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Handling of Embezzlement Criminal act on the investigation stage based on restorative justice

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Abstract

This study aims to examine the strength of the legal basis in handling criminal acts of embezzlement at the investigative stage based on restorative justice. Restorative justice is a concept of thinking that responds to the development of the criminal justice system by focusing on the need for the involvement of perpetrators and victims who feel excluded from the mechanism of the criminal justice system nowadays.

The type of research used in this research is normative legal research. The materials used consist of primary legal materials, secondary legal materials, and tertiary legal materials. The research approaches used in analyzing consist of the Statute and Conceptual Approach.

The results of this research show the legal basis for solving cases of embezzlement through a restorative justice approach at the investigation stage which refers to Article 16 Paragraph (2) and Article 18 Law No. 2 of 2022 concerning The State Police of the Republic of Indonesia, known as discretion, and The Republic of Indonesia National Police Regulation No. 8 of 2021 concerning The Handling of Criminal Acts based on Restorative Justice still does not have the force of law, because it contradicts the Law No. 8 of 1981 concerning the Criminal Procedure which is the legal protection in handling criminal cases including the crime of embezzlement.

Keywords: Criminal Act, Embezzlement, Restorative Justice

Introduction

The police are the forefront of Indonesian law enforcement because the police are an institution that has authority in law enforcement, security, and order in society. Police are also an apparatus that can determine whether a violation or crime that occurs in society will be processed further or not in the criminal justice system.

According to M. Faal, the criminal justice system is a system of the criminal justice process. Each function component consists of the police as investigators, the prosecutor's office as the public prosecutor, the court as the adjudicating institution, and the correctional institution as the entities that reintegrate the convicted individuals. The functions work together, integrated to achieve a common goal which is to tackle crime. (Faal, 1991) ^[1] The police have a relatively significant role because normatively, the formulation of primary duties based on Article 13 of Law No. 2 of 2002 concerning The State Police of the Republic of Indonesia:

1. Maintaining public orderliness and safety;
2. Law enforcing; and
3. Providing protection, safeguard and services to public.

Jonlar Purba stated that police are the gatekeepers of the criminal justice system. As Donald Black said, his role as a criminal investigator and examiner of criminal acts place police in charge of dealing with a majority of ordinary or common criminal offenses. (Purba, 2017) ^[4] Police mostly work reactively rather than proactively, relying on the community to complain or report the alleged occurrence of criminal offenses. (Purba, 2017) ^[4]

One of the law enforcement that is carried out without case selection as in ordinary criminal acts with less severe motives that

have received a social reaction from the society. The disturbance of society's sense of justice for methods of resolving ordinary crimes with less severe motives does not provide a platform for non-formalistic settlement methods. As affirmed by positivist perception has been strengthened by law enforcement officials in law enforcement practices and places procedures as the basis for legality to uphold justice, even more important than justice itself. (Samekto, 2008) ^[6]

In several law enforcement cases, ordinary criminal acts with less severe motives have received a response from society, such as the case of Mbok Minah, who stole three cocoa that occurred at the domain of Banyumas Police. Another case occurred in Palu, Central Sulawesi, conducted by AAL (15 years old children), who is known for the theft of a pair of sandals. Another children offenders of crime were also conduct by Deli Suhandi (14 years old), the children allegedly committed the crime of stealing a top-up card worth Rp.10.000,- (ten thousand rupiah) happened in Johar Baru, Central Jakarta. (Tengens)

Those representations of minor cases prove that law enforcement is more repressive and tends towards the approach of punishment. Therefore, it is necessary to analyze the regulation of common criminal offenses with less severe motives, including the crime of embezzlement.

In order to respond to the development in the legal necessities of society and fulfill a sense of justice for all parties, on 19 August 2021, Listyo Sigit Prabowo, as the Chief of the Indonesian National Police, issued The Republic of Indonesia National Police Regulation No. 8 of 2021 concerning the Handling of Criminal Acts based on Restorative Justice. This is the legal basis of restorative justice, which emphasizes restoration to its original state and balance of protecting the interests of victims and perpetrators of crimes that are not oriented toward punishment.

The Republic of Indonesia National Police Regulation No. 8 of 2021 has more complete substantiation rather than the Circular Letter of the Chief of Indonesian National Police No. SE/8/VII/2018 concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases.

The problem that arises is related to the substance of Police Regulation No. 8 of 2021, which regulates the handling of criminal acts based on restorative justice, which does not yet have legal protection in the form of the Constitution.

Based on the description, the author is interested in conducting a study of the strength of the legal basis in handling criminal acts of embezzlement at the investigation stage based on restorative justice.

2. Research Methodology

The type of research used in this study is normative legal research, namely research on legal principles carried out on legal principles, which are standards of behavior or attitude. (Soekanto, 2019) ^[7] The materials used consist of primary legal materials, secondary legal materials, and tertiary legal materials. The research approach used in analyzing consists of Statute Approach dan Conceptual Approach.

3. Result of Research and Discussion

Implementing the restorative justice approach in the criminal justice system in Indonesia is a mandate for implementing the principle contained in criminal law. The principle stated that applying of Penal Code and Criminal Procedure Code is the last resort/last remedy or *ultimum remedium*, furthermore, if

it is within the framework of *Pancasila* Philosophy / Five Principles.

As creatures of God Almighty, the concept of punishment must be directed to the awareness of the faith of the criminal offenders, so the form of punishment will not conflict with any religious beliefs held by Indonesian people (including the concept of compassion).

According to J. E. Sahetapi and M. Solahudin, the purpose of punishment, according to Pancasila, should serve to nurture the mental state and transform the offender into a religious human being. The punishment that cannot injure human rights, degrade their dignity, and cultivate national solidarity. The offender must be direct to increase tolerance with other people and cultivate a sense of love for the nation, fostering maturity of self-control and awareness of obligations for every citizen that upholds justice along with the community. (Pryatno, 2020) ^[3]

Miriam Liebman states, "Restorative justice has become the term generally used for an approach to criminal justice (and other justice systems such as a school disciplinary system) that emphasizes restoring the victim and community rather than punishing the offender." (Liebman, 2007) ^[2]

According to Eva Achjani Zulfa, restorative justice is a concept of thinking that responds to the development of the criminal justice system that focuses on the need for the involvement of perpetrators and victims who feel excluded from the working mechanism of the existing criminal justice system. (Zulfa, 2009) ^[9]

Restorative justice is a concept of thinking that responds to the development of the criminal justice system by focusing on the need for the involvement of perpetrators and victims who feel excluded from the mechanism of the criminal justice system that occurs nowadays. On the other hand, On the other hand, restorative justice is also a new frame of mind that can be used in responding to a crime for law enforcers and legal practitioners. (Liebman, 2007) ^[2]

There are several positive impacts of restorative justice approach can offer to the criminal justice system, as follows:

1. The restorative justice approach will provide an alternative to handling criminal acts by offering a platform for the achieving of settlement outside the court (for example *afdoening buiten proces*) in the scope of criminal law.
2. Establish the prosecution and trial process faster in order to help reduce the case arrears and the enormous cost burden.
3. Avoid imposing prison sentences that often offer a negative impact than the desired positive impact (there is an assumption that at present, imprisonment sanctions tend not to have a deterrent effect on perpetrators, but imprisonment sanctions actually offer perpetrators a place to learn to be even eviler through "school of crime" in correctional institutions, and other things that are negative impacts of imprisonment).
4. Avoid overpopulation of prison capacity.
5. Achieving savings in the state financial budget. So, the budget can be use for other essential purposes.

Satjipto Rahardjo stated that interchange-interaction with the society or their environment shows that the police have a characteristic that stands out compared to the other parties (judges, prosecutors, and lawyers). Police are the living law or the forefront of criminal law enforcement. Regarding arrests and detentions, the police face or have their problems.

When deciding to arrest and detain, the police have carried out multifunctional jobs, not only as a police officers but also as a prosecutor and a judge, simultaneously carrying out discretionary actions. (Rahardjo, 1993)^[5]

Restorative justice is an alternative settlement of criminal cases or disputes/conflicts that prioritizes peace between conflicting parties in order to create harmony, balance, and peace in society, especially for those in conflict. It is rare to resolve conflicts in criminal law through a restorative justice approach because law enforcement officers (investigators) always argue that there is no legal basis, even though the parties between perpetrators and victims of criminal acts want to resolve the case through peaceful resolution.

In the process of investigating a criminal act, when there is a sense of peace between the complainant and the accused based on the reason that both parties have engaged in a negotiation or consultation, and an agreement is reached for family-based resolution so that the parties have received justice and benefits that they want without any coercion from any party, then the complainant submits the revocation of the report to the investigator. In this case, investigators face a dilemma. On the other hand, if they continue to proceed with the case file to the public prosecutor, it will conflict with the sense of justice and harm the litigant's benefits have felt. If the investigation process terminates, it would be contrary to Article 109 Paragraph (2) of Law No. 8 of 1981 concerning the Handling of Criminal Acts based on Restorative Justice.

Meanwhile, within the Police Institution, a term known as discretion is regulated in Article 18 Paragraph (1) Law No. 2 of 2002 concerning The State Police of the Republic of Indonesia. The discretion has a function for the public interest officials of the Indonesia National Police in carrying out their duties and authorities based on their assessment.

In Article 16 Paragraph (2) Law No. 2 of 2002 concerning The State Police of the Republic of Indonesia, the Implementation of the provisions referred to in paragraph (1) sub-paragraph 1 shall be a preliminary investigation and investigation conducted in accordance with the following requirements:

- 1) Shall not be contrary with a rule of law;
- 2) Shall be parallel with legal obligations that must be conducted;
- 3) Shall be proper, reasonable and under their jurisdiction;
- 4) Shall be based on proper consideration and urgency; and
- 5) Shall respect human rights.

Restorative justice is a very popular discourse among societal fatigue who see formal law as dominated by positivist schools of thought and cannot optimally accommodate people's sense of justice because it prioritizes legal certainty (*Rechtssicherheit*).

Restorative justice offers the concept of non-formalistic settlement that emphasizes beyond the formal legalistic aspect but can be carried out by mediation between the perpetrator and the victim, reparations (the perpetrator restore everything that is destroyed), the discussion between victim and perpetrator (involves the families of both parties and prominent figure in the community), and victim awareness work (an attempt by the perpetrator to be more concerned about the impact of offenders actions).

In addition, the existing criminal justice system is considered no longer able to provide protection for human rights and transparency towards the public interest, which is increasingly decreased. The fact shows that many people

prefer to settle criminal cases outside the system. Settlements outside the system are either carried out by the parties (perpetrators and victims independently) or by involving law enforcement officers. Dissatisfaction with the criminal justice system not only related to the case handling and administration mechanism, but also to the final outcome of the ongoing process.

The restorative justice model attempts to restore the situation offering justice seekers more confidence in case resolution. The role of the police in the restorative justice model is only as a "facilitator" and not as law enforcement officers who can determine their will. Thus, the expected result of the restorative justice process is to create peace between the perpetrators and victims of a crime of their families through win-win solution efforts.

In this current reformation era, society is experiencing various kinds of changes, including the development of law in society. Therefore, the discretion of law enforcement officers, especially investigators, is essential to make breakthroughs against rigid legal rules. The application of discretion will be appropriate with the realization of justice that aligns with the development of law in society.

The regulation regarding police discretion, as stipulated in Article 18 Law No. 2 of 2002, has provided a juridical basis for police investigators to apply restorative justice in handling criminal cases, especially in criminal acts of embezzlement.

Through discretion, investigators can choose various actions in resolving criminal cases they handle. One of the actions that can be take in implementing restorative justice is to bring both parties together or their families to resolve conflicts and restore balance in society by keeping away the desire to imprison perpetrators of crimes but still held accountable.

Investigators have a moral obligation outside of formal legal procedures to be able to resolve conflicts that arise between victims and perpetrators of criminal acts in the investigation process through discretion. These conflicts can be resolved with a restorative justice approach in order to achieve justice on both sides and not cause other legal problems. However, if the two parties disagree to reconcile, then the investigation process can be continued, and the case can be transferred to the public prosecutor.

Investigators' Discretionary actions are carried out because these actions can effectively resolve the criminal offense. However, this action raises a complicated problem. Alternatively discretionary action is the application of criminal law that is carried out in accordance with its own policy to make the law work effectively. Furthermore, this action becomes an obstacle for law enforcement agencies, especially investigators. Investigators are always blamed for practicing discretion because these actions lead to discrimination in applying of the law.

Law enforcement is not solely carried out to maintain the Public Safety and Security (*Keamanan dan Ketertiban Masyarakat/Kamtibas*) situation. It will also provide several separate assessments of the Police in carrying out their main duties as protectors, defenders, and public servants. However, apart from enforcing the law, investigators must be able to provide a sense of justice to the community. Moreover, it affects the implementation of handling criminal cases with Alternative Dispute Resolution as a form of Restorative Justice which can be carried out by the police through Police Discretion. This is accomplished in order to create a solution or settlement of problems or cases

that arise, but pay attention the principle of providing justice to all parties.

The crime of embezzlement has the potential to be resolved through a restorative justice approach at the investigative stage to reach an agreement between the perpetrator and the victim.

In the perspective of restorative justice, the purpose of a crime is similar to the perspective of criminal law in general, for example, attacks on individuals and society and social relations. However, in the restorative justice approach, the primary victim of a crime is not the state as in the existing criminal justice system. Therefore, crime creates an obligation to repair damaged relationships due to the occurrence of a crime. While, justice is interpreted as a process of obtaining solutions to problems that occur in a criminal case where the involvement of victims, communities, and perpetrators is essential to repair, reconcile and guarantee the continuity of these repair efforts.

Restorative justice is well placed as a basis for moral development, emphasizing on mutual problem-solving through communication, negotiation, compromise, and responsibility. Concerning universal norms, the criminal justice system generally which carries out formal processes, tends to be exclusive and perpetuates universal norms. Meanwhile, the restorative justice approach creates a space for consensus and encourages community moral learning. It has a functions as legal education in a proportional manner bound by a relationship of mutual interest which is achieved through an active perspective, honest, and able to understand the meaning of doing justice.

Musyawah or deliberation in the settlement of criminal cases through a restorative justice approach always aimed at achieving satisfaction for all parties. Agreements created through deliberations usually contain things such as:

1. Apology from the perpetrator of the crime to the victim;
2. Perform various unpaid work/activities for the victim;
3. Financial compensation to the victim;
4. Volunteer work for social organizations;
5. Compensation in the form of money for social purposes;
6. Provide first aid at the time of the incident;
7. Wholeheartedly complying with the agreement. The range of possible agreements from negotiations is unlimited, and their variations depend on each negotiation.

At the investigation stage, the settlement of criminal cases, especially the crime of embezzlement through a restorative justice approach, acknowledged that have occurred a lot. However, sometimes the police have to “turn a blind eye.” Settlement of criminal cases through deliberation / *musyawarah mufakat* between victims and perpetrators of criminal acts is usually carried out in cases where the Investigation Commencement Warrant (*Surat Perintah Dimulainya Penyidikan/SPDP*) has not been issued and addressed to the Public Prosecutor.

In settlement of criminal cases through restorative justice, generally, the police only provide facilities (as facilitators) for the settlement of criminal cases outside the court because of the perpetrator’s request to be able to resolve the dispute amicably settled with the victims.

The results of amicable deliberations between the perpetrator and the victim usually have to be outlined in the form of a written agreement/statement or letter of conciliation, which in essence, contains that the criminal case between the victim

and the perpetrator has resolved properly and is binding. So, in the future, there will be no more claims regarding the fulfillment of the contents of the agreement/statement/peace agreement. The agreement/statement or conciliation letter made by the victim, perpetrator, or the family will be used as the basis for the police to take discretionary steps.

Investigator’s actions in resolving cases of embezzlement through deliberation, when examined further, actions that uphold the objectives of the law, namely justice that prioritizes a restorative justice approach that is in accordance with the values of Pancasila justice.

Resolving conflicts between perpetrators and victims in these cases through restorative justice can produce beneficial solutions for both parties. Furthermore, avoid rigid formal legalistic criminal justice process and tend to prioritize legal certainty without regard to justice and expediency.

The victim-offender model is an appropriate mediation in resolving cases of embezzlement at the investigation stage because perpetrators and victims have the same position by not distinguishing who is at fault. However, perpetrators of criminal acts are expected to resolve all losses of victims of embezzlement immediately. Furthermore, the investigator will use the letter of peace as a basis for taking the discretionary stage.

The legal basis for resolving embezzlement criminal acts through a restorative justice approach at the investigation stage is in the form of Article 16 Paragraph (2) and Article 18 of Law No. 2 of 2002 concerning The State Police of the Republic Indonesia and National Police Regulation No. 8 of 2021 concerning the Handling of Criminal Acts based on Restorative Justice. According to the author, the regulation has not provided a solid legal basis because the settlement of criminal acts outside the court is not regulated and is not recognized in Law No. 8 of 1981 concerning the Criminal Procedure as the primary source of law and the legal protection in examining all criminal acts including the crime of embezzlement.

4. Conclusion

The legal basis for resolving cases of embezzlement through a restorative justice approach at the investigation stage refers to Article 16 Paragraph (2) and Article 18 of Law No. 2 of 2002 concerning The State Police of the Republic Indonesia, known as discretion and The Republic of Indonesia National Police Regulation No. 8 of 2021 concerning the Handling of Criminal Acts based on Restorative Justice still does not have the force of law, because it contradicts with the Law No. 8 of 1981 concerning the Criminal Procedure Code which is the legal protection in handling criminal cases including the crime of embezzlement.

5. References

1. Faal M. *Penyaringan Perkara Pidana Oleh Polisi (Diskresi Kepolisian)*, Jakarta, Pradnya Paramita, 1991, p. 24.
2. Liebman, Miriam. *Restorative justice: How It Works*, London, Jessica Kingsley Publishers, 2007, p. 25, 27.
3. Pryatno, Dwija. *Sistem Pelaksanaan Pidana Penjara Di Indonesia, cet.-1*, Bandung, PT Refedika Aditama, 2020, p. 28.
4. Purba, Jonlar. *Penegakan Hukum Terhadap Tindak Pidana, Bermotif Ringan Dengan Restorative Justice*, Jakarta, Jala Permata Aksara, 2017, p. 69.
5. Rahardjo, Satjipto. “Studi Kepolisian Indonesia:

- Metodologi dan Substansi”, artikel disampaikan pada Simposium Nasional Polisi Indonesia, Semarang, Fakultas Hukum UNDIP, 1993, p. 5.
6. Samekto, FX. Aji. *Justice Not For All: Kritik Terhadap Hukum Modern Dalam Perspektif Hukum Kritis*, Yogyakarta, Genta Press, 2008, p. 33.
 7. Soekanto, Soerjono dan Sri Mamudji. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Depok, PT. RajaGrafindo Persada, 2019, p. 62.
 8. Tengens, Jecky. Pendekatan Restoratif Justice dalam system Pidana Indonesia. retrieved from <https://www.hukumonline.com/authors/au60079e7b54f30/Jecky%20Tengens/?page=2&type=column>, accessed on 10 April 2023.
 9. Zulfa, Eva Achjani. *Keadilan Restoratif*, Jakarta, Badan Penerbit Fakultas Hukum Universitas Indonesia, 2009, p. 36.