



Reconstructing the embezzlement case investigation based on restorative justice in Indonesia

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Abstract

Law are essentially exists inside community to solve their problem as with the embezzlement for example, this kind of crime that only cause a damage that can be returned to normal must be considered a more peaceful restorative justice approach to solve it in order to restore balance in the community. The objectives to be achieved in this study how to reconstruct the Embezzlement Investigation Law In Indonesia. The method of research uses a Sociological juridical research methods sourced from primary and secondary data obtained through interviews with victims, perpetrators, investigators, and advocates, as well as community leaders, and through literature studies. The results in this study are to realize peace between the perpetrators and victims in embezzlement criminal cases based on restorative justice, the law Article 109 Paragraph (2) of the Criminal Procedure Code, Article 77 of the Criminal Code and Article 16 Paragraph (2) of Law No.2 of 2002 must be reconstructed so that it can promotes the peaceful negotiation between the perpetrators and the victim or their families in a fair and balanced manner as The current formulation of regulations in Indonesia does not accommodate peace as a form of settlement of criminal cases outside the judicial process. Future peace arrangements must be included in material Penal law and formal Penal law.

Keywords: reconstruction, embezzlement investigation, restorative justice

1. Introduction

The structure of criminal procedure and criminal procedure instruments in Indonesia has set the formal procedures that must be passed in resolving a criminal case. But unfortunately, the formal system in practice is often used as a repressive tool for those who are clad in the attributes of law enforcement. this has been supported by the fact that there has been various kinds of criminal cases that should be resolved using a peaceful reconciliation must end up in court because of criminal offenses handling system "delict" nature so that the authority to investigate a case cannot be stopped. this is in contrary to the main principle in the criminal system namely "Ultimum Remidium" where the punishment of someone must be the last resort ^[1].

Among many cases, Settlement of embezzlement crime cases may be one of many cases that can be settled using restorative justice, an effort to achieve peace between the victim and the perpetrator or his family with the aim of restoring balance in the community. The concept that has been running for this does not provide protection and respect for the interests of victims and perpetrators of criminal acts. This is a conventional mechanism that is based on the establishment of a formal criminal process (criminal justice system) without looking at the development of law and a sense of community justice. In the concept of a restorative approach, the goal of resolving a crime is to restore the condition to its original condition. The main principle of resolving criminal acts through a restorative approach is how to look for efforts that can resolve various conflicts ethically and appropriately,

encourage someone to be able to make an agreement as a form of affirmation of compromise values that can create communication that is restorative, so that all forms of damage and loss what happens as a result of a crime that can be restored to its original condition ^[2].

Recently the talk about regulating the embezzlement case especially in relation to embezzlement case that potentially or already create nation's financial loss to a special regulation where an outside the court method are widely considered in some countries in Europe ^[3], A renewal of the law and criminal justice system that relies on the socio-cultural values of the Indonesian people, and thus reflects the values of the Pancasila philosophy of life and global developments that reflect the respect for the values of local wisdom, In Indonesia must be considered as a necessity ^[4].

The main objectives to be achieved in this study how to reconstruct the Embezzlement Investigation Law In Indonesia?

2. Method of Research

This research is a socio legal research, or Socio-legal study. A legal study in the form of empirical studies oriented to the discovery of theories about the process of occurrence and

¹ Kwat Puji Prayitno,(2012), *Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum In Concreto)*, Journal Of Dinamika Hukum. 2012;12(3):407-420

² Darrell Fox,(2009), *Social Welfare and Restorative Justice*. Journal Kriminologija i Socijal-na Integracija. Vol. 17 Issue 1 Year 2009. London: Metropolitan University Department of Applied Social Sciences;.

³ Georgeta Valeria Sabău,(2013), *Considerations Regarding Embezzlement In The New Penal Regulation*, Studia Universitatis Vasile Goldis Arad, Seria Stiinte Economice. 2013;23(4):124-131

⁴ Junaedi , (2014), *The Existence of Human Rights Court as a National Effort to Eliminate the Severe Violation of Human Rights in Indonesia*, Indonesia Law Review. 2014;4(2):176-195 DOI 10.15742/ilrev.v4n2.110.

about the process of working of law in society^[5].

The approach used in this study consists of several legal research approaches. Peter Mahmud Marzuki mentioned that the approach used in legal research is *statute approach*, *case approach*, *historical approach*, *comparative approach*, and *conceptual approach*^[6].

3. Research Results

The Current Investigation Of Embezzlement In Indonesia

In carrying out its main duties, police officers, especially for investigators in carrying out a series of investigative actions, must of course adhere to the existing rules, but on the other hand of course these rules must be able to compile legal actions to be carried out by an investigator, so that the investigator has full authority in carry out its functions^[7], of course this will be in line if in the perspective of a legal umbrella governing a crime that occurs in the midst of the community has been able to regulate so that it becomes the basis in law enforcement efforts carried out by members of the Indonesian National Police.

Investigation is a series of investigative actions in terms of the way regulated in Law No.8 of 1981 concerning Criminal Procedure Law (KUHAP). According to the Criminal Procedure Code, investigators have a number of authorities. Namely (1) Receiving a report or complaint from a person about a crime. (2) Taking the first action at the scene, ordering a suspect to stop and checking his identification. (3) Making arrests, detention, search and seizure. (4) Examining and confiscating letters, taking fingerprints and photographing someone, summoning people to be heard and examined as suspects or witnesses, bringing in experts as needed in connection with case trials, stopping investigations and carrying out other actions according to responsible law^[8]. this kind of authority is necessary although still have few limitations to prevent abuse of authority^[9].

For the Police, the legal basis for the authority to issue a warrant for stopping the investigation or SP3 is not (only) the provisions of Article 109 of Law Number 8 of 1981 concerning Criminal Procedure. Even though Article 109 Paragraph (2) of the Criminal Procedure Code, formal reasons for the issuance of SP3 are regulated. For investigators from the police, the more important provisions and the distance is not too far and therefore become a concrete reference governing their behavior are: Head of the national police of Indonesia or Kapolri Regulation Number

14 of 2012 concerning Management of Criminal Investigation (Perkap 14/2012) and Regulation of the Head of Criminal Investigation Police Head Regulation Republic of Indonesia National Police Criminal Detective Agency Number 2 of 2014 concerning Standard Operating Procedures for Organizing Criminal Investigations (Perkaba 2/2014). The provisions of Article 76 Paragraph (1) Perkap 14/2012 regulates that: Termination of the investigation referred to in Article 15 letter i, is carried out if:

- a. There is not enough evidence;
- b. The incident is not a criminal offense; and
- c. By law, because: (1) the suspect died; (2) the case has expired; (3) the complaint is revoked (specifically offense complaint); and (4) the crime has obtained a decision of a judge who has permanent legal force (*nebis in idem*)^[10].

Meanwhile, on the other hand within the Police institution the term "discretion" is known as regulated in Article 18 Paragraph (1) of Law no. 2 Year 2002 About the Police State of the Republic of Indonesia, as seen below :

"For the benefit of public officials of Police of the State of the Republic of Indonesia in carrying out the task and authority to act according to the judgment itself."

Whereas in Article 16 paragraph (2) of Law Number 2 of 2002 concerning the National Police of the Republic of Indonesia it is stated that:

Other actions referred to in Paragraph (1) letter l are actions of investigation and investigation carried out if they meet the following requirements:

1. Not against a rule of law;
2. In line with the legal obligations that require the action to be carried out;
3. Must be reasonable, reasonable, and included in the office environment;
4. Appropriate consideration based on compelling circumstances; and
5. Respect human rights.

Although in daily practice there are still many investigators who conduct investigations that still hold firmly using formal legalistic legal procedures and do not want to use the restorative justice approach, but not a few investigators who already have progressive thoughts use it in solving any legal issues in relation to the process of investigation of criminal acts, including in the case of embezzlement. Investigators who hold a progressive view, of course he will put forward the restorative justice approach in every case handling a crime, with the hope that the case he handled can be resolved peacefully and beneficial to both parties, namely victims and perpetrators of criminal acts.

4. Discussion

Applying the Restorative Justice System on Embezzlement Case Investigation in Indonesia

Restorative justice is seen by many people as a philosophy, a process, an idea, a theory and an intervention. Restorative

⁵ Zaenudin Ali, in Agus Surono,(2016), *Collaborative (Partnership) As A Form Of "Restorative Justice" In Conflict Resolution Forest Resources Management*, Journal of Dinamika Hukum. 2017;16(3) DOI 10.20884/1.jdh.2016.16.3.648.

⁶ *Ibid.*

⁷ Bačanović Oliver,(2010), *Restorative justice in Macedonian criminal legislation and difficulties in its implementation*, Temida. 2010;13(3):5-24 DOI 10.2298/TEM1003005B

⁸ Dahlan Sinaga, (2017), *Penegakan Hukum Dengan Pendekatan Diversi (Perspektif Teori Keadilan Bermartabat)*, Nusa Media, Yogyakarta, p. 134.

⁹ According to Borkov, official position are often exposed to the danger of the abuse of their authority if left unchecked therefore limitations must be made, such as in russia where art. 201.1 and 285.4 of the Criminal Code of the Russian Federation are proposed to be guided by the recommendations of the Supreme Court of the Russian Federation on the delimitation of abuse of official powers from embezzlement. See V. N. Borkov, (2018), *Application Of The Criminal Law In Contracting System And State Defense Order Violations*, *Pravoprimenenie*. 2018;2(2):56-63 DOI 10.24147/2542-1514.2018.2(2).56-63.

¹⁰ Maria Ulfah, Anne Safrina, W.M. Herry Susilowati,(2017), *Penghentian Penyidikan: Tinjauan Hukum Administrasi Dan Hukum Acara Pidana*, *Mimbar Hukum*, Volume 29, No. 1, February 2017, p. 20.

justice is the judiciary system that emphasizes reparation for damages caused or related to criminal acts ^[11]. Restorative justice is done through a cooperative process that involves all parties (stakeholders). It has three basic principles: there must be a restoration to those who have been injured, the offender has an opportunity to be involved in the restoration if they desire and the court system's role is to preserve the public order and the community's role is to preserve a just peace.

Restorative justice is an alternative or another way to deal with a crime case that puts forward the integration approach of the perpetrators on the one hand and victims / the community on the other side as a whole to find solutions and return to the pattern of good relations in society. The key word for restorative justice is "empowerment" moreover, this empowerment is the heart of the restorative ideology ^[12], therefore restorative justice is determined by its success. In the traditional concept, victims are expected to remain silent, accept and not interfere in criminal procedure. Fundamentally the idea of restorative justice wants to reorganize the role of such victims, from being passive to waiting and seeing how the criminal justice system handles "their" crimes, empowered so that victims have a personal right to participate in criminal procedure. In the literature on restorative justice, it is said that "empowerment" is related to parties in criminal cases (victims, perpetrators and the public). Barton ^[13] interpreted this empowerment as the action of meeting, discussing and resolving criminal justice matters in order to meet material and emotional needs. To him, empowerment is the power for people to choose between the different alternatives that are available to resolve one's own matter. The options for making such decisions should be present during the whole process ^[14]. In actuality, empowerment in the context of restorative justice is the process of meeting in this case between the perpetrator and the victim or the community to discuss and actively participate in the resolution of the criminal matter. This is an alternative or other choice of influence of the response to crime. The response to crime that was originally carried out by holding criminal justice by the state to find the culprit's guilt, then followed by the imposition of sanctions in order to denounce and impose suffering or misery on him which in principle is exile / disintegration ^[15]. Restorative justice, on the contrary, carries the philosophy of integrated solutions, each party plays an active role in solving problems. Therefore, the concept of restorative

justice is arguably integrating the principle of deliberation in the settlement of criminal cases, in line with the fourth precepts of the philosophy of Pancasila ^[16] the Indonesian nation namely populace which is led by wisdom in deliberation of representation.

Sure, embezzlement is a serious crime as it affects the economical power of a person or an institution but as stated by the author before that penal law must be a last resort (ultimum remedium) it must be considered before, is there another way to deal with this other than through the court?

There are still many cases of embezzlement criminal cases in Indonesia that should be resolved not thru the court but through a restorative justice approach between victims and perpetrators of crimes, but in fact these cases are even though the parties want to resolve them by means of consensus agreement to make peace, but by law enforcement officials (investigators) was appointed as a case that was processed until the trial on the grounds that the actions of the suspect had met the elements of a criminal act (positive law). Apart from that, until now there has been no regulation or legal umbrella that allows law enforcement officers in this case investigators to stop the investigation on the grounds of peace between the victim and the perpetrators of criminal acts. However, if the parties to the litigation require a settlement outside the formal procedure, then the investigator takes the step of discretion.

Thus the implementation of the investigation of embezzlement in Indonesia which is based on restorative justice can be said to exist between "yes" and "no", because "yes" from the perspective of justice and usefulness has been carried out by investigators based on the request of the parties, namely the perpetrators and the victims or their families to resolve the problem with peace, while said "no", because based on legal certainty until now not there is a legal basis or there are no laws governing it.

By the laws governing it means that the current law in Indonesia that governs the Embezzlement case handling still governs the embezzlement case "half-heartedly" as even though embezzlement can in reality be solved with compensation for the damage caused, but the current law doesn't permit it. As stated in The provisions of Article 76 Paragraph (1) Perkap 14/2012 mentioned above that didn't mention *peace between perpetrators and victims* as a way to stop the investigation so even when peace does occur, it doesn't mean the investigation would end and it would mean the peace negotiation will be useless therefore a reconstruction of the law must be done.

Based on that the author would like to present a reconstruction on the law governing the investigation to as follows:

- a. Article 109 Paragraph (2) Criminal Procedure Code states : In the case investigator stop the Investigation for the peace between the perpetrator and the victim , not there is enough evidence or events that turned out not constitute acts of crime or the investigation terminated by- law , the investigator telling case that the prosecutor general , the suspect or his family.
- b. Article 16 Paragraph (2) of Law No.2 of 2002 concerning the National Police of the Republic of Indonesia, states : Other actions referred to in paragraph

¹¹ Hossein Gholami , omid Rostami Ghazani, (2013), *Fields of Restorative Justice in the Statute of the International Criminal Court*, Faṣṣnāmāh-i Pizhūhish-i Huqūq-i Kiyfārī. 2013;2(4):33-64.

¹² Angkasa Angkasa, Saryono Hanadi, Muhammad Budi Setyadi, (2009), *Model Peradilan Restoratif Dalam Sistem Peradilan Anak (Kajian Tentang Praktik Mediasi Pelaku Dan Korban Dalam Proses Peradilan Anak Di Wilayah Hukum Balai Pemasyarakatan Purwokerto)*, Journal Of Dinamika Hukum. 2009;9(3):186-204

¹³ C. Barton, (2011), *Empowerment and Retribution in Criminal Justice*. In : H. Strang, J. Braithwaite (eds), *Restorative Justice: Philosophy to Practice*. Journal TEMIDA Mart 2011. Aldershot: Ashgate/Dartmouth, p. 55-76.

¹⁴ Wachtel, and McCold. (2003), *Restorative practices, The International Institute for Restorative Practices (IIRP)*. New York: Criminal Justice Press & Amsterdam: Kugler Publications Journal, Vol. 85-101 Year 2003.

¹⁵ Sawatsky, Jarem. (2010), *Restorative Value: Where Means And Ends Converge*. Restorative Justice Online Journal, <http://www.restorativejustice.org/articlesdb/articles/3681>. Vol. IX. Year 2010. Manitoba, Ca-nada: Lecturer at Menno Simons College and Canadian Mennonite University;

¹⁶ Prayitno, Kwat Puji. (2007), *Pancasila Sebagai Bintang Pemandu (Leitstern) dalam Pembinaan Lembaga dan Pranata Hukum di Indonesia*. Jurnal Media Hukum. Vol. 14 No. 3 Tahun 2007. Yogyakarta: FH Universitas Muhammadiyah Yogyakarta.

(1) letter l are actions of investigation and investigation carried out if they meet the following conditions:

1. *peace exists between perpetrators and victims* ;
2. not against a rule of law;
3. in line with the legal obligations that require the action to be carried out;
4. must be reasonable, reasonable, and included in the office environment;
5. appropriate consideration based on compelling circumstances; and
6. respect human rights.
7. Article 77A of the Criminal Code states: The authority to demand abolition if there is peace between the perpetrator and the victim.

The reconstruction presented above is a must, as it will be the foundation to implement restorative justice in Indonesia, although unlike cases like embezzlement where the damage it cause could be alleviated with compensation but for other cases like murder, it still need further research analysis as the damage could not be alleviated even with appropriate compensation.

5. Conclusion

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