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The Implementation of Restorative Justice System to resolve Domestic Violence Acts

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ABSTRACT

Domestic violence is often referred to as a hidden crime because both perpetrators and victims attempt to hide their offence from public view. According to Article 28 of the 1945 Constitution, which regulates human rights, all forms of violence, especially domestic violence, are violations of human rights and crimes against human dignity. Restorative justice system is one of the approaches used to resolve case of domestic violence. The concept of a restorative justice system is used to resolve violations of the law that occur based on victims and perpetrators' interests. The objectives of this research is to find out the implementation of restorative justice in managing domestic violence issues in society; and to analyse the restorative justice mechanism in domestic violence cases based on the Indonesian legal system. The approach method used in this research is a normative juridical approach based on laws and regulations related to legal issues. In addition, it is also used conceptual approach based on developed perspective and doctrines in legal sciences. The settlement of domestic violence cases using penal mediation method with a restorative justice approach was successfully resolved the criminal cases occurred in community.

Keywords: *Crime, Domestic Violence, Restorative Justice*

INTRODUCTION

The occurrence of violence against human beings is still a concern in this globalisation era because violence does not only occur in the neighbourhood, but also in the household. However, this is evidenced by criminal cases that are revealed and published only in criminal cases that occur in the neighbourhood. People do not realise that the household can be the most frightening place for family members because the household has been considered the safest place for all family members to interact with love, mutual respect and honour. In addition, violence in any form such as physical, sexual, psychological or neglect violence can occur in a household that is supposed to be a place to protect each other.¹

According to Article 1 of Law No. 23/2004 on the elimination of domestic violence (PKDRT), domestic violence is any act against a person, especially a woman, which causes sexual, physical, psychological or domestic abuse, including domestic neglect, which leads to fear, loss of self-confidence, loss of ability to act, helplessness, or severe psychological pain to a person. In addition, domestic violence includes physical violence (punches, kicks, psychological or emotional abuse); financial violence; sexual violence (forced sexual intercourse). Thus, it can be concluded that domestic violence includes all forms of actions that cause unpleasant feelings, pain and injury.

Domestic violence is usually limited to the nuclear family, which includes fathers, mothers, and children. In addition, it has become a normal thing for us to see, hear, and read in both print and electronic media, a child being beaten by his parents, or a wife being abused by her husband. In addition, the state and society must participate in preventing domestic violence offences by implementing protection and enforcement based on Pancasila and the 1945 Constitution of the Republic of Indonesia.² Domestic violence is often referred to as a hidden crime because both perpetrators and victims attempt to hide their offence from public view.³ Under Article 28 of the 1945 Constitution which regulates human rights, it is stated that all forms of violence, especially domestic violence, are violations of human rights and crimes against human dignity and discrimination. Based on these considerations, Law No. 23/2004 regulating the elimination of domestic violence was enacted.

Domestic violence is a type of complaint offense as outlined in Article 51 and Article 52 of Law on the protection of domestic violence. As a complaint offense, the criminal sanctions (ultimatum remedium) are the last effort in resolving it. In

¹ Agung Budi Santoso, "Kekerasan Dalam Rumah Tangga (KDRT) Terhadap Perempuan: Perspektif Pekerjaan Sosial," *Komunitas Jurnal Pengembangan Masyarakat Islam* 10, no. 1 (2019): 39–57.

² Aries Dirgayunita, "Pendidikan Keluarga Sakinah Dalam Perspektif Hukum Islam Dan Psikologi," *Imtiyaz: Jurnal Ilmu Keislaman* 4, no. 2 (September 23, 2020): 163–174, <https://jurnal.staim-probolinggo.ac.id/index.php/Imtiyaz/article/view/96>.

³ Rukmini. Milen, *Aspek Hukum Pidana Dan Kriminologi* (Bandung: PT. Alumni Bandung, 2014).

addition, the case will be reopened when there is reconciliation between the two parties. In Article 1 Paragraph (25) of Law No. 8/1981 concerning criminal code explains that complaint is a report that includes a request from a concerned party to an authorized official to take legal action against someone who has harmed him by committing a complaint criminal violation. Additionally, a complaint offense is a crime that can only be tried as a result of a complaint from the harmed person, allowing for revocation or out-of-court resolution (non litigation).⁴

The principle criminal law does not recognize the existence of out-of-court criminal settlement mechanisms. Meanwhile, it is different from civil law that used out-of-court case settlement through mediation. In addition, dispute resolution outside the court (non-litigation) is often called Alternative Dispute Resolution (ADR). According to Takdir Rahmadi, alternative dispute resolution is a concept that includes various forms of dispute resolution other than the judicial process through legal regulations, either based on a consensus approach or not. In the process of enforcing criminal law, it begins with a report or complaint received by the police from the victim or who knows that a criminal offense has occurred. Then the police follow up by conducting investigations, and prosecutions conducted by the prosecutor's office until the trial in court conducted by the judge.⁵ Restorative justice system is one of the approaches used to resolve domestic violence cases based on the interests of victims and perpetrators. The restorative justice approach is considered a paradigm and mechanism that operates outside of the criminal justice system to resolve criminal cases.⁶

Restorative justice is an act of empowering alternative settlements outside the court through mediation that emphasize the principle of win-win solution, and can be used in resolving disputes through court process. The settlement of criminal cases through out-of-court mechanisms is currently common and acceptable to the public since the public believes that it felt more justified. Furthermore, practitioners and legal experts stated that restorative justice are only able to be applied in civil cases, and not to resolve the criminal cases since criminal cases cannot be resolved through out-of-court mechanisms. The restorative justice approach can be applied in law enforcement process against domestic violence cases that have not reflected the principle of justice as a legal goal yet. The criminal cases are investigated, prosecuted, and sentenced in court, especially for criminal defendants whose causes minimum losses that not harm the state. In actuality, the community believes that criminal prosecutions involving little damages are completely unacceptable.

⁴ Andro Giovani Ginting, Vici Utomo Simatupang, and Sonya Arini Batubara, "Restorative Justice Sebagai Mekanisme Penyelesaian Tindak Pidana Kekerasan Dalam Rumah Tangga," *Jurnal Rectum* 1, no. 2 (2019): 180–187.

⁵ Candra Irawan, *Hukum Alternatif Penyelesaian Sengketa Di Indonesia*, Edisi Revi. (Bandung: CV. Mandar Maju, 2017), <https://core.ac.uk/download/pdf/157834389.pdf>.

⁶ Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dan Perempuan*, 1st ed. (Bandung: Refika Aditama, 2014).

Criminal offences do not have to be resolved through the judicial process. The settlement of criminal cases through mediation is one way to realise restorative justice which cannot be separated from the legal ideals based on the legal basis of justice (law is justice), and legal principles in the process of case settlement which refers to written and unwritten law. The formulation of legal rules for resolving criminal cases with a restorative justice approach through mediation must be in accordance with the values and benefits of law, and legal objectives. Therefore, this research is conducted to find out the implementation of restorative justice in managing domestic violence issues in society; and to analyse the restorative justice mechanism in domestic violence cases based on the Indonesian legal system.

RESEARCH METHODOLOGY

This research is normative juridical to obtain research results that can be accounted for in a scientific basis. Normative legal research is used to review or analyse primary and secondary legal materials by understanding law as a set of positive rules or norms in the legislative system that regulates human life.⁷ While normative legal research is commonly known as document study, it uses qualitative methods in analysing data, and uses secondary data sources, such as laws and regulations, court decisions, books, legal theories, and doctrines.⁸ The legal material was collected by reading, observing, listening, or searching through the internet. While processing the material is conducted by selecting secondary data or legal material, then classifying it based on the legal material and compiling the research data systematically and logically.

RESULT AND DISCUSSION

Domestic violence is the criminal act that can be resolved through criminal justice system or based on retributive justice principle. In the construction of criminal law based on a retributive perspective, the suffering or loss of the victim has been compensated by criminal sanctions that imposed on the perpetrator. The authority to resolve criminal acts are only owned by law enforcement officials that inseparable from the idea of criminal activities, which, in the retributive approach, are viewed as acts that contravene state law. Under this conception, the state as the victim of unlawful acts committed by citizens, has the authority to take legal action against the perpetrator and impose punishment through the use of law enforcement officers.

In retributive perspective, the construction of criminal settlement will confront the state as the party whose rule of law has been violated against the criminal as the party who violate the law. Under this construction of criminal law, all the victims' interests related to the resolution of criminal offences are less or not

⁷ Johnny Efendi, Jonaedi & Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 1st ed. (Depok: Prenada Media Group, 2016).

⁸ Sugiharto, "The Regulation Policies on Legal Aid Norms for Indonesian National Police and Their Family," *YURIS (Journal of Court and Justice)* 1, no. 3 (2022).

accommodated. Meanwhile, the legal system has morally and juridically agreed that legal justice is provided to people or parties whose rights have been violated. Judicial institutions, such as criminal courts, are institutions that provide guarantees of justice aimed at people or parties whose legal rights have been violated, who are referred to as victims. In fact, the decisions of these judicial institutions often disappoint victims' perceived feelings of justice.⁹

In contrast to retributive perspective which focuses on punishing the perpetrator as compensation for his act, the restorative justice perspective focuses on restoring the suffering of victims as a form of perpetrator responsibility without overriding the interests of perpetrator rehabilitation and the interests of creating and maintaining public order. In addition, restorative justice also provides opportunities for victims to be actively involved in the process of resolving their cases.¹⁰

In line with the presence of Restorative Justice in criminal law enforcement, there is a theoretical concept that focus on restoring the physical and psychological healing of victims, called theory of substantive justice. According to Suteki, substantive justice can be achieved through a policy of non-enforcement of law, which means that the law is not enforced. In principle, the law can be violated in the interests of human rights, democracy, morals and ethics. Meanwhile, the substantial justice can be defined as the truth justice. Significant justice seekers are more focus on the core of the law, which includes moral, ethical, and religious issues, rather than formal and tangible parts of the law. Then, this was considered to the stipulation of substantial justice, that it is not quantitative justice as formal justice, but qualitative justice that based on public morality and human values and is able to provide satisfaction and happiness for the community.¹¹ The existence of the concept of penal mediation with restorative justice is an innovation for the development of Criminal Law, which is in line with the theory of Substantive Justice. Then, the Restorative Justice becomes the main basis for case settlement in a criminal offense, which in this case is a crime of domestic violence.

Restorative justice is a concept of punishment with the intention of maintaining the balanced and fair criminal justice system.¹² Restorative justice is also an alternative way of criminal justice by prioritizing the integration approach of the perpetrator and the victim or the community to find solutions and reestablish good social relations.¹³ Meanwhile, according to Article 1 of Law No. 11/2012 concerning juvenile criminal justice system stipulates that restorative justice is the

⁹ Luthfi Trikusuma Aji, "Penerapan Restorative Justice System Sebagai Upaya Penyelesaian Tindak Pidana Kekerasan Dalam Rumah Tangga" (Universitas Islam Negeri Walisongo, 2020).

¹⁰ Riza Priyadi, "Restorative Justice Pada Kasus Tindak Pidana Kekerasan Dalam Keluarga Perspektif Hukum Pidana Islam Dan Hukum Pidana Positif" (Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2019).

¹¹ Suteki, *Masa Depan Hukum Progresif* (Yogyakarta: Thafa Media, 2015).

¹² R. Wiyono, *Sistem Peradilan Pidana Anak Di Indonesia*, Cetakan 1. (Jakarta: Sinar Grafika, 2016).

¹³ Hanafi Arief and Ningrum Ambarsari, "Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia," *Al'Adl Jurnal Hukum* 10, no. 2 (2018): 173–190.

resolution of criminal cases by involving perpetrators, victims, families of perpetrators or victims, and other related parties to jointly seek a fair solution by focusing on restoration to its original status rather than revenge.

The analysis of restorative justice system implementation in this research can be studied through two methods, called the theory of restorative justice that is currently developing and the rule of law that currently applies in Indonesia. Theoretically, it can be studied systematically by understanding the concept, objectives, principles, and models of restorative justice that have been applied and remain to develop until now. The rule of law can be determined by the legal basis for the implementation of restorative justice in a country and standardised guidelines for its implementation.

The implementation of restorative justice in resolving criminal acts of domestic violence is conducted by bringing together the two parties, the perpetrators and the victims at the police station for mediation. The mediator between two parties is used to facilitate the mediation with the aims to obtain an agreement between them. This process has met the requirements of restorative justice. In addition, the police have implemented the concept of punishment or alternative of criminal justice by prioritizing the integration approach of the perpetrator and the victim as a unit to solve the criminal case of domestic violence. Then, the police only facilitate both parties for mediation to reach an agreement through the investigators.

The existence of Chief of Police Circular Letter Number Pol: B/3022/XII/2009/SDEOPS provides an opportunity for investigators to make a legal process in resolving criminal acts of domestic violence with the concept of Restorative Justice. According to the Circular Letter, investigators can only conduct restorative justice efforts if both parties request to be reconciled. However, investigators with their discretionary authority offer restorative justice efforts as a settlement of domestic violence criminal cases and withhold the SPDP from being submitted to the public prosecutor.

The investigator observes the cases of domestic violence committed by husbands against wives are still minor violence category, since the crime not cause disability to the victims, or do not cause victims to suffer from diseases that prevent them from doing their daily activities. The investigator conduct the mediation process based on the desire of the victim and the perpetrator, avoid a long legal process, minimize the costs incurred in legal process, and there is a direct apology accompanied by a sense of regret from the perpetrator for his actions and will not repeat the same actions in the future.

Besides, the mediation process should be conducted as an offer in solving the criminal cases, and the investigator should to force the parties concerned when they refused to do the mediation process. There were 2 cases in 2016 that a mother as a victim advocate from an Non-governmental Organization (NGO) who finally revoked all reports, and the advocate was not allowed to enter the room during

mediation with the reason that the mediation process was about child custody and internal family affairs. When the victim was outside the room and revoked her report, the victim told the counselor that when the victim was mediated, the victim was confused because there were only 3 people in the room, including the perpetrator (male), the investigator (male) and female victim. Before report revocation, there was a statement letter and a bargaining process between the two parties. In addition, the victims wanted to demand justice by going through the judicial system, but the mediation process made them less enthusiastic in solving their case. Moreover, the investigator coordinated with the community NGO and the victim exclusively by telephone, informing them that the mediation would not use an official letter issued to the victim for the next week. This occurred when a community NGO supported a victim of domestic violence to be mediated.

According to NGO perspective as a victim advocate, the settlement through mediation does not guarantee that cases of domestic violence will happen again in the future since the perpetrator think that all problems can be mediated, while the mediation process do not fulfill the victim's rights. For example, when the wife reports her husband for legal proceedings to obtain justice, the wife must conduct the mediation process that weaken her case. The mediation process should be conducted based on victims' desire, not to protect the perpetrator for the legal process does not continue on to the next stage.

When the victim and the perpetrator reach an agreement without coercion during mediation process, it might give both parties a sense of justice. According to several research, the mediation process in the police does not guarantee that victims and perpetrators are not under pressure. For example the victim's guardian was not allowed to take part during the mediation process, that it was possible that the victims was under pressure during the mediation process.

The implementation of mediation conducted by Semarang Police Station in resolving domestic violence offences has fulfilled the concept and principles of restorative justice, therefore the implementation of mediation based on the principle of restorative justice will be described. In reviewing this discussion, the author will use the principles of restorative justice according to Bagir Manan as follows:

- a. Fostering the joint participation between perpetrators, victims, and community groups to resolve the criminal offense. The placement of perpetrators, victims, and the community as stakeholders who collaborate and directly try to find fair solutions for all parties (win win solutions). The mediation process conducted in the police only involves the victim and the perpetrator, without involving other parties or the community affected by the crime of domestic violence. In addition, the mediation process conducted in the police is at the initiative of the investigator as a mediator, and there is no standard procedure in the mediation process and special quality of the investigator during the mediation process. The mediation process only consists of the mediator

(investigator), the perpetrator and the victim, and it is possible that the victim feels pressured, because they are not accompanied by their guardian during the mediation process.

- b. Encourage the perpetrator to be responsible for the criminal acts that has caused injury or loss to the victim. Furthermore, it builds responsibility to not to doing the same criminal acts in the future. First, the mediator explains his/her role and explains the mediation process to find the best solution. The mediator should be neutral, listen to the parties' statements equally, make suggestions to both parties to find solutions to the problems that led to the agreement.

According the interview results from Semarang Police, it cannot be proven that mediator can encourage the perpetrator to take responsibility for the victim and responsibility not to repeat the criminal acts he has committed in the future. The criminal act as a form of violation of the law, a violation by someone (a group of people) against someone (a group of people). Thus, it is appropriate for the perpetrator should be responsible towards the victim, rather than prioritizing legal accountability. Every crime of domestic violence is always sought for peace or restorative justice settlement. This is based on Circular Letter Number SE/8/VII/2018 concerning the Application of Restorative Justice in Criminal Case Resolution. Therefore, mediation efforts conducted by police in resolving criminal acts of domestic violence have placed the event or criminal act not primarily as a form of violation of the law, but as a violation by a person (group of people) against a person (group of people). However, criminal cases of domestic violence that are resolved through mediation must fulfill the provisions as stated in the circular letter, called meeting the material and formal requirements. Then, every criminal offense that meets these conditions is always directed at settlement through mediation (restorative justice) by not prioritizing punishment due to violation of the law, but viewing criminal cases of domestic violence that meet the material and formal requirements as an offense by a person (group of people) against a person (group of people). Thus, the mediation process requires the perpetrator to be responsible to the victim and not legally accountable, and encourages resolving the criminal offense in more informal and personalized ways rather than resolving it with formal (rigid) and impersonal procedures.¹⁴

Based on the description above, it can be concluded that the process of implementing restorative justice in solving the domestic violence is still not implemented well. This is due to the fact that the principles of restorative justice have not been fulfilled properly, although in its implementation it has a clear legal basis, called Circular Letter Number SE/8/VII/2018 concerning the Application of Restorative Justice in Criminal Case Resolution.

¹⁴ Abintoro Prakoso, *Pembaruan Sistem Peradilan Pidana Anak* (Yogyakarta: Laksbang Grafika, 2013).

The process of resolving domestic violence crimes was based on the guidelines as contained in Circular Letter Number SE/8/VII/2018 concerning the Application of Restorative Justice in Criminal Case Resolution. It will be described regarding the fulfillment of material and formal requirements for criminal acts of domestic violence that can be resolved through restorative justice. According to Point 3 of Circular Letter Number SE/8/VII/2018 on the Application of Restorative Justice in Criminal Case Settlement, the material requirements in the permissibility in case settlement with restorative justice approach are as follows:

- a. There is no public unrest and no public rejection;
- b. No impact on social conflict;
- c. There is a declaration from all parties involved not to object, and to waive their right to sue before the law;
- d. Limiting principle are:
 - 1) The perpetrator:
 - a) The crime is not severe, namely guilt (schuld or mensrea in the form of intent (dolus or opzet), especially intent as an intention or purpose (opzet als oogmerk).
 - b) The perpetrator is not a recidivist.
 - 2) On criminal offenses in process:
 - a) Investigation; and
 - b) Investigation before the SPDP is sent to the Public Prosecutor.

In addition, the criminal offense must also meet the formal requirements, namely as follows:

- a. Reconciliation Request Letter from both parties (complainant and reported party);
- b. Statement of reconciliation (akte dading) and settlement of disputes between the parties (the complainant, and/or the complainant's family, the reported party, and/or the reported party's family and representatives of community) known by the investigator's superior;
- c. Minutes of Additional Examination of the litigants after the settlement of the case through restorative justice;
- d. Special case title recommendations approving restorative justice solutions;
- e. The perpetrator does not object to liability, compensation, or it is done voluntarily;
- f. Restorative justice is available for all crimes that do not involve human victims.

Meanwhile, the mechanism for implementing restorative justice in resolving criminal offenses is as follows:

- a. After receiving the reconciliation request from both parties (complainant and reported party) signed on a stamp duty, conduct administrative research on formal requirements for case settlement through restorative justice;
- b. A request for reconciliation after the formal requirements are met is submitted to the superior investigator for approval;
- c. After the application is approved by the superior investigator (Chief of Criminal Investigation Agency/The Chief of Regional Police Force/The Chief of Indonesian National Police), the time for signing the statement of reconciliation is set;
- d. Conducting a conference that results in an agreement signed by all parties involved;
- e. Prepare an official memorandum to supervising investigator or Head of the Working Unit regarding the request for a special case title for the purpose of terminating the case;
- f. Conducting a special case title with participants of the reporter, and/or the reporter's family, the reported and/or the reported's family and representatives of community appointed by the investigator, the investigator in charge and representatives of internal supervisory function and legal function and elements of government when necessary;
- g. Compile administrative completeness and special case title documents and case title result reports;
- h. Issuing an Order to Discontinue investigation and a Decree to Discontinue the investigation on restorative justice;
- i. For cases the investigation stage, the investigator issues an Order to Discontinue Investigation and a Decree to Discontinue Investigation signed by:
 1. Director of Criminal Investigation;
 2. Director of Criminal Investigation at Regional Police Force;
 3. The Chief of Indonesian National Police.
- j. For cases at the investigation stage, the investigator shall issue an Order to Discontinue Investigation and a Decree to Discontinue Investigation as set out in the Appendix to this Circular Letter, signed by:
 - 1) Director of Criminal Investigation;
 - 2) Director of Criminal Investigation at Regional Police Force;
 - 3) The Chief of Indonesian National Police.
- k. Record into a new register book B-19 as a restorative justice case counted as a case settlement.

Based on Circular Letter Number SE/8/VII/2018 on the Application of Restorative Justice in Criminal Case Settlement, it can be analyzed regarding the requirements and application in the settlement of domestic violence crimes committed at Semarang Police Station as follows:

The process of implementing criminal case settlement through restorative justice according to Circular Letter Number SE/8/VII/2018 on the Application of Restorative Justice in Criminal Case Settlement begins with receiving a request for reconciliation from both parties. This means that the desire to reconcile must be based on both parties' interest (the reporter and the reported party) at the initiation of the police (investigator/mediator).

Based on the research results, it was found that the desire to reconcile remains the will of the litigants, called the perpetrator and the victim. This shows that the implementation of settlement through restorative justice fulfills one of the principles of restorative justice, called fostering the joint participation between the perpetrator and victim. Meanwhile, Semarang Police Station does not include community groups to resolve the crime of domestic violence. After the police receive a request for reconciliation from both parties (complainant and reported party) signed on a stamp duty, the investigator conducts administrative research on the formal requirements for case settlement through restorative justice by fulfilling the formal requirements in the form of:

1. A letter of request for reconciliation from both parties;
2. A statement of peace and settlement of disputes between the parties in police mediation process is declared ended by points of agreement between the perpetrators and victims of domestic violence. Then, it followed up with the confirmation of a written reconciliation agreement made by both parties and signed by both parties which is used as a statement of reconciliation.
3. Additional Minutes of Examination of litigants after case settlement through restorative justice; The investigator conducts BAP of litigants who have been resolved through restorative justice system.
4. The perpetrator does not object to liability, indemnification, or voluntary conduct;
5. Restorative justice is available for all crimes that do not involve human victims.

Based on the description of the settlement process for domestic violence crimes obtained from the police, it can be concluded that the general settlement process is as follows:

1. The reports from public or victims of domestic violence cases.
2. The police receive the victim's report
3. The police mediated between the perpetrator and the victim over the case.

4. The peace/agreement or no agreement between the two parties (perpetrator and victim).
5. When there is an agreement, the victim's report will be withdrawn, and the case will be resolved amicably.
6. When there is no agreement, the report will proceed to further criminal proceedings.

CONCLUSION

The police have tried to resolve cases of domestic violence using penal mediation method with a restorative justice approach, it is proven that on average the cases complained about by the community, more cases are successfully resolved with restorative justice, but the rest of the cases cannot be resolved properly. So the fewer cases are submitted to the prosecutor's office, and other cases solved without explanation. Based on several factors, that the main factor is because the law stipulates that domestic violence is a complaint offense, so that in this case law enforcers, then they are passive in cases of domestic violence. Besides, the level of public awareness that does not fully understand domestic violence and mediation is an important factor in the implementation of penal mediation using restorative justice approach.

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