

Resolution of Restorative Justice against Criminal Acts of Violence in the Household

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Abstract: *Violent conflict in the household (domestic violence) is a very common case in the household phase and becomes a sensitive issue if not handled carefully. This research was conducted to find out how the legal basis for mediating the resolution of KDT cases outside the court; 2) What is the form and process of resolving cases of violence outside the court of households used by the parties; and 3) What factors hinder the success of the resolution of cases of domestic violence outside the court. This research method uses a normative juridical approach which is to study the legislation or law conceptualized as a rule or norm in handling domestic violence conflicts. The results of this study can be explained that the positive law of Indonesia in principle is not possible for settlement outside the Court, although in certain cases governed the settlement of cases outside the trial as in the resolution of domestic violence. Settlement of domestic violence through channels outside the court can be done in 3 (three) ways, namely: 1) Disputing Parties Settle Their Own Cases Without the Help of a Third Party as an Intermediary (Mediator); 2) Disputing Parties Ask For Help For Their Families To Be Settled (Mediated); and 3) Voluntary Dispute Agrees Agree to Come Ask for Community Leaders to become Mediators. There are several factors that become obstacles in the implementation of restorative justice, especially for the resolution of domestic violence, namely: 1) Legal substance that has not accommodated the implementation of restorative justice in full; 2) Law enforcers who have not optimally implemented existing regulations and are still behaving rigidly, and the culture of law / community participation has not been maximized; 3) Lack of regulation making that accommodates all provisions regarding the handling of domestic violence cases through a restorative justice approach, outreach to all law enforcement officials and the public; and 4) Coordination between law enforcement officers, and changing the paradigm of law enforcement officials from a retributive and restitutive justice approach to restorative justice has not yet been fully achieved.*

Keywords: Restorative Justice, Domestic Violence

1. Background

Many women's organizations and Non-Governmental Organizations (NGOs) raise issues of struggle in the household (domestic violence) to fight for and defend women's interests. Not only women, children also receive the same attention. The National Commission on Violence Against Women (hereinafter referred to as National Commission on Violence Against Women) was established based on Presidential Decree of the Republic of Indonesia Number 181 of 1998 (hereinafter referred to as Presidential Decree No. 181 of 1998) and subsequently Law Number 23 of 2004 of Domestic Violence (hereinafter referred to as Law PKDRT). Since its establishment Komnas Perempuan has noted a surge in complaints of violence. The potential for domestic violence is mostly suffered by his wife and children, this is very dangerous if kept silent and will become a bad culture for domestic life in Indonesia. Domestic violence initials cycle of violence (cycle of violence). Violence cycle theory explains 5 (five) phases, namely:

- 1) Beginning Phase (Build-Up Phase) In this phase there is a start between the pairs. If husband and wife do not have the ability to finish it will peak;
- 2) The Violence Phase (Stand-Up Phase)
- 3) Regret Phase (Regret Phase) Actors often feel guilty for their actions or fear of crime. They began to try to resist his serious actions;
- 4) Redemption Phase (Pursuit or buy-back phase) The perpetrator tries to redeem his actions with gifts and promises he will change to make the couple not leave. If it fails, domestic violence still ends;
- 5) Honeymoon Phase (Honeymoon Phase) After the

domestic violence occurs, the couple returns.¹

Various efforts to overcome it, however, it seems that even the perpetrators of violence do not feel afraid of law enforcement that has been done. This is due to the view of society that women are lesser creatures than men who have a higher position. The existence of structuralisation in the community creates gender inequality or injustice. Gender inequality is the difference in roles and rights between women and men in society that places women in a lower status than men. The "privileges" possessed by men seem to make women the "property" of men who have the right to be treated arbitrarily, including by force. This society's view has erased the rights of women both in the household and in the environment that actually exists.

Domestic violence is not just any violence. Family problems that should be kept in each house are difficult to bring out. Many domestic violence victims choose to stay at home because they are ashamed and afraid to admit that they are indeed victims. For this reason, institutions are needed to help them get out of the suffering of domestic violence. Considering the large number of victims of domestic violence are women, the National Commission on Violence against Women (Komnas Perempuan) is one of the many institutions involved in resolving domestic violence cases.

While in reality, the problem of domestic violence can be said to be new to the judges of the religious court. Judges need to be knowledgeable about domestic violence in order

¹ Michel Victory, (Ed.). *For Better or Worse : Family Violence in Australia*, (Victoria: CIS Publisher, 1993), hlm. 128

to be able to resolve cases so that they are in tune with the sense of justice desired by the community. Mastery of Law No. 23 of 2004 concerning the Elimination of Domestic Violence (UU PKDRT) alone is not enough stock. Domestic violence issues also need to be addressed in a legal perspective outside the court.

The PKDRT Law has so far been regarded as one of the regulations that made a breakthrough in the law because there have been a number of criminal law reforms that have never been regulated by previous laws. But the problem is, is the legal breakthrough regulated in the PKDRT Law in its implementation truly applicable and responding to the needs of victims of the dynamics of the judicial process that they undergo?

Below is the data on domestic violence cases received by LBH APIK Jakarta in 2016 and 2017 based on the forms of violence experienced by the victims.

Table 1: Forms of domestic violence in 2016 - 2017

Type of violence	2016	2017
Physical, Economic	-	3
Physical, Psychic	84	41
Physical, Psychic, Economics	16	39
Physical, Psychic, Economic, Sexual	4	4
Physical, Psychic, Sexual		4
Psychic	130	30
Psychic, Economics	68	82
Psychic, Economic, Sexual	2	2
Psychic, sexual	-	1
The economy	23	8
Sexually	-	2
Total	323	216

Source: LBH Apik Jakarta, 2018

From the overall data of LBH Apik Jakarta above, not all cases are resolved through legal channels or only a few cases of domestic violence are resolved through law. There are many reasons and obstacles why domestic violence cases are not proceeded or resolved by legal means. The obstacles are because the victim does not want the case to be known to the public, then the victim does not want to deal with the case too long, the victim wants to get out of domestic violence as soon as possible, the victim does not want to face the police, etc.²

Based on domestic violence records largely due to economic factors, the husband is unemployed and has a temperamental nature. The economic factor in question is domestic violence perpetrated by a husband against his wife due to lack of economic needs. An example of a domestic violence offender is a man who is often insulted by his wife. If this happens repeatedly then the patience of a husband disappears and beating his wife initially initially only intended to give lessons to the wife, but because it violates the Domestic Violence Act, it is reported to the police. In cases like this, criminal law should provide protection for the wife whose memorandum is the initial trigger for the problem to occur. The beginnings begin with domestic violence which then enters the public sphere. With imprisonment, it is hoped that prisoners will make it

better, but life in Penitentiary in Indonesia has not succeeded in fostering prisoners so that it becomes better, given the conditions in Penitentiary which are mostly overcapacity. It could be that convicts who do not have evil talent when he enters the Penitentiary will only be down or even more evil.

To overcome this need to change the paradigm. Prison crimes which were originally as a means of punishment in overcoming crime of domestic violence need to be questioned for its existence, especially against cases of domestic violence that are not so severe, by utilizing crime prevention through non-criminal efforts in the form of mediation of penalties. According to Barda Nawawi Arief, viewed from the perspective of criminal politics, the most strategic policy is through "non-penal" means because it is more preventive and because the penal policy has the disadvantage of being offender oriented, not victim oriented.³

The conception of mediating penalties is expected to be an alternative in resolving domestic violence cases. The basis of this concept is taken from restorative justice which seeks to provide justice with a balance between victims and perpetrators of domestic violence by seeking win-win solutions and striving to be solutions to problems in the criminal justice system. The main purpose of mediating penalties in domestic violence, as explained by Fatahillah A. Gratitude, namely: First, protect and empower victims to be able to convey their desires and get the desired sense of justice. Second, to restore (to restore) the lives of households that respect each other's rights and obligations of each partner. Third, suppress the high divorce rate in Indonesia.

In this case, Mudzakkiras quoted by I Made AgusMahendaIswara, stated several categorizations as a barometer or scope and scope of cases that can be resolved outside the criminal court through "mediating penalties" including: (1) Violations of the criminal law include the offense category of complaint, both absolute and relative complaints; (2) Violation of the criminal law has a criminal fine as a criminal threat and the violator has paid the fine (Article 80 of the Criminal Code); (3) Violations of criminal law are included in the category of "violations", not "crimes", which are only threatened with criminal fines; (4) Violations of criminal law include criminal offenses in the field of administrative law which place criminal sanctions as ultimumremedium; (5) Criminal law violations are categorized as light / all-light and law enforcement officials use their authority to exercise discretion; (6) Violations of ordinary criminal law which are terminated or not processed by the Attorney General in accordance with their legal authority; (7) Violations of criminal law are included in the category of violations of customary criminal law which are settled through adat institutions.⁴

³ Barda Nawawi Arief, *Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan*, (Bandung: PT. Citra Aditya Bakti, 2015), hlm. 122

⁴ Mudzakkir, dalam I Made AgusMahendaIswara, 2013 "Mediasi Penal Penerapan Nilai-Nilai Restoratif Justice Dalam Penyelesaian Tindak Pidana Adat Bali", Tesis, Program

²"Data KDRT 2017-2018", Sumber: LBH Apik Jakarta, 2018.

In general, the resolution of cases outside the court has several advantages, namely: (1) To reduce congestion and case congestion in the judiciary; (2) Increase community involvement (legal decentralization) or empower disputing parties in the dispute resolution process; (3) Facilitating access to justice in the community; (4) To provide an opportunity for the achievement of dispute resolution that results in a decision that is acceptable to all parties; (5) The settlement of cases is faster and the costs are low; (6) Is closed / confidential; (7) The level of possibility to implement an agreement is higher, so that future relations between disputing parties are still possible; (8) Reducing the spread of "dirty games" in the judiciary.⁵

Based on Komnas Perempuan's research, the average woman only reports that after experiencing 35 acts of violence, 8 out of 10 acts of violence occur in the household. For example, data entering the National Commission on Violence Against Women in 2017 shows that 3,510 cases (59 percent) were reported to the National Commission, where the victim took the case to the religious court. From the notes of the victims' assistants, more victims did not take the case to court. They choose to take the case to other ways to settle it outside the law or silence the case.⁶ Thus a conclusion can be made that consciously or unconsciously many parties in domestic violence cases have taken the path of resolution outside the court in advance to seek peace, even though many parties ultimately failed to take this path and ultimately chose criminal proceedings as well as divorce as an end.

It is this failure to save households outside the court of law that creates a miserable reality of life with increasing divorce rates every year. Even though the settlement outside the court did not give little hope that the situation would recover after the occurrence of domestic violence. But it cannot be denied that the settlement outside the court does not provide a definite guarantee to the victim that the perpetrator will not repeat the acts of domestic violence, which makes many people doubt his success. The position of women is indeed very unstable in these circumstances, if she decides to remain silent then it can be ascertained that her suffering will not end but if she chooses to take the trial course there are certainly many considerations and consequences to think about. Women as victims of domestic violence cannot be blamed if they choose to escape from their suffering because it is a form of resistance to the violence they experience. Domestic violence cannot be tolerated as reasonable because the impact of domestic violence is very broad and forms a culture that can damage the next generation of the nation.

Formulation of the problem

Based on the background description above, the problem formulation in this research is as follows:

- 1) What is the form and process of resolving cases of domestic violence based on the current legal provisions?

- 2) What legal remedies can be done to improve the success of resolving cases of domestic violence outside the court?

Writing purpose

Based on the formulation of the problem above, the objectives of this legal research are:

- 1) To find out and examine how the form and process of resolution of cases of domestic violence based on the provisions of the current legislation.
- 2) To find out and examine how legal efforts can be done to improve the success of resolving cases of domestic violence outside the court.

2. Research Methods

Research Approach

The research method used in this research is the judicial normative approach method, that is, the law is often conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a rule or norm which is a benchmark for behaving according to human beings deemed appropriate.

The normative juridical approach in this study is to examine the concept of the settlement of cases outside the court (restorative justice) on the practice of resolving cases of domestic violence.

Research Specifications

This research can be seen from several angles such as:

- 1) In terms of its nature, this research is a descriptive study. Descriptive research aims to describe precisely the nature of an individual, a particular condition, symptom or group, or to determine the frequency of a symptom.⁷ In writing this thesis, described the alternative use of the concept of the settlement of cases outside the court (restorative justice) to the practice of resolving cases of domestic violence.
- 2) From the point of view, this research is perspective research. Perspective research is intended to get suggestions on what needs to be done to overcome certain problems.⁸ Associated with this thesis, because it discusses the crucial cases regarding domestic violence and its impact on social life, economy and the future of the family in particular, then an appropriate solution is needed, so one must look for other alternatives in resolving every case of violence in the home stairs.
- 3) From the point of view. This research is a problem solution research. Problem solution research aims to provide solutions or suggestions for solving the problem.⁹
- 4) From the point of application. This research is a problem focused research. Problem-focused research is a study that connects pure research with applied research.¹⁰ In this study the problems examined are based on theory or

Pascasarjana Fakultas Hukum Universitas Indonesia, (Jakarta: Universitas Indonesia), hlm. 55-56.

⁵ Adi Sulistyono, *Mengembangkan Paradigma Non-Litigasi di Indonesia*, (Surakarta: UNS Press, 2006), hlm. 15.

⁶ Faqihuddin Abdul Faqihuddin Abdul, *Referensi Bagi Hakim Pengadilan Agama Tentang Kekerasan Dalam Rumah Tangga*, (Jakarta: Penerbit Komnas Perempuan, 2013), hlm. 76

⁷ Sri Mamudij, et al., *Metode Penelitian Dan Penulisan Hukum*, Jakarta : Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hlm. 4.

⁸ Amiruddin dan Zainal Asikin, *op. cit.*, hlm. 28.

⁹ Sri Mamudji. Et al., *op. cit.*, hlm. 5.

¹⁰ *ibid*

seen the relationship between theory and practice.¹¹The problem that is the focus of this paper is to analyze the concept of the settlement of cases outside the court (restorative justice) on the practice of solving cases of violence in household.

- 5) From the standpoint of knowledge used: This research is a mono-disciplinary study. Mono-disciplinary research is research based on a scientific discipline. The scientific discipline used in this study is the discipline of law.

Method of collecting data

Normative legal science research is the study of legal materials, which are sourced from secondary data. Secondary data sources consist of primary legal materials, secondary legal materials and tertiary legal materials.¹²

- 1) Primary legal materials, namely legal materials consisting of statutory regulations, official records or minutes in the making of laws and judges' decisions, including:
 - a) Criminal Law Code
 - b) Law Number 1 of 1974 concerning Marriage.
 - c) Law Number 39 of 1999 concerning Human Rights.
 - d) Law Number 23 of 2004 concerning the Elimination of Domestic Violence.
 - e) Other laws and regulations, especially those relating to domestic violence.
- 2) Secondary legal materials are used to help understand various legal concepts in primary legal materials, analysis of primary legal materials is assisted by secondary legal materials obtained from various sources of journals, books, papers and scientific works on domestic violence.
- 3) Tertiary legal material is needed to explain things in terms of explaining the meanings of words from primary legal materials and secondary legal materials, especially legal dictionaries.

3. Analysis Method

Analysis of the data above uses descriptive qualitative and argumentative analysis methods. Description in the form of a description of legal materials as they are then continued with an evaluation in the form of an evaluation of the legal materials. These legal materials are interpreted by legal interpretation methods, both grammatical interpretations, systematic interpretations, authentic interpretations, which are then analyzed based on relevant legal theories and doctrines related to the problem.¹³

4. Research Results and Discussion

1) Legal Basis for Mediation in Settling Cases of Domestic Violence Outside the Court

Penal mediation at the international level has long been known in several conferences, for example the 9th UN conference in 1995, especially those that correlate with criminal justice management (Document A / CONF 1969/6)

¹¹ibid

¹²Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2007), hlm.97

¹³Bahder Johan Nasution, *Metode Penelitian Ilmu Hukum*, (Bandung: MandarMaju, 2008), hlm. 27

mentioned the need for all countries to consider "privatizing some law enforcement and justice functions" and alternative dispute resolution (ADR) in the form of mediation, conciliation, restitution and compensation in the criminal justice system.¹⁴in the International Criminal Reform Conference in 1999 it was stated that one of the key elements of the new agenda for reforming criminal law was the need to enrich the formal justice system with informal systems or mechanisms with standards human rights standards that identify nine strategies for developing restorative justice, alternative dispute resolution, informal justice, alternatives to custody, alternative ways of dealing with juveniles, dealing with violent crime, reducing the prison population, the proper management of prisons and the role of civil in penal reform. Likewise, in the 10th UN Congress in 2000 (Document A / Conf. 187/4 / rev.3), it was stated that providing protection to victims of crime should be introduced by restorative mediation and justice mechanisms.¹⁵

In Indonesia positive law, in principle, it is not possible to have a solution outside the court, although in certain cases it is regulated regarding the settlement of cases outside the trial such as in the settlement of domestic violence which can be transferred from the court process to the court process. Peace in criminal cases outside the trial is almost always recommended by criminal judges who handle criminal disputes, especially in cases of domestic violence that cause casualties even though in the end the peace is only considered by judges as one of the things that relieve criminal offenses against perpetrators, and cannot be used to end criminal disputes, but this proves that the peace between the perpetrators and the victims has become the concern of law enforcement itself.

Likewise, in the case of handling domestic violence, even though many laws have been regulated in the law, but the handling of domestic violence in bringing about restoration in nature which protects human rights is not expeditiously regulated by the Act. Chambliss and Seidman supported by SatjiptoRaharjo stated that basically there are two elements which are factors that also determine the realization of recovery (restorative) in overcoming the crime of domestic violence, namely:¹⁶

- a) The goal to be achieved by resolving the dispute. If the aim of the institution is to reconcile the parties so that they can then live together again after the dispute, then one can expect that the pressure there will be more emphasis on ways of mediation and compromise, on the other hand if the purpose of the institution is to apply rules (rule enforcement), then the way to resolve bureaucracy may be more widely used, where the aim is to establish explicitly what is really the contents of a regulation and then determine whether the regulation has been violated.

¹⁴LilikMulyadi, *Kompilasi Hukum Pidana Dalam Perspektif Teoritis dan Praktik Peradilan*, (Bandung: Penerbit MandarMaju, 2010), hlm. 15

¹⁵Ibid

¹⁶Ridwan Mansur, *Mediasi Penal Terhadap Perkara KDRT*, (Jakarta: Yayasan Gema Yustisia Indonesia, 2010), hlm. 73

b) The degree of outlet in the community. The higher level of outlet contained there. In such circumstances, the dominant layers or groups will try to maintain their strengths by forcing the enactment of regulations there that guarantee a different position from the situation in a simple society where the level of technology usage is still low, agreement on value is still easily reached where harmony is a pattern of dispute resolution. In societies that have a high coating with the composition of societies that encourage the emergence of inequality (application of regulations) with the differentiation of sanctions is a work pattern suitable for the community.

Whereas with regard to law enforcement regarding domestic violence, Rukmana Amanwinata is of the view that in domestic violence cases as well as cases where the perpetrators and victims of children who are still in the domestic sphere, the resolution is carried out through general courts that have a criminal procedural legal system that applies to general criminal acts, even though if the case of domestic violence is examined it has its own characteristics which certainly has specificity in the procedural law, institutions, patterns of handling, verification, and so forth, therefore as well as the goal to be achieved by the Indonesian state is the realization of a just and prosperous society spiritual and material based on Pancasila, so it is also called a law state that has independent characteristics.¹⁷

The objective aspired by Law No.23 of 2004 concerning the Elimination of Domestic Violence (hereinafter referred to as the Domestic Violence Act) is not achieved if the existing system empirically fails to resolve cases of violence in households holistically. The empirical study above is a real field study that shows the weakness of the Domestic Violence Law based on the Criminal Justice System that currently exists. Moreover, the study of legal protection which of course opens the view of the Criminal Procedure Code to change itself, with appropriate and appropriate modifications, especially in cases of domestic violence. Therefore it is necessary to need a media in the system that can accommodate the settlement of the case, one of which is to use the restorative justice system, which is based on human rights according to Indonesian society. Romli Atmasmita's views on the protection of human rights in the context of Indonesian society that needs to be emphasized the relationship between citizens and between citizens and the state with traditional-Normative assumptions with harmonious and balanced patterns of harmony (positive assumptions) which according to Ridwan Mansyur that regulation should restorative justice laws based on human rights began to be developed.¹⁸

Even law enforcers in the field of domestic violence have had another perspective, based on the rights of victims and perpetrators, which can only be achieved through dialogue. Ridwan Mansyur said that when he interviewed law enforcement who handled cases of domestic violence the same thing was justified. Thus, the final results achieved empirically by enacting the Domestic Violence Act are not

just providing penalties for the perpetrators of crime, but also thinking about the welfare of the family so that it does not seem abandoned by the Criminal Justice System.¹⁹

As previously explained, that if the Indonesian Criminal Justice System is rigidly enforced against cases of domestic violence, the consolidative objectives of the Domestic Violence Law have never been achieved. Therefore, legal reform is needed that not only changes the law alone but also changes the existing criminal justice system, so that all the goals desired by the law are achieved. This is in accordance with the function of the law itself given the sociological development that contains new needs. This is in accordance with the function of the law itself, so that in addition to maintaining what has been achieved, the law should also be able to accommodate all the needs that arise from the community.²⁰

One application for legal reform in resolving cases of domestic violence is the restorative justice approach. Literally, restorative justice can be interpreted as restoring justice for victims and perpetrators. But that understanding develops, when the perspective of restorative justice is incorporated into a justice system, so that the meaning of restorative justice is a systematic resolution of criminal acts, where this process emphasizes the recovery of losses suffered by victims and or the community as a result of the perpetrators' actions, and involves the perpetrators and victims actively and directly in the settlement.²¹

The consolidative nature of the settlement through the restorative justice approach is manifested in the dialogue between the parties concerned, which is better known among the people of Indonesia as "deliberation for consensus" consensus is a form of nationality value that grows and is rooted in Indonesian society, therefore it is not surprising that the founder of the country Indonesia made deliberation as the noble values of Pancasila as the basis of the state. Pancasila as a reflection of the habits that exist in the community, which then poured in a form of state. Likewise, it is the case with the habits of the Indonesian people from various resolutions of all disputes between them. They are culturally, among Indonesian people, deliberation should be intended to be part of the Indonesian Criminal Justice System, especially in the settlement of cases of domestic violence that require a private perspective in its resolution.²² In theory, there are various forms of deliberation that can be applied in this context, including negotiation and consolidation. Of the three forms of deliberation, it seems that negotiation is the best way, in terms of the internal settlement of the family. In theory, there are various forms of deliberation that can be applied in this context, including negotiation and consolidation. Of the three forms of deliberation, it seems that negotiation is the best way, in terms of internal settlement of the family, because the case of domestic violence will certainly open up opportunities to reveal things that are considered disgrace in the family. Culturally even in Indonesian society, things that are

¹⁹Ibid, hlm. 238

²⁰Ibid

²¹Ibid, hlm.239.

²²Ibid, hlm. 241.

¹⁷Ibid, hlm. 75.

¹⁸Ibid, hlm. 237

considered a disgrace by the family are still taboo to be found before the law. However, the method to be applied here, of course, must be adapted to the existing justice system, so that there is no large deviation between the application of the settlement method and the existing judicial system.²³

Therefore, the existence of police discretion, especially in handling domestic violence cases without being presented to court, should be appreciated. The police considerations for resolving a case without going to court are:

- 1) That what the community wants is actually more emphasis not on law enforcement, but on the values of peace and peace of the community.
- 2) Settlement through law or the court will not solve the problem, often will only expand the disagreement and displeasure between litigants.
- 3) Cases that are complained sometimes have no legal basis to be resolved legally.²⁴

Therefore, the National Police Chief at least issued a letter regarding the handling of disputes outside the court and there is a regulation regarding the mediation. Mediation by the police includes restorative justice.

These regulations include:

- a) Police Chief's Letter No. Pol. B / 3022 / XII / 2009 / sdeops concerning the concept of Alternative Dispute Resolution (ADR).

In the Chief of Police's Letter No. Pol. B / 3022 / XII / 2009 / sdeops regarding the concept of Alternative Dispute Resolution (ADR), there are steps to solve the problem using the ADR concept, which include:

- 1) Striving for handling criminal cases that have small material losses, the solution can be directed through the ADR concept.
- 2) The settlement of a criminal case using ADR must be agreed by the parties to the litigation but if there is no new agreement it is settled in accordance with legal procedures that apply in a professional and proportional manner.
- 3) Settlement of criminal cases using ADR must be based on consensus and must be known by the surrounding community by including the local RT RW.
- 4) Settlement of criminal cases using ADR must respect social / customary legal norms and meet the principles of justice.
- 5) Empowering members of the Policing / Community Policing (Polmas) and playing the Police and Community Partnership Forum ("FKPM") in their respective areas to be able to identify criminal cases that have minor material losses and allow them to be resolved through the ADR concept .
- 6) For cases that have been resolved through the ADR concept so that they are no longer touched by other legal actions that are counter-productive with the aim of Community Policing.

After the researcher reads and understands the steps to resolve a criminal case in accordance with the Chief of

Police No. Pol. B / 3022 / XII / 2009 / sdeops regarding the concept of Alternative Dispute Resolution (ADR), the researcher can draw the conclusion that in the settlement of criminal cases including criminal acts of domestic violence in the Police by using the method of restorative justice, the priority here is with deliberation between the party involved in promoting justice and when the case has been successfully resolved then no further legal action can be taken or in other words the case has been resolved.

- b) Regulation of the Head of the Republic of Indonesia Police Number 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Polri Duties.

In the Republic of Indonesia's Chief of Police Regulation No. 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Polri Duties, it is stated that Problem Solving is the process of approaching Kamtibmas and crime problems to find solutions to problems through efforts to understand problems, analyze problems, propose alternatives appropriate alternative solutions in order to create a sense of security, peace and order (not only based on criminal law and arrest), to evaluate and re-evaluate the effectiveness of the chosen solution.

In this case the researcher can draw the conclusion that in order to solve criminal problems, it is possible to use appropriate alternative solutions and not only based on criminal law and the arrest means that they can be the basis for implementing restorative justice.

2) Form and Process of Settlement of Cases of Domestic Violence Outside the Court by the Parties

Settlement of domestic violence through channels outside the court, in practice can be done in 3 (three) ways, viz.²⁵

- 1) The Disputing Parties Settle Their Own Case Without The Assistance of a Third Party as an Intermediary (Mediator).

According to the author's analysis that this method does not belong to the mediation category, but this method is called negotiation where the negotiation is a two-way communication designed to reach an agreement when both parties have various interests that are the same or different. This process does not involve a third party because the parties themselves take the initiative to resolve their disputes. While in principle in the process of dispute resolution (mediation) there must be a third party who acts as a mediator (mediator). Article 8 paragraph (1) of the Supreme Court Regulation No. 1 of 2008 states that: "The parties have the right to choose mediators from judges not case examiners from the court concerned or from lawyers or legal academics."

Based on the provisions of article 8 paragraph (1) above, the parties that settle disputes (mediation) must appoint a

²³Ibid, hlm. 242

²⁴Masinambow, *HukumanKemajemukanBudaya*, (Jakarta: YayasanObor Indonesia, Jakarta, 2003), hlm. 153

²⁵ M. H. Soeroso, *Kekerasandalamrumahdalam perspektifyuridis- sosiologis*, (Jakarta:SinarGrafika, 2010), hlm. 65

mediator as mediator, but the practice of dispute resolution (mediation) conducted by the Tumpak Village community is not in accordance with existing laws and regulations, the first way this does not include mediation.

3) Disputing Parties Ask For Help For Their Families To Be Settled (Mediated)

The parties asked his family as an intermediary (mediator) to anticipate so that the family's secrets were not spread widely into the public sphere. So it is enough to be known by family interns alone and can be kept secret. According to the author's analysis that the method is included in the mediation category, because the method is in line with the principle of mediation, which is confidentiality (confidentiality) means that everything that happens in the mediation process must not be broadcast to the public. Besides that the method is also in line with what is taught by the Qur'an to resolve disputes by way of tahkim (mediation) as explained in the An-Nisa verse 35, which means: "If there is a dispute between the two, then send a hakam from a male family and an hakam from a female family." The verse explains that when there is a family dispute, it should ask the family as hakam (mediator). So that the parties can be more transparent in expressing the problem.

4) Voluntary Disputing Parties Agree to Come Ask for Community Leaders, Village or Village Head as Intermediary (Mediator)

According to the author, this method also includes mediation because the method is in accordance with the existing mediation principles, namely the voluntary principle. This means that each party who acts as a mediator of his own will, voluntarily and there is no coercion or pressure from the other party.

Broadly speaking, the Process of Settling Cases of Domestic Violence in customary law can be stated as follows:²⁶

The parties to the dispute can ask for help from a third party (mediator) to resolve their dispute. Mediators entrusted by the parties, generally are Traditional or Community Leaders or Religious Leaders. Furthermore, those who give trust to the Customary Person as a third person (mediator) are based on the belief that they are people who have authority, are respected, respected, obeyed by their words and they are people who can keep the secret behind the disputes that occur between the parties. Customary leaders who are trusted as third parties (mediators) take approaches that use traditional language and religious language, so that the parties to the dispute can sit together, tell the background, the cause of the dispute and the possibilities of finding a way out to end the dispute.

The process of resolving disputes in this way was well known long before independence, where someone involved in the dispute, how to resolve the dispute was carried out by peaceful means and involving third parties. These third parties are usually community leaders, religious leaders or traditional leaders. The use of settlement through mediation or by means of deliberation, this consensus is one of the

many dispute resolution methods chosen by the community, because the litigation process is long and requires expensive costs.

The process of resolving cases of violence in the house on the date above, is in accordance with the Mediation Theory where a process of resolving disputes between two or more parties through negotiations or by means of consensus with the help of neutral parties who do not have the authority to decide. The neutral party is called a mediator with the task of providing procedural and substantial assistance. The consensus or consensus approach in the mediation process implies that everything that is produced in the mediation process must be the result of agreement or agreement of the parties. In accordance with their consensual or collaborative nature, mediation can result in a win-win solution for the parties (win-win solution).²⁷

5) Factors that hamper the resolution of cases of violence in the household outside the court

Restorative justice as an attempt to find a peaceful resolution to conflicts outside the court, especially for cases of domestic violence is still difficult to implement. The emergence of the idea of restorative justice as a criticism of the application of the criminal justice system with imprisonment that is considered ineffective in resolving social conflicts. The concept of Restorative Justice is expected to be a solution in the settlement of domestic violence, but in practice there are still many technical obstacles.

Legal mechanisms and law enforcement officers and the community are factors that should receive enough attention to provide attention and protection for victims of domestic violence. Therefore, efforts should be made to ensure that law enforcement officials involved in handling domestic violence do not only refer to the Domestic Violence Act, but also refer to national and international instruments and Joint Decree. Law enforcement officials dealing with domestic violence should prioritize peace rather than formal legal processes.

The following are some factors that hinder the implementation of Restorative Justice:

- 1) Legal substance that has not yet accommodated the implementation of complete restorative justice.
- 2) Law enforcers who have not optimally implemented existing regulations and are still behaving rigidly, and the culture of law / community participation has not been maximized.
- 3) Lack of regulation making that accommodates all provisions regarding the handling of domestic violence cases through a restorative justice approach, outreach to all law enforcement officials and the public
- 4) Coordination between law enforcement officers, and changing the paradigm of law enforcement officers from retributive and restitutive justice approaches to restorative justice has not yet been fully achieved.

²⁷TakdirRahmadi, *Mediasi :Penyelesaian Sengketa Melalui Pendekatan Mufakat*, (Jakarta: Raja GrafindoPersada, 2010), hlm. 21-24

²⁶*Ibid*, hlm. 65

Mediation in domestic violence cases needs to be socialized to the wider community. It is necessary to increase the human resources of law enforcement officials involved in handling domestic violence through socialization, education and special training so that they can understand the form of justice seekers in domestic violence cases through mechanisms outside the court so that the rights of victims can be protected and upheld.

The concept of Restorative Justice is a new paradigm in criminal law enforcement, although in fact the concept has long been developed and practiced in the settlement of criminal cases in several countries that adopt a common law system. Because the concept is relatively new, it is not surprising that efforts to apply the concept in the practice of criminal law enforcement in Indonesia, especially by the National Police, encounter many obstacles.

One obstacle is the low understanding of police officers towards the concept of Restorative Justice. Polri members in general often hear the mention of the term Restorative Justice, but in reality not a few members who do not understand the term, let alone apply it. Because the concept is relatively new in criminal law enforcement.

Moreover, Law No. 2/2002 on the National Police only introduces the concept of police discretion. Although the discretion is already contained in Article 18 of Law No. 2 of 2002 concerning the National Police so that it provides an opportunity for the police to implement discretion as a non-deviant act, but in the practice of carrying out police duties, there are still many police officers who are hesitant to use this authority, especially in handling criminal cases.

In full Article 18 of Law Number 2 of 2002 states:

- 1) In the public interest, officials of the Republic of Indonesia National Police in carrying out their duties and authorities may act according to their own judgment.
- 2) The implementation of the provisions as referred to in paragraph (1) can only be carried out in a very necessary condition by observing the laws and regulations and the Professional Code of Ethics of the Indonesian National Police.

Furthermore, the Elucidation of Article 18 paragraph (1) states:

What is meant by "acting according to his own judgment" is an action that can be carried out by members of the Indonesian National Police who in acting must consider the benefits and risks of their actions and are truly in the public interest. "

The reluctance of members of the Indonesian National Police to apply discretion, especially in examining criminal cases, especially domestic violence cases, is due to the low understanding of the police apparatus regarding discretionary authority, so that discretion legally contained in Article 18 of Law Number 2 of 2002 concerning Police is seen as illegal.

In addition, the application of police discretion is also often regarded as a trick by the police to obtain material benefits

from litigants, so there is a fear of negative public evaluations. To provide an understanding of members of the Indonesian National Police regarding the concept of Restorative Justice must be accompanied by an understanding of the concept of police discretion, because the discretion with restorative justice is related.

In implementing or implementing the concept of restorative justice, police investigators often experience doubts in making decisions in the investigation process, especially if the perpetrators / their families and victims / families as well as the community apparently want peace in the resolution of cases or cases. This is due to the absence of rules or legal umbrella or formal procedures / mechanisms to accommodate this matter so that this situation becomes a dilemma for Polri investigators in the field based on factors:

- 1) Investigators' concerns or fears will be blamed by their leaders or superiors and disputed in the supervision and inspection by the Polri's internal supervisory and examining institutions that use formal procedural parameters.
- 2) The absence of a legal umbrella that regulates and becomes the basis of legitimacy in making decisions in the investigation process whether based on the concept of Restorative Justice or other approaches that are in accordance with the Sociological Jurisprudence school.
- 3) There is no formal procedural procedure or mechanism for implementing it.

Understanding the concept of police discretion simply understands that the authority of Polri members to make decisions or choose various actions in resolving criminal cases that they handle is based on the law on the basis of situations and conditions, according to their own conscience and judgment in the public interest.

Whereas Restorative Justice can be simply understood as a criminal philosophy which places the victim at the central point in resolving criminal cases and keeping the perpetrators of imprisonment from imprisonment through diversion, but is still held accountable. As a criminal philosophy, in its implementation requires a concept that has legitimacy in its application.

As a form of actualization of that philosophy, the concept must be stated in legislation. With the regulation regarding police discretion in Article 18 of Law Number 2 Year 2002 concerning the Police, it has actually given a juridical basis to Polri investigators to apply the philosophy of Restorative Justice in handling criminal cases.

To ensure uniformity in the implementation of restorative justice within the Indonesian National Police, a norm or principle is needed to ensure the similarity of the actions of Indonesian police investigators in applying the concept of restorative justice to criminal law enforcement, and also to provide legitimacy to Indonesian police investigators so that all actions carried out in the implementation of restorative justice for investigation purposes, it is not illegal and deviates from applicable procedural law.

5. Conclusion

- 1) In Indonesia positive law, in principle, it is not possible to have a solution outside the court, although in certain cases the settlement of cases outside the court is regulated as in the resolution of domestic violence which can be transferred from the court process to the court process. Several conferences, for example the 9th UN conference in 1995, especially those related to criminal justice management (Document A / CONF 1969/6) mentioned the need for all countries to consider "rival law enforcement and justice functions" and alternative dispute resolution (ADR) in the form of mediation, conciliation, restitution and compensation in the criminal justice system. Likewise, in the case of handling domestic violence, even though many laws have been regulated in the law, but the handling of domestic violence in bringing about restoration in nature which protects human rights is not expeditiously regulated by the Act.
- 2) Settlement of domestic violence through channels outside the court, in practice can be done in 3 (three) ways, namely: 1) Disputing Parties Settle Their Own Cases Without the Help of Third Parties as Mediators; 2) Disputing Parties Ask For Help To Their Families To Be Settled (Mediated); and 3) Voluntary Dispute Agrees Agree to Come Ask for Community Leaders to become Mediators. In this case the parties to the dispute can ask for help from a third party (mediator) to resolve their dispute.
- 3) There are several factors that become obstacles in the implementation of restorative justice, especially for the resolution of domestic violence, namely: 1) Legal substance that has not accommodated the implementation of restorative justice in full; 2) Law enforcers who have not optimally implemented existing regulations and are still behaving rigidly, and the culture of law / community participation is not yet optimal; 3) The absence of making regulations that accommodate all the provisions regarding the handling of domestic violence cases through a restorative justice approach, outreach to all law enforcement officials and the public; and 4) Coordination between law enforcement officers, and changing the paradigm of law enforcement officials from the retributive and restitutive justice approaches to restorative justice has not yet been fully achieved.

6. Suggestion

- 1) There needs to be a legal substance that accommodates the implementation of restorative justice in full, so that the process of resolving certain legal cases can be done through restorative justice, which is faster, fairer, simpler and does not take time and large costs.
- 2) It is hoped that law enforcers can optimally implement existing regulations by involving optimal legal culture / community participation.
- 3) Regulations need to be made that accommodate all the provisions regarding the handling of domestic violence cases through a restorative justice approach, and increased coordination between law enforcement officials, and change the paradigm of law enforcement officials from the retributive and restitutive justice

approaches to restorative justice which is completely unattainable.

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