

# RECONSTRUCTION OF PENAL MEDIATION AS ALTERNATIVE IN THE SETTLEMENT OF CRIMINAL ACTIONS OF FRAUD AT THE LEVEL OF INVESTIGATIONS BASED ON THE VALUE OF UTILIZATION

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## **Abstract**

The settlement of cases in a criminal case by means of penal mediation is an option of dispute resolution involving a third party. The mediation of the penal is not only justified, as it not only exists and is used as well as proves benefit in society or has sociological justification. The existence of penal mediation as a legal means of settling criminal cases, especially the settlement of alleged criminal act of fraud is also justified in the legislation, namely Law no. 2 Year 2002 with the concept of discretion. The theory of dignified justice shows the existence of penal mediation in the settlement of criminal cases of fraud is a form of Pancasila value derivation, *volksgeist* Indonesian nation. Based on the Four Precepts which says a philosophical deliberation of consensus, led by the wisdom. The reconstruction of the concept of authoritative discretionary powers mediates the penalty of fraud criminal cases, and is within the jurisdiction of the investigator or at the level of investigation of value for benefit and certainty, and all in the perspective of the theory of justice with dignity based on justice.

**Keywords :** *Penal Mediation, Fraud, and Investigations*

## **A. INTRODUCTION**

In the criminal justice process there are several stages that must be passed for the justice seekers either at the level of investigation, investigation, trial in the court until the stage of the conviction of punishment and even legal efforts if used by the parties which of course takes time, energy, for justice seekers.

Alternative Dispute Resolution (ADR) is a form of dispute resolution. In this case ADR is a form of alternative case resolution for certain offenses. The researcher believes that it is a result of the most recent thinking in the field of law in the Pancasila legal system<sup>1</sup>. The notion of that notion exists not only in Indonesia but also in the world. Mediation is a legal or legal institution. Empowerment of mediation as a legal institution or more simply can be said the law itself is a result of philosophical thought (value

of law in the settlement of certain criminal cases. It can also be included as a result of practical thinking. In short, it is a reconstruction in the field of criminal law.

The reconstruction of the outcome about such criminal law is not a new phenomenon. Such reconstruction has long been used. This reconstruction may be recognized as true law or right law in agreement with nature, which philosophers and theorists or academics are pursuing to achieve a justice law *de lege lata*.<sup>2</sup>

A natural law thinker in strand of natural law as law of right reason named Marcus Tullius Cicero of Rome or philosopher who has long been known by the name Cicero who lived in 106 BC to 43 BC, even said that as long as a thought does not have to come from outside (outside) of ourselves then in line with postulates in the theory of dignified justice, that is to build

<sup>1</sup> Teguh Prasetyo, *Sistem Hukum Pancasila (Sistem, Sistem Hukum dan Pembentukan Peraturan Perundang-Undangan di Indonesia) : Perspektif Teori Keadilan Bermartabat*, Cetakan I, Nusa Media, Bandung, 2016.

<sup>2</sup> De lege lata is an acceptable Latin phraseology in various legal systems of the world. The phraseology means the law. Gandhi Nursantyo, *Perlindungan Hukum Petani, Refeksi Hukum Pidana Modern*, Cetakan I, Gava Media, Surabaya, 2015, p. 1.

and discover the laws excavated from within the Indonesian earth itself (*volksgeist*) including not necessarily coming from experienced reviewers and interpreters about it though. So such thinking is called the fruit of the critical mind of the individual (philosopher).

Reconstruction becomes a result of rationalization or critical philosophical assessment in understanding God Almighty's creative works that govern what to do and forbid what not to do.<sup>3</sup>

Reasoning and reconstructive reasoning of such a *Volksgeist* will lead to a result. Particularly specific, one of which is mediation as an institution. It is also included in this mediation penal. If the reconstruction is completely natural as a result of the mind, the reconstruction result will be accepted and implemented or used in society, then that is the value of benefit. Such a thing can then be called by law.

The use of penal mediation can be seen as the use of a tool or component and legal means for correction in the integrity of the legal system based on Pancasila and especially in SPP in Indonesia.<sup>4</sup> The penal mediation medium for such correction may be selected and used given in the perspective of the Dignity Justice Theory is viewed as a system. In the unknown system in it conflict. The correction that can be seen as a formation of new thinking (reconstruction) in order to establish and justify the settlement of constructive alternative case and in line with the SPP function based on Pancasila by *Bareskrim* (criminal agency) is done to the formal legality (conventional) known so far.

The aim of this reaserch is to explain the existence of penal mediation serve as the legal basis for alternative fraud settlement at the current level of investigation. This research trying to find the disadvantages of mediating penalties in resolving fraud cases at the current level of investigation. Furthermore, this research find the reconstruction of penal mediation as the legal basis for alternative fraud settlement at the level of value-based investigation of benefit.

The approach method used in this research was normative legal research which used legislation

<sup>3</sup> Teguh Prasetyo, *Keadilan Bermartabat Perspektif Teori Hukum*, Cetakan Pertama, Nusa Media, Bandung, 2015, p. 142.

<sup>4</sup> *Ibid.*, p., 9.

approach, concept approach, analytical approach, philosophy approach and case approach with the assumption that approaches can be merged<sup>5</sup>. The law is also descriptive empirical, but the terminology for that should not otherwise be normative research with the dominant approach is the use of legislation approach because the logical law, normative legal research, such as this research is based on research on existing law and legal system.

Primary legal materials or primary data for this research is understood as data or legal materials in the form of legal facts obtained directly through research in the field of law including information from respondents related to research objects and practices that can be seen related to the object of research in the form of action - law enforcers whether it be police investigators, advocates, prosecutors and judges in the criminal justice system in the legal material collected.

## B. DISCUSSION

### 1. The existence of penal mediation may serve as the legal basis for alternative fraud settlement at the current level of investigation;

Conceptionally, penal mediation is essentially the use of discretion by a police officer (investigator), then as a legal institution, its effectiveness depends on several factors. Factor that influence law enforcement, in this case penal mediation is the legal factor itself. Here it means that the practice of law, in this case penal mediation as a law implementation, in practice there is a conflict between legal certainty and justice.

A policy or action that is not wholly law-based is something that is justifiable as long as the policy or action does not conflict with the law. So in essence the implementation of the law not only includes law enforcement, but also peace maintenance, because the implementation of law is actually a process of harmony between the value of rule and real behavior patterns aimed at achieving peace.

<sup>5</sup> *Ibid.*, p.11.

The second factor is law enforcement. Law enforcement factor, legal function, mentality or personality of law enforcement officer plays an important role, if the regulation is good, but the quality of duty is not good, it is indicated that there is a problem. Therefore, one of the keys to success in law enforcement is the mentality or personality of law enforcement.

The third factor is the factor of facilities and supporting facilities. It means that the factor of facilities or supporting facilities includes software and hardware, one example of software is education. The education received by police today tends to be conventional, so that in many cases the police are facing obstacles in doing their duty. For example is the knowledge of computer crime. In special crimes which are still authorized by the prosecutor, because technically juridical police considered not yet able and not yet ready. It is also realized that the task that must be carried by the police is too much.

Community factors also influence law enforcement. Law enforcement comes from the community and aims to achieve peace within the community. Every citizen or group at least has a legal awareness. The problem that arises is the level of legal compliance, namely high legal compliance, medium, or less. The existence of the degree of legal compliance of the people to the law is one indicator of the functioning of the law concerned.

In addition to these factors, there are other cultural factors that also need to be considered in mediation penal. Based on the concept of everyday culture, people talk so often about cultural issues. Culture functions greatly for people and society, that is, arranging for people to understand how to act, to do, and to determine their attitude when they relate to others. Culture, then, is a fundamental line of behavior that establishes rules about what to do, and what is prohibited by law.<sup>6</sup>

The existence of mediation penal can be used as an alternative legal tool to settle the case, especially settling the case of fraud, whether regulated in Article 378 of the Criminal Code and

the same offense outside the Criminal Code. Penal mediation can be initiated at the current level of investigation in Indonesia. The reason is penal that mediation is a form of settlement of alternative criminal cases (out of the court settlement) that useful and found by this research in the practice of life everyday. The penalty mediation is based on discretionary authority held by police officers. Jurisdictionally, the authority is regulated in Article 18 jo. article 16 of Law Number 2 Year 2002 concerning the Police of the Republic of Indonesia. Culturally, it is also in line with cultural deliberations of consensus. Sociologically it is found in the practice of alternative dispute settlement or its existence is justified in the Indonesian legal system, especially the Criminal Justice System based on Pancasila.

In the perspective of the theory of dignified justice, we have the discretion of the police officers of the Republic of Indonesia who can be used as the basis for mediating the penal, for example police officers to be "mediators" in the settlement of cases of alleged criminal acts of fraud. In the perspective of the theory of dignified justice, this is a derivation of the Indonesian Volksgeist, the Pancasila. Thus the use of discretion as the basis of justification for the process of mediating penal is also a soul of Indonesian nation that upholds the value of consensus of consensus based on the wisdom of wisdom

## **2. Weaknesses of penal mediation in fraud in the settlement case-setting at the current level of investigation;**

Penal mediation can make corrections and reform the court handling system in court by fixing the arrears of the case. The dimension of usefulness in penal mediation on criminal cases of alleged fraud is to avoid bad names. It is beneficial or has value for the benefit of the individual. This has implications for the function of criminal law to provide protection to legal interests, namely individual interests. It is good for the alleged perpetrators of their own criminal acts as entrepreneurs.

In essence, the due process of law model emphasizes a system of civil disputes settlement, state administration

<sup>6</sup> Soerjono Soekanto, *Faktor-Faktor Yang Mempengaruhi Penegeakan Hukum*, Cetakan Kelima, Raja Grafindo Persada, Jakarta, 2004, p. 42.

and criminal settlement system etc. by having been regulated and determined in detail and rigid or strict and standard according to prevailing laws and regulations.

In penal mediation as a alternative means of settlement of criminal cases that are used at the level of investigation and investigation to resolve cases due to alleged criminal acts of fraud and embezzlement, found a weakness that dimension "deviation" to the system or due process of law model. In fact the system or due process of law becomes an important pillar in the concept of the rule of law.

Deviation of the system or due process of law which can be seen in the existence of mediation of penal as an alternative to the settlement of criminal cases of alleged existence of crime (offense) fraud and embezzlement, at least indicated through sudden changes of status and arbitrary or very impressed easily given to the suspect.

In the perspective of the weakness of the due process of law of the criminal prosecution of alleged fraud and embezzlement, there is uncertainty about who actually mediates in the process of investigation which is also a "means" for the alternative settlement of criminal cases. The processes of investigation that can be "utilized" as a medium of dispute settlement that exists indeed exist in law and practice law. The uncertainty about who the real mediator is evident from the Police Call.

The unclear problem of due process of law in the implementation of mediation penal is seen from the study of legal materials in the form of photocopies of documents arising from the direct mediation of penal as a means of settling criminal cases at the level of investigation. This is a doubt in determining who in fact the definite party, acting as mediator for the settlement of alleged criminal act of fraud and embezzlement.

The problem of uncertainty in determining and ensuring the mediator actually opens up the great potential or space for various kinds of prejudices and conjectures and judgments on the penal mediation institution itself. Moreover, the doubt must be understood by the party who has been declared a suspect. In this case, the intended suspect will be faced with a confusion, to whom he/she should face in order to apply for legal protection in the settlement of criminal cases through mediation of penal which is facing him.

Concerned with the issue of due process of law, which becomes a problem in penal mediation as a means of alternative settling criminal cases; it exists within the Indonesian legal system, namely that in the process of alternative settlement of cases through penal mediation. There is great potential in abuses of authority and violations of human rights. Both of these, namely the importance of abuse of power and no violation of human rights are very important in the concept of the rule of law. There is a possibility of the weaknesses of this penal mediation, ie the transparency of the settlement process. The process of penal mediation is much closed. It does not allow obtaining certainty.

The legal uncertainty occurs when in the observed document contains fact that the status of the party that has been subjected to mediation of the penal varies in the documents observed in the penal mediation. There is inconsistency of the suspect's status in the existing process, the change from the suspect become reported party. The legal certainty should take action as a concrete form of the value of usefulness. Changing the status of a suspect in a process to being reported to another process at the same institution may lead to the conclusion that there is legal uncertainty in the settlement of the case used.



Another disadvantage that can be conceptualized here is the legal basis of penal mediation by police investigators. Penal mediation is essentially a discretionary use of police officers at the investigation level, ie the use of discretion by the investigator to dispute the existence of an alleged criminal case which the police officer is addressing.

Another weakness of mediation in criminal cases—in this case is within the framework of discretion of police officers or police discretion—is a progressive effort in the SPP. Mediation penal is a legal tool or institution that develops in practice and not to be forgotten legal action to terminate the investigation as referred to in Article 7 paragraph (1) letter (i) jo, Article 109 paragraph (2) of Law Number 8 Year 1981 regarding Criminal Procedure Code (KUHAP).

The legal fact states that mediation in criminal cases are generally regarded as legal mechanisms that have not yet had formal legal basis in Indonesia's criminal justice system. Therefore, to prevent abuse of power and / or to bear legal umbrella for all parties involved in it.

If penal mediation is essentially a discretionary use by a police officer (investigator), then as a legal institution, its effectiveness depends on several factors. Factors that influence law enforcement, in this case the penal mediation, is the legal factor itself. It is meant that the practice of law—penal mediation as a law implementation—there is a conflict between legal certainty and justice.

### **3. Reconstruction of penal mediation as the legal basis in alternative settlement of fraud cases based on value-based inquiry of benefit.**

Reconstruction of penal mediation begins with regard to the settlement of fraud cases at the level of investigation to alleged perpetrators of criminal acts as set forth in the Criminal Code and criminal provisions outside the Criminal

Code. Reconstruction of values in penal mediation contained in the formulation of existing provisions prioritizes the value of usefulness.

Reconstruction of values and norms means reorienting and reevaluating and recasting values and norms in a rule that is not always new. This means that even if the reconstruction is done, but the formula of the rules should not change. Implementation of penal mediation to resolve the fraud case, especially Article 378 of the Criminal Code is known that penal mediation is an alternative criminal law. Such an understanding does not exist before the reconstruction is done. The settlement with penal mediation as an alternative criminal law institution takes place primarily at the level of investigation and investigation.

The use of penal mediation also reflects other values in the law, or philosophy of the nation's culture as for example, the cultural value of consensus that exists in the Fourth Precept of Pancasila as the basic source of all law in the Pancasila Legal System.

Penal Mediation as a means of settling out of the court settlement cases for alleged criminal acts of fraud committed at the level of investigation based on the discretion of police officers. It means a police officer, every police officer (investigator), involved in a series of penal mediation processes. In this case it should be emphasized that penal mediation is a form of alternative settlement of cases.

The legal basis of penal mediation in the discretion can be found in Article 18 of Law Number 2 Year 2002 concerning the Police of the Republic of Indonesia. Article 18 contains the juridical underpinning of penal mediation at the level of investigation or investigation.

Penal mediation patterns have characters that are not too different from the usual mediation patterns. In general mediation, the law, including mediation, cannot be separated from the function of

law to resolve disputes or cases occurring within society. The function of the law is a silencer of conflict, whether it is a civil conflict in the form of disputes or conflicts involving public interest in criminal cases or disputes over interests or rights and claims. Therefore, various existing libraries call such a function of law in various terms. For example, the law in the position as a damper conflict law as a way of resolving conflict.<sup>7</sup> Another concept is law as a weapon in social conflict, similarly, the concept of "law as a conflict management"<sup>8</sup>. Furthermore, the function of law is as a means to facilitate the process of social interaction or law as a facilitation of human interaction<sup>9</sup>". All aspects in the above phrases are none other than the concept of dispute resolution or case. Penal mediation is included in the meaning given to the above concepts.

The mediation dispute settlement mechanism as part of alternative dispute settlement or PSA also has a common understanding with ADR. Alternative Dispute Resolution or ADR is developed by both legal practitioners and academics as a means of resolving disputes that have more access to justice<sup>10</sup>. It is similar with the pattern of dispute resolution using penal mediation. In penal mediation, the pattern of settlement is also oriented towards justice.

Meant by justice in the settlement of alternative criminal cases of alleged fraud, it is done to ensure who is most entitled to the object of the dispute. The initiative in the process of settling criminal cases using penal mediation begins with the investigator. The investigator submits a summons to the alleged offender. The problem is the use of the summons, which in this case may be considered by the layman as a means of enforcing coercive measures by the authorities. Such a presumption may arise because it may be later that the party is conceived and has been summoned it does not commit a criminal offense as in-conjurer. If such a call occurs then it can cause unfavorable ideals, particularly the dimension of the value of protection to the human dignity, or humanize the human beings (*nguwongke uwong*) in the theory of justice and the more popular are well known in the legal system based on Pancasila on generally, as well as in the Police Act which became the legal basis for the implementation of penal discretion.

Reconstruction of fraud case mediation is the concept of alternative dispute settlement in the criminal field at the level of investigation in order to obtain a certainty or legal umbrella, it can be reconstructed against a product law relating to fraud cases which can be described in the table below:

<sup>7</sup> Vilhem Aubert, *Law as A Way of Resolving Conflicts: The Case of Small Industrializes Society*, Aldine Publishing Company, Chicago, 1969, p. 282.

<sup>8</sup> Austin Turk, *Law as A Weapon in Social Conflict*, Artikel dalam William M. Evan (Ed.), *The Sociology of Law A Social Structural Perspective*, The Free Press, New York, 1980, p. 105 dan 106.

<sup>9</sup> Soerjono Soekanto, *Fungsi Hukum dan Perubahan Sosial*, Alumni, Bandung, 1981, p. 4.

<sup>10</sup> Mas Achmad Santosa, *Alternative Dispute Resolution (ADR) di Bidang Lingkungan Hidup*, Makalah disampaikan dalam Acara Forum Dialog tentang *Alternative Dispute Resolution (ADR)* yang diselenggarakan oleh Tim Pakar Hukum Departemen Kehakiman dan The Asia Foundation, Departemen Kehakiman dan The Asia Foundation, Jakarta, 1995, p. 1.

Fraud Elements	Formulation of the Criminal Code	Formulation of the Criminal Code Draft	Recommended reconstruction
Article 378 of the Criminal Code: Anyone; For the purpose of benefiting oneself or others; Against the law; By using a false name, with a trick, or a series of lies; Moving others to give something to them, or to give debt or write off accounts receivable.	“Anyone with the intent to profit yourself or others against the law, using a false name, with a trick, or a series of lies, moving others to surrender something to him, or to give debt or write off accounts is threatened because fraud with a maximum imprisonment of four years “.	Article 619: “Anyone who violates the law with the intention of leveraging oneself or others by using false names or false positions, abusing religion, using tricks or lies of words to persuade people to give an item, make a confession debt or write-off of the receivables shall be punished for fraud with a maximum imprisonment of four years or a maximum of four categories of penalties “.	“... not prosecution but on the grievance of the deceived, the unlawfully disadvantaged, by using false names, by deceit, or by a series of falsehoods, has been moved to surrender something to him or to the party who has given debt or write off accounts receivable “.

### C. CONCLUSION

The existence of penal mediation can be used as the legal basis in alternative settlement of fraud cases at the current level of investigation, which is regulated in Article 378 of the Criminal Code and the same offense outside the Criminal Code. Penal mediation can be initiated at the level of investigation. Penal mediation is based on discretionary authority held by police officers. Jurisdictionally, the authority is regulated in Article 18 jo. Article 16 of Law Number 2 Year 2002. Culturally, it is also in line with cultural deliberations of consensus. Its existence is justified in the legal system of Indonesia, especially the Criminal Justice System based on Pancasila. In the perspective of the theory of dignified justice, the discretionary authority of the Republic of Indonesia, police officers who can be used as a foothold to mediate the penal are for police officers to be “mediators” in the settlement of cases of alleged criminal acts of fraud. That in the perspective of the dignified justice theory is a derivation of the Indonesian *volksgeist*, the Pancasila;

- a. The disadvantage of mediating penalties in fraud case investigation at the current level of investigation is the impression of “deviation” on the system or due process of law. The system or due process of law model, in a mainstream perspective is an important pillar in the concept of a legal state. The system deviation or due process of law which can be seen in the existence of mediation of penal as an alternative to criminal prosecution of alleged criminal acts (*delik*) of fraud and embezzlement, at least indicated through sudden changes of status and arbitrary impression or very easy given to the suspect. The sudden change of status may give the impression that penal mediation is arbitrary and may cause problems in the future to police officers who exercise arbitrary discretionary powers, when there are parties who are dissatisfied with the mediated penal which has been executed in order to seek a settlement of the case alternative criminal law;

b. The reconstruction of penal mediation as the legal basis in the alternative of the settlement of fraud cases at the level of investigation based on the value of benefit, namely the importance of the formulation of crime offense as offense complaint. As seen in the provisions of the provisions in the Criminal Code, UU ITE and the Criminal Code Draft. It will provide certainty that if the report has been revoked then the case is declared to have expired and does not appear again in the future. With regard to the legal basis of penal mediation, then in the reconstruction found a value or rule of law. Whereas the legal basis of mediation of penal as a means of settling out of the court settlement cases for alleged criminal acts of fraud, namely the discretion of police officials, provided that the discretionary eligible that the discretion is not contrary to a rule law; in harmony with the legal obligations that require such action to take place; shall be reasonable, and shall be included in the sphere of office; appropriate considerations based on

coercive circumstances; and respect for human rights. The value of the discretion is included in the precepts of Pancasila, which are deliberations that emphasize wisdom and wisdom. One of the wisdom-wise measures is respect for human rights. In such wisdom, the process of penal mediation reflects a form of criminal justice process which by the theory of dignified justice is called the goal of law which humanizes human beings.

In order to create a guideline for the use of penal mediation, it may be set forth in a KAPOLRI regulation. It is intended to prevent the impression that mediation of penal is exercised on the basis of arbitrary powers. The concept of penal mediation can be standardized. The conceptualization of the concept is not only to prevent a conflicting understanding with the concept of peace, but also in order to increase legal certainty. Recommends that Article 378 of the Indonesian Criminal Code and Article 28 paragraph (1) of the ITE Law be incorporated into complaints, as with other criminal offenses such as defamation, adultery and family theft contained in the Criminal Code.

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