adjusting the penal mediation to the culture and values prevailing in each region.

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