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Preface

The evolving paradigm of the Indonesian criminal justice system has positioned Restorative Justice as the primary mechanism, shifting the role of the state from being solely an enforcer to becoming a rehabilitator. This shift is particularly evident in the application of restorative justice within Indonesia's juvenile criminal system, as stipulated by Law Number 11 of 2012 on the Child Criminal Justice System, which introduces diversion. This implementation of restorative justice enables the possibility of halting criminal prosecution.

The concept of restorative justice emerges as a response to the issue of punitive measures leading to overcrowded prisons and hindering victims' restitution rights. Tony F. Marshall defines the restitution justice system as a collaborative approach involving all relevant parties to address violations, discuss consequences, and pave the way for future resolution. However, its application hinges on conditions such as the perpetrator's admission of guilt, victim consent, law enforcement approval, and community support. Restorative justice primarily centers on resolving criminal cases outside the formal court system, often termed extrajudicial settlement. Conversely, In the British criminal system, restorative justice encompasses compensating both victims and wrongdoers for reconciliation. Regrettably, Indonesia's criminal system doesn't officially recognize penal mediation. Nevertheless, recent developments, like the Prosecutor's Regulation number 15 of 2020 see the Public Prosecutor initiating peace efforts between victims and suspects in a non-coercive manner, acting as a facilitator rather than a plaintiff.

To advance this discourse, a comprehensive analysis of restorative justice implementation through a multi-perspective and international lens is necessary. Practically, restorative justice extends beyond the confines of the criminal system and encompasses various other areas, including contract law, civil law, human rights, and environmental law. These approaches are needed to enhance the regulatory framework for restorative justice in Indonesia.

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The Role of the National Police Institution (POLRI) in Implementing Restorative Justice: Has it Fulfilled the Legal Objective?

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ABSTRACT: The National Police institution as the main gate for upholding justice in Indonesia, it is necessary to apply restorative justice to resolve criminal cases outside the court. The National Police of the Republic of Indonesia as the executor of the functions of the state government in terms of law enforcement duties, are expected to be able to provide security in addition to providing protection, protection and service to the community to be able to realize the demands of society to achieve justice. As for these problems, among others, in the settlement of cases through restorative justice, of course, it is very beneficial for both parties to the litigation. However, the investigator's lack of knowledge regarding the concept of restorative justice is an obstacle in its application, this is due to a lack of socialization regarding police regulation no. 8 years 2021 Concerning the Handling of Criminal Acts Based on Restorative Justice. Law enforcement carried out by the Indonesian National Police, which is just, certainly cannot be separated from the discussion of justice as a legal ideal that must be used as a direction and guideline in law enforcement itself. This research method uses normative juridical research with a statutory approach. The importance of the National Police Institute in implementing restorative justice is to facilitate perpetrators and victims for mediation so that the case does not reach the court.
Keywords: Restorative Justice, Purpose of Law, and the Role of the Police Institution

I. INTRODUCTION

Restorative Justice or often translated as restorative justice, is an approach model that emerged in the 1960s in efforts to resolve criminal cases, which is different from the approach used in the conventional criminal justice system, this approach focuses on the direct participation of perpetrators, victims and society in the process of resolving criminal cases. Despite the fact that this approach is still being debated theoretically, this view has in fact developed and influenced many legal policies and practices in various countries.

Handling criminal cases with a restorative justice approach offers different views and approaches in understanding and dealing with a crime. In the view of restorative justice, the meaning of a crime is basically the same as the view of criminal law in general, namely attacks on individuals and society as well as social relations. Therefore crime creates an obligation to repair damaged relationships due to the occurrence of a crime. While justice is interpreted as a process of finding solutions to problems that occur in a criminal case where the involvement of victims, communities and perpetrators is important in efforts to repair, reconcile, and guarantee the continuity of these repair efforts.

The Indonesian National Police (Polri) as part of the Integrated Criminal Justice System has a very important role in enforcing criminal law. In Law no. 2 of 2002 concerning Polri Article 2 states that the function of the police is to carry out one of the functions of the state government in the task of protection, protection and community service and law enforcement. Article 14 paragraph (1) letter g of Law no. 2 of 2002 mandates that the Police have the authority to investigate criminal acts which were previously preceded by investigative actions by investigators. which is Predictive, Fair Responsibility and Transparency (PRECISION).

The transformation towards a Precise National Police covers 4 areas, 16 priority programs, 51 activities and 117 action plans. In the operational field, one of the Chief of Police's priority programs is the Law Enforcement Performance Improvement Program. In this case, one of the main concerns of the National Police Chief is the existence of a law enforcement process that fulfills the people's sense of justice. This can be realized by prioritizing progressive law in resolving cases through restorative justice which does not only look at aspects of legal certainty, but on benefits and fairness. This understanding is in accordance with what was stated by Gustav Radbruch.

Gustav Radbruch mentions justice, benefit and legal certainty as the three basic ideas of law or the three objectives of law, and can also be equated with legal principles. A verdict or court decision must be in accordance with the law because the judge must judge based on the law. Decisions must also contain justice, be

objective and impartial. Therefore, the ideal decision is a decision that contains justice, benefits and legal certainty proportionally.[1] According to Radbruch, certainty and finality/benefit are two aspects that cannot be separated from justice. Certainty and benefit must be put in the framework justice itself. According to him, the function of legal certainty is to ensure that law (which containing justice and norms which advance kind human), really useful as a rule obeyed.[2]Related to that, there is certainty that the rule is obeyed, then justice is truly bring benefits for the good of humanity both as individuals and as a group. Theory Radbruch no possible exists conflict Among justice, certainty and expediency. Certainty and expediency should not only be placed in framework justice, but actually is part integral from justice that alone. Certainty law no again just certainty law, but certainty who has justice.[3]

Among these three principles, what often becomes the main focus is the issue of justice. Friedman stated that, "in terms of law, justice will be judged as how law treats people and how it distributes its benefits and costs", (in law, justice will be considered as an effort to treat people and efforts to distribute benefits and costs) and In this connection Friedman also stated that, "every function of law, general or specific, is allocative", (every function of law, whether general or special, is an allocation).[4]

Formal criminal law enforcement through law enforcement agencies will produce justice which tends to only be procedural justice, but a restorative justice approach will produce substantive justice which has actually been agreed upon and desired by the parties, both perpetrators and victims, with or without involving the community or local leaders. . The restorative justice approach is the most recent model of settlement of criminal cases at this time which wishes to provide a constructive alternative to the settlement of criminal cases outside the criminal justice system.

Comparing the restorative justice approach with the existing criminal justice system really shows a stark contrast. On the one hand, the state's full authority over punishment creates a criminal justice system through one channel, namely

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[1] Arief Sidharta, Judicial Reform and State Responsibility, Anthology of the Judicial Commission,*Judge's Decision: Between Justice, Legal Certainty and Benefit, Republican Judicial Commission Indonesia,*Jakarta, 2010, p. 3

[2]Yovita A. Mangesti, Bernard L. Tanya, Legal Morality (Yogyakarta: Genta Publishing, 2014), p. 74.

[3]*Ibid.*

[4] Bernard L. Tanya et al, "Legal Theory - Human Orderly Strategies across Space and Generations",(Surabaya: Our CV, 2006), p. 107

through the criminal justice process. Meanwhile, restorative justice, with the paradigm it has developed, opens opportunities for alternative settlements of criminal cases through other channels outside the criminal justice system, including direct, free and independent mediation and reconciliation in determining the model of settlement of criminal cases that is considered the best and fairest. With this approach,

From the description of the background above, the author feels interested in discussing it in a discussion so that the existing problems will be clearly decomposed. So that in the future law enforcement carried out by the police institution can realize the ideals of law, namely justice, benefits and legal certainty for all people in Indonesia. The problem to be discussed is how is the application of restorative justice by the National Police to achieve justice, benefits and legal certainty for all citizens in Indonesia? Is the implementation of restorative justice by the police in accordance with the principle of legal expediency?

II. METHODOLOGY

Type Type study in in creation write this is (legal research) or literature research, namely research activities that are devoted to reviewing and analyzing the substance of laws and regulations and norms in positive law in Indonesia that apply, or research that is focused on examining the application of principles or norms in positive law .[5]This research method will examine authoritative legal rules and literature as concepts, theories and opinions of legal experts which are then linked to the problems in this study.[6] The legal materials that will be used in this research are primary legal materials, including police regulation no. 8 of 2021 concerning the Handling of Crimes Based on Restorative Justice.

III. THE ROLE OF POLRI IN IMPLEMENTING RESTORATIVE JUSTICE

In the concept of a rule of law, laws become the center of attention in dealing with all legal issues, both when there is a violation of material or formal law. All violations of the law must be fought because the law must be upheld under any circumstances. This is in line with the adage that is often used as the basis for arguments for a rule of law system, namely *"fiat justicia ruat coelum"*, even though the sky is falling, justice must be upheld.

At first glance, the law looks so solid and ideal. But often this proverb actually makes justice a difficult thing to find in the law itself. The law seems to turn a blind

[5]Johnny Ibrahim, *Theory And Methodology Study Law normative*, (Poor: Bayumedia Publishing, 2012), h. 295.
[6]Peter Mahmud Marzuki, "Legal Research" Jakarta; Pranda Media; 2005, p, 29.

eye to human values. Justice in law is narrow as a result of the mask of the goal of legal certainty in law enforcement in Indonesia. In resolving problems of violations of material criminal law, formal procedures have been regulated in Indonesia which are regulated in the Criminal Procedure Code. However, the procedure in formal law is often used as a mere repressive tool and ignores the values of justice and even the nature of law as a preventive action also tends not to be taken into account.[7]

This situation has positioned the penal system as no longer of value as a system that provides a deterrent effect for perpetrators or offenders. The perpetrators of criminal acts placed in prisons and correctional institutions are increasing, even exceeding the capacity in Indonesia. This has an impact on the lack of focus on handling, coaching and supervising convicts which ultimately places penitentiaries not re-socializing convicts but instead becoming a place or place for criminal learning used by convicts to further hone the criminal abilities and behavior of the convict.[8]

This basis then makes the concept of Restorative Justice a new prima donna in the law enforcement system in Indonesia. Restorative Justice is an alternative method of resolving legal cases that focuses on its main goal, namely applying a sense of justice to the parties to the litigation.[9]

In various actual discourses, restorative justice is a special way to resolve criminal cases outside the court. Although not all types of punishment can be applied in this system, the application of this system can be said to be far more effective than the conventional criminal justice process. This type of crime can refer to Supreme Court Regulation (Perma) No. 12 of 2012 concerning Adjustments to the Limits of Misdemeanor Crimes and the Amount of Fines in the Criminal Code. Even though this Perma can only be applied in the court environment, it is hoped that the implementation of Perma No. 02 of 2012 can be strengthened by a memorandum of understanding (MoU) between the Chief Justice of the Supreme Court, the

[7]Prayogo Kurnia et al, Law Enforcement Through Ideal Restorative Justice as an Effort to Protect Witnesses and Victims, (Journal; Faculty of Law, Sebelas Maret University Surakarta, GEMA Th XXVII 2015), p 8.
[8]Ibid.
[9]Purwadi Arianto. Restorative Justice Approach in Law Enforcement Efforts by POLRI (A Study in the Application of Criminal Law 2013). h, 5.

Minister of Law and Human Rights, the Attorney General,[10]

Awaloedin Djamin uses the term "community development" (Binmas) to refer to pre-emptive police duties. Given the role played by the police in such a comprehensive manner (repressive-preventive-pre-emptive), a suitable judicial model developed by the police (and of course also by other law enforcement agencies) in handling various criminal cases is Restorative Justice.).[11]

The form of implementing the concept of Restorative Justice is usually carried out by holding mediation between the suspect and the victim to negotiate a mutual agreement in resolving cases. In some cases, the perpetrator is asked to pay a certain amount of money to the victim and the victim apologizes so that the case does not go to court. A win-win solution is obtained that accommodates the interests of victims and suspects. There are still many other alternatives that can be used as a form of implementation of this concept. In carrying out the concept of Restorative Justice, POLRI investigators use the discretionary authority granted by law.[12]

Such a judicial model prioritizes efforts to "restore the situation" so as to increase the trust of the justice seeker community. The role of the police in the restorative justice model is as a "facilitator" and not merely as a "punisher" (law enforcement) which leads to repressive actions. Thus, the expected outcome of the restorative justice process is to foster "peace" between the parties through win-win solution efforts.

To respond to developments in the legal needs of society that fulfills a sense of justice for all parties, the National Police is authorized by Law no. 2 of 2002 concerning the Indonesian National Police to formulate a new concept in criminal law enforcement that accommodates the norms and values that apply in society as a solution while providing legal certainty, especially the benefit and sense of justice

[10]Memorandum of Understanding between the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Head of the Indonesian National Police No. 131/KMA/SKB/X/2012, No.M.HH-07.HM.03.02 Year 2012, No.KEP-06/E/EJP/10/2012, No. B/39/X/2012 concerning Implementation of Application for Adjusting Limits on Misdemeanor Crimes and Amount of Fines, Quick Examination Procedures, and Application of Restorative Justice.

[11]Yunan Hilmy, Law Enforcement by the Police Through a Restorative Justice Approach in the National Legal System, (Jurnal Rechts Vinding: National Law Development Media, Volume 2 Number 2, 2013). h, 253.

[12]Prayogo Kurnia et al., Law Enforcement Through Restorative Justice is Ideal as an Effort to Protect Witnesses and Victims. h, 9.

for the community. Seeing all this, Polri needs to realize the resolution of criminal acts by prioritizing restorative justice which emphasizes restoration to its original state and a balance of protection and interests of victims and perpetrators of crimes that are not oriented towards punishment.

Handling of criminal acts based on restorative justice itself must meet general requirements which include material and formal requirements, as well as special requirements. The material requirements that must be met in resolving cases with restorative justice include:

1. Does not cause anxiety and/or rejection from the community
2. Does not impact social conflict;
3. Does not have the potential to divide the nation;
4. Not radicalism and separatism;
5. Not a repeat offender based on a court decision, and
6. Not a crime of terrorism, a crime against state security, a crime of corruption and a crime against people's lives.

While the formal requirements that must be fulfilled include peace from both parties, except for drug crimes, this peace is evidenced by the existence of a peace agreement signed by the parties, and fulfillment of the rights of victims and responsibilities of perpetrators, except for criminal acts drugs. Fulfillment of this right can be in the form of returning goods, compensating for losses, replacing costs incurred as a result of criminal acts and compensating for damages caused by criminal acts.

If the material and formal requirements can be met, then the investigation or investigation can be terminated, of course the termination of the investigation or investigation is carried out through the mechanism of holding a special case, and the reason for stopping the investigation and investigation is for the sake of law.[13]

In forming a statutory regulation, the awareness that law is a system can be realized by harmonization and synchronization first. The term harmonization (adjustment) emphasizes the existence of the same indicators and characteristics in a regulation, while synchronization (harmonization) is more concerned that a regulation may not conflict with other regulations.[14]

[13]RI Police Regulation Number 8 of 2021 concerning Handling of criminal acts based on restorative justice.
[14]Muladi, "Harmonization and Synchronization of Laws and Regulations Concerning Corruption Eradication" (paper at the Workshop on Establishing a Corruption Court held by the A1 KHN Working Group

Thus the implementation of restorative justice by the National Police in the needs of modern society as well as part of the national legal sub-system has at least the following characters and lines of thought:

a. Implemented based on the state philosophy of Pancasila;
b. Designed to achieve certain stages of state objectives as stated in the Preamble to the 1945 Constitution;
c. Minimizing the implementation and application of norms that actually cause injustice, because the application of such legal practices will lead to new injustices;
d. The formation of the law must invite participation and absorb the aspirations of the people through procedures and mechanisms that are fair, transparent and accountable; and oriented towards the development of social justice; as well as ensuring the life of civilized religious tolerance; as well as observing and adopting the principles/rules of related international conventions that have been ratified.
e. Law enforcement must be carried out systematically, directed and based on a clear concept, aimed at increasing legal guarantees and certainty in society, both at the central and regional levels, so that justice and legal protection of human rights can be felt by the community;

Restorative Justice aims to empower victims, perpetrators, families and communities to correct an unlawful act by using awareness and conviction as a basis for improving social life explaining that the concept of Restorative Justice is basically simple.[15]Restorative Justice is a theory of justice that emphasizes recovery of losses caused by criminal acts.

Thus, the police need not only play a repressive role. In reality, the percentage of police work that is repressive in nature is smaller when compared to that which is preventive in nature, and even smaller when compared to work that is pre-emptive in nature. Such a combination of Polri's roles indicates that the way the police work is not like a "firefighter" who works after an incident, but must always precede an incident by prioritizing preventive and pre-emptive rather than repressive actions.[16]

from the Faculty of Law UNDIP and BPHN, in Jakarta 30 July 2002).
[15]Nikmah Rosidah, "The Legal Culture of Juvenile Judges in Indonesia", Master's Library; Semarang, 2014, h. 103.
[16]Achmad Ali, "Police and Legal Effectiveness in Combating Crime" in Exploring Empirical Studies of Law, (Jakarta: PT. Yasrif Watampone, 1998), p. 221.

IV. IS THE IMPLEMENTATION OF RESTORATIVE JUSTICE BY THE POLRI INSTITUTION COMPATIBLE WITH THE PRINCIPLE OF LEGAL USE ?

Within the framework of the Pancasila Law State Concept, the approach to the concept of restorative justice has only been implicitly recognized in the constitution and only partially regulated in several criminal law laws and regulations, including the SPPA Law, the Special Autonomy Law for Papua Province, which has been acknowledges that there is a method of "deliberation for consensus" in criminal law enforcement, as well as institutional regulations such as the Police through the Chief of Police Circular Letter Number SE/8/VII/2018 concerning the Application of Restorative Justice in the Settlement of Criminal Cases,The Attorney General's Office through the Attorney General's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and the Supreme Court through the Decree of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning Enactment Guidelines for Implementing Restorative Justice.[17]

This approach model is an attempt to resolve criminal cases that focuses on the direct participation of perpetrators, victims and the community in the process of resolving criminal cases. Despite the fact that this approach is still being debated theoretically, this view is in fact evolving and influencing legal policy and practice in many countries.

*restorative justice*is a concept of thinking that responds to the development of the criminal justice system by emphasizing the need to involve the community and victims who feel excluded from the mechanisms that work in the existing criminal justice system. On the other hand, restorative justice is also a new framework of thinking that can be used in responding to a crime for law enforcers and workers. In its application, Restorative Justice emphasizes: the willingness of the perpetrator to repair the harm he has caused as a form of responsibility, the willingness of the victim to apologize, the willingness of the public to be involved in settling cases and the willingness of law enforcement officials to enforce the law fairly.[18]

[17]Eko Syaputra, Application of the Concept of Restorative Justice in the Criminal Justice System in the Future (Lex LATA: Journal of Iliah Ilmu Hukum). h, 243.
[18]Yunan Hilmy, Law Enforcement by the Police Through a Restorative Justice Approach in the National Legal System, (Jurnal Rechts Vinding: National Law Development Media, Volume 2 Number 2, 2013). h,

In essence, the implementation of restorative justice is to repair social damage caused by perpetrators, develop recovery for victims and society, and return perpetrators to society. This effort requires the cooperation of all parties and law enforcement officials.

*restorative justice*offers something different because the judicial mechanism that focuses on proving criminal cases is changed to a process of dialogue and mediation. In addition, the ultimate goal of the current system in the criminal justice system is to prove the guilt of the perpetrators and sentence them to change into efforts to seek agreement on a profitable settlement of criminal cases. The purpose of sentencing is directed at improving the social relations of the parties.

The restorative justice approach focuses on the needs of both victims and perpetrators of crime. In addition, the Restorative Justice approach helps criminals to avoid other crimes in the future. This is based on a theory of justice which considers crimes and violations, in principle, to be violations against individuals or society and not against the state. Restorative Justice fostering dialogue between victims and perpetrators will show the highest level of victim satisfaction and perpetrator accountability.[19]

The concept of Restorative Justice is basically simple. The measure of justice is no longer based on retaliation from the victim to the perpetrator (both physical, psychological or punishment); however hurtful acts are cured by providing support to the victim and holding the perpetrator accountable, with family and community assistance when needed.

In Indonesian, it means that Restorative Justice itself means a fair settlement that involves the perpetrator, victim, family and other parties involved in a crime and jointly seeks a solution to the crime and its implications by emphasizing restoration to its original state. . To realize justice for victims and perpetrators, it is good when law enforcers think and act progressively, namely not applying rules textually but needing to break through rules (rule breaking) because in the end the law is not text for the sake of achieving the justice that society desires.[20]

According to Bentham, the function of law is to provide the greatest value of benefit and happiness to as many people as possible. So, the concept is to put expediency as the main function of law. The size is the greatest happiness for as

250.

[19]Hanafi Arief & Ningrum Ambarsari, "Application of the Principles of Restorative Justice in the Criminal Justice System in Indonesia", (Jurnal: Al'Adl, Volume X Number 2, 2018) h, 178.

[20]Ibid

many people as possible. That way, judgments about good and bad, whether or not the law is fair depend on the extent to which it is able to provide happiness to society. Expediency is defined by him as happiness (happiness). Apart from the criticism of Bentham's thought above, this utilitarianism teaching is very suitable to be used as a reference by legislators, so that later, the law can provide broad benefits.[21]

By making restorative justice an approach, there are several advantages to be had. First, the community is given space to handle their own legal issues which they feel is more just. Second, the burden on the State in some ways is reduced. for example to deal with criminal acts that can still be resolved independently by the community. The police, prosecutors and courts can focus more on eradicating criminal acts with more dangerous qualifications. Administratively, the number of cases entering the justice system can be reduced so that the burden on court institutions as described above is reduced.[22]

V. CONCLUSION

In order to realize justice, benefit and legal certainty, which is the hope of the community, the National Police has opened up opportunities to resolve criminal cases through a restorative justice mechanism. In carrying out the settlement of criminal cases through restorative justice, investigators or investigators must first complete both material and formal requirements as stated in the Republic of Indonesia Police Regulation No. 8 of 2021. After all the requirements are met, investigators or investigators can stop investigations or investigations with reasons for the sake of law.

Judging from the principle of legal expediency, the application of restorative justice by the Indonesian National Police is very beneficial for the people in Indonesia because the approach taken by investigators is a mediation approach between potential defendants and victims and the community, so that if a solution is found to reconcile, the investigation and investigation process is stopped by law.

[21]Ainullah,*The application of the theory of legal expediency (utilitarianism) in the policy of limiting the age of marriage "*.Journal of Islamic Studies Vol.3 No.1 June 2017, h. 88

[22]Taken from Yunan Hilmy's presentation, "Law Enforcement Through a Restorative Justice Approach", Presented at the South Kalimantan Regional Police Narcotics Research Function Meeting, in Banjarmasin, 11 April 2012.

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Yunan Hilmy, Law Enforcement by the Police Through a Restorative Justice Approach in the National Legal System, Rechts Vinding Journal: National Law Development Media, Volume 2 Number 2, 2013

Impact and Settlement of Psychic Violence in Household as a Crime with Restotarive Justice

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ABSTRACT: Domestic violence is not a new thing for the people of Indonesia. There are many cases of domestic violence handled by the Police in Indonesia, but these are dominated by physical violence. Types of domestic violence are not only physical violence but there are other types of violence, one of which is psychological violence. Based on this, this study will discuss 1). the nature of psychological violence in the household and its impact on victims; 2). Arrangements regarding Domestic Violence in the Law on the Elimination of Domestic Violence; and 3).Resolution of Domestic Psychic Violence using a Restorative Justice Approach. This research is a socio-legal research that will be carried out using a legal and other social science approach related to the title. The results of the discussion show that this psychological violence is very harmful to the mental health of the victim. In practice, a lot of psychological violence has been carried out in our society, but the victims are not aware of it. Psychological violence is also an object of legal protection that must be known and understood by the general public. psychologically it is also one of the crimes where there is a criminal threat for the perpetrator, so that restorative justice can also be carried out for its settlement.

Keywords: violence, psychological, household, crime, impact

I. INTRODUCTION

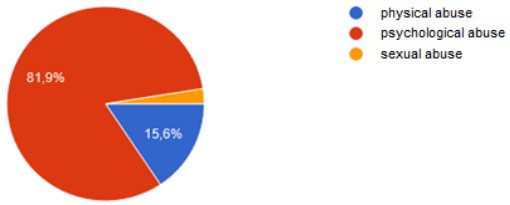
Marriage is a sacred bond between a man and a woman to form a family and continue the next generation. Marriage can occur if there is an agreement between the two parties, a man and a woman who will make a promise that they will always be together in going through the journey of life together. The hope of everyone who gets married is to be happier and have friends in going through the ups and downs of life in marriage.

However, in reality, not all parts of marriage are happy. The life journey of a married couple is inseparable from the ups and downs. These problems can lead to domestic violence. The background behind the causes of domestic violence is very complex, so it is very likely that it will occur in various levels of society. It does not only occur among the weak economy or because of low education, but it can also occur among economically established and educated people.

In terms of form, physical violence it is more often revealed because it is easy to prove. Meanwhile, psychological violence and household neglect often go unrevealed, including violence against children or domestic helpers, even though these cases occur a lot.[1]

Domestic violence is not a new thing for the people of Indonesia. There are many cases of domestic violence handled by the Police in Indonesia, but these are dominated by physical violence. This was reinforced by legal facts obtained from the community, that there were around 81.9% stating that what was most often carried out in society was psychological violence rather than physical and sexual violence.

Diagram 1. The most dominant violence occurred



Source: research questionnaire, 2022

This type of domestic violence is not only physical violence, but also known as psychological and sexual violence. These three types of domestic violence have been regulated in Law Number 23 of 2004 concerning the Elimination of Domestic Violence, specifically in Article 5, that anyone is prohibited from committing acts of

[1]Firdaus, "Acts of Psychic Violence in the Household According to the PKDRT Law and Review of Surah Al Mujilah Verse 1-04". *Journal of the Study of Religion, Law and Islamic Education (KAHPI),* vol. 2, no. 2 , pp. 11, July 2020.

violence in the household against other household members by means of physical violence; psychological violence, sexual violence and neglect of the household.[2]

There are still many of our people who do not know and understand that what is categorized as domestic violence is not only violence that results in physical injury, but there are other forms of violence which are in the form of violence that results in psychological pressure on a person, or also known as causing physical injury. inner. Most of what happens in the field regarding psychological violence is considered normal by the victims, because there is a tendency to excessive love for their partner, so that matters relating to acts that fall into the category of psychological violence are often ignored.

Based on the background mentioned above, this paper is expected to provide knowledge and understanding to the community about the importance of protecting oneself from psychological violence that is rife in the household environment, namely by discussing 1). the nature of psychological violence in the household and its impact on victims; 2). Arrangements regarding Domestic Violence in the Law on the Elimination of Domestic Violence; and 3).Resolution of Domestic Psychic Violence using a Restorative Justice Approach.

II. METHODOLOGY

This research is a socio-legal research. The identification carried out in socio-legal studies is not limited to texts, but also an in-depth study of the context, which includes all processes. The socio-legal approach is a combination of approaches within the social sciences family, which are combined with approaches known in legal science. A socio-legal approach that does not only focus on studying norms but looks at the context of norms and their application in full.[3] The essence of the socio-legal approach is the approach of the social sciences to explain the relationship between law and society through textual studies and its tangible application to the study of how law works in the daily lives of citizens, so that it is hoped that it will be able to provide more justice.[4]

This research was conducted using a legal and other social science approach related to domestic violence psychologically, namely by using primary legal material, namely the Law on the Elimination of Domestic Violence, and other regulations

[2]Law Number 23 of 2004 concerning the Elimination of Domestic Violence. State Gazette of the Republic of Indonesia of 2004 Number 95. Supplement to the State Gazette of the Republic of Indonesia Number 4419. (hereinafter referred to as the 2004 Domestic Violence Law). Article 5

[3] Herlambang P. Wiratraman, "Socio-Legal Research and Methodological Consequences". Available : file:///C:/Users/WINDOWS%2010/Downloads/penelitian-sosio-legal-dalam-tun.pdf

[4] Marlina Purba, "Socio-Legal Studies in the Utilization of Renewable Energy in Indonesian Waters", *51st Year Journal of Law and Development* no. 1,pp. 246, January-March 2021.

related to domestic violence and its resolution, and secondary legal material, namely in the form of books -scientific books; and journal articles whose subject matter is related to psychological violence in the household, supplemented by primary legal facts obtained from distributing questionnaires to the public.

In this case the methodology of socio-legal research is carried out by applying a social scientific perspective to legal studies, in this case one of which is social science and psychology. This socio-legal research relies on legal materials and also sociological aspects that exist in society, which are then analyzed by the authors of legal materials and facts using the descriptive legal material analysis method and draw conclusions from the discussions carried out.

III. THE NATURE OF PSYCHOLOGICAL VIOLENCE AND ITS IMPACT ON VICTIMS

This psychological violence in accordance with Article 7 of the Law on the Elimination of Domestic Violence is stated as an act that results in fear, loss of self-confidence, loss of ability to act, feeling of helplessness, and/or severe psychological suffering to someone.[5] Based on the above understanding that psychological violence has elements:

a. is an act committed by the stronger to the weaker;
b. non-physical actions;
c. resulting in a loss of self-confidence, a sense of helplessness and psychological suffering to the victims.

Based on this, it can be concluded that this psychic violence is carried out by stronger oreng to weaker ones, which is usually done repeatedly, so that the person who becomes the victim will be depressed and lose his identity so that he will indirectly feel dependent and also feel can't do anything to get out of that state, which will eventually affect it psychologically.

Based on this understanding, there are several things that distinguish psychological violence from other violence, namely the result of psychological violence which makes the victim lose his identity, feel unworthy to be happy, and suffer from a sense of fear and is very likely to experience a prolonged sense of trauma which

[5]Ibid. Article 7

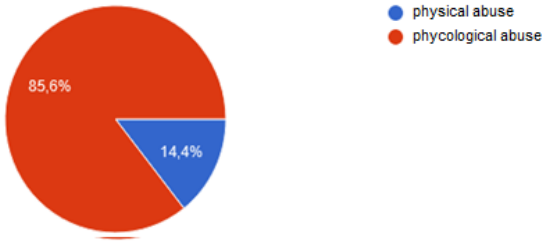
makes him distrustful of others. someone else. Psychological acts of violence result in physical and psychological misery and suffering.[6]

Another distinguishing thing is that physical violence can be seen by the eye, the injuries caused to the victim's body can be seen by naked eye, which can be in the form of bruises, scratches, bleeding, loss of skin and so on which cause pain on the victim's body skin. While this psychic violence is not too real that can be seen with the naked eye, usually in the form of verbal or treatment that makes a person feel pressure on himself, causing a decrease in a person's mental power as a victim in thinking and acting.

There are various forms of psychic violence that can be accepted by the victim, including in the form of harsh words, in the form of swearing, insults that occur continuously and repeatedly, high-pitched voices that aim to lower the victim's self-esteem and create fear of victim, so that the victim can only follow the words of the perpetrator and cannot decide for himself to move freely. Psychological violence can take the form of degrading and hurtful words, dirty words, yelling, insults, and even threats. These words make the victim remember them for a long time, can also become a prolonged trauma so that they cannot trust other people anymore, and cannot socialize with other members of the community, the victim will feel no self-esteem and also cause confusion, even cause serious psychological problems in victims. Psychological violence is dominated by verbal violence.

This is evidenced by the opinion of the public who also consider that verbal violence is also psychological violence, as in the diagram below there are around 85.6% who justify that verbal violence is included in psychological violence.

Diagram 2 . Verbal violence including psychological violence



Source: research questionnaire, 2022

[6] I Gusti Ngurah Erman Triardana, Ni Putu Rai Yuliartini, Dewa Gede Sudika Mangku, "Criminological Review of Domestic Violence Crimes in Buleleng Regency". *Yustitia Community E-journal, Ganesha University of Education, Law Study Program*, vol. 4 no. 2, pp.462, 2021.

In practice there are many people who do not know the boundaries that an action or deed can be categorized as psychological violence or not, so that many perpetrators who have committed these acts and victims who receive such treatment do not understand that this is a form of violence that is protected by law.

Proving psychological violence in the household is not as easy as proving physical violence, in contrast to physical violence that is clearly visible to the naked eye, for example victims of beatings or rape can be proven by witness statements and visum et repertum. Meanwhile, psychic is the soul, spiritual and mental as well as the heart that can only be felt by the victim, because what is injured or sick is not the person's body or body, but the mind, soul or spirit.[7]

Based on the results of the distribution of questionnaires in the community, it is known that there are several factors that can trigger a person to commit psychological violence in the household, namely as follows:

a. Economic factor
   This economic factor is a trigger that is often the reason for the occurrence of domestic violence. When household life has difficulties in terms of the economy, it will affect harmony in the household, especially if the members in the household cannot accept each other and find solutions together, it is very possible that there will be frequent fights.
b. Emotional instability factor
   This factor is an internal factor for each household member. Where this factor is a complementary factor to the other factors. Because the emotional stability of each human being is different, so when something triggers it there are people who are able to resist being provoked and some even with it's easy to vent his frustration on loved ones.
c. The disharmony factor in the household
   This factor can also be the reason for the occurrence of domestic violence where the disharmony of the relationship between husband and wife, parents and children greatly influences the emotional condition of each member of the household.
d. other factors
   These other factors can come from the perpetrator's environment, for example the perpetrator went through his childhood in a harsh environment and was traumatized when he was young getting rough treatment from those closest to him.

[7]Resti Arini, "Domestic Psychic Violence as a Crime". *Lex Crimen* vol. II, no. 5, pp. 34. September 2013.

The impact of psychological violence has a healing tendency that takes longer than healing the wounds on the body of victims of physical violence. The psychological violence that has been experienced by victims can cause prolonged trauma.

Psychological violence attacks the mental health of its victims, in this case psychological violence has an impact on hurt feelings, and a shaken soul. The psychological impact caused by violence is not as simple as what society in general thinks. The psychological impact experienced by victims is quite large. When the victim's psychology is affected, the victim's mindset slowly changes and affects various things. Starting from the way of thinking about something, emotional stability that is vulnerable, even to depression. The psychological impact can be said as a type of post-event trauma. Where this trauma is enough to affect the victim, especially causing excessive fear and anxiety as a result of the brain accidentally flashing back about the violent incident that has been experienced.[8]

IV. REGULATIONS REGARDING DOMESTIC VIOLENCE IN THE LAW ON THE ELIMINATION OF DOMESTIC VIOLENCE

The Law on the Elimination of Domestic Violence is one of the regulations that fills the legal void in terms of violence perpetrated in the household, because prior to the Law on the Elimination of Domestic Violence, all forms of violence perpetrated in the household were subject to articles of ordinary maltreatment, resulting in difficulties in resolving it due to non-fulfillment of elements -the elements of the article imposed, so that the case cannot be followed up. The existence of the Law on the Elimination of Domestic Violence protects all members in a household from violence that occurs in the household.

Based on the provisions in the Law on the Elimination of Domestic Violence, it is stated that there are several forms of violence including physical violence, psychological violence and sexual violence. Based on the results of collecting legal facts in the field, it is known that physical violence occupies the highest place in cases reported as domestic violence at the police, followed by sexual violence. For psychological violence is violence that is rarely reported by victims. In fact, based on the results of the distribution of questionnaires, it is known that there are many incidents that are indicated as psychological violence.

Some of the objectives of the Law on the Elimination of Domestic Violence, namely as a means to prevent acts of violence committed in the household; so that victims

[8]Astri Anindya, Yuni Indah Syafira Dewi, Zahida Dwi Oentari. "Psychological Impacts and Efforts to Overcome Sexual Violence Against Women". *TIN: Applied Informatics of the Archipelago* vol. 1, no. 3, pp. 138, August 2020.

get protection for acts that meet the elements of domestic violence; punish perpetrators of domestic violence so that they become deterrent and do not repeat their actions again; and with the protection of household members from violence, it is hoped that household integrity can be maintained and harmonious and prosperous.[9]

Psychological violence also carries a criminal threat as stipulated in Article 45 of the Law on the Elimination of Domestic Violence, which is punishable by a maximum imprisonment of 3 (three) years and a maximum fine of Rp. 9,000,000.- (nine million rupiah). Whereas for psychological violence perpetrated by a husband against his wife or vice versa which does not cause illness or other consequences related to the victim's livelihood, the criminal threat is lower, namely a maximum of 4 (four) months and a maximum fine of Rp. 3,000,000.- (three million rupiah).[10]

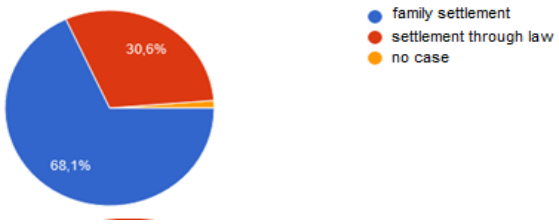
Protection for psychological violence in the household is a complaint offense[11], meaning that cases regarding psychological violence in the household can only be followed up for legal processing if there is a report from the victim of psychological violence to the authorities, so that the prosecution of this case of psychic violence depends on whether or not there is a report from the victim.

Victims of domestic psychological violence often do not feel they have received violence, in fact they tend to rarely be aware that they have been victims of psychological violence. This is because acts of psychological violence are difficult to see because victims have experienced it repeatedly from their partners or family members who committing this psychological violence. The pretext that is always uttered is for reasons of love and affection, then the victim gives forgiveness and an opportunity for the perpetrator to change. However, in reality these actions are always repeated, so they become commonplace, and are not considered a form of crime.

With regard to the preferred form of settlement, if it is carried out by a partner, based on data taken in the community from 160 respondents it is known that there are 68.3% who will not report psychological violence and prefer to resolve it amicably, then there are 30.4% who will report it to the police as psychological violence to be processed legally, and the rest feel there is no need to make an issue of it, as shown in diagram 3 below.

[9]Law on the Elimination of Domestic Violence 2004. Op.Cit. Article 4
[10]Ibid. Article 45
[11]Ibid. Article 52

Diagram 3. Preferred Remedies for Psychic Violence



Source: research questionnaire, 2022

There are several reasons why more victims remain silent about acts of psychological violence rather than continuing them through the legal process, namely:

a. Because the victim is not aware that he has experienced psychological violence;
b. Due to ignorance of psychological violence that can be punished;
c. Due to the reason they still love and care so they don't want to report it to the police;
d. Another reason that does not require separation.

V. THE SETTLEMENT OF DOMESTIC PSYCHIC VIOLENCE USING A RESTORATIVE JUSTICE APPROACH

Psychological violence in the household can happen anytime, anywhere and to anyone. Therefore, like other forms of violence, settlement of cases of psychological domestic violence can be carried out in 2 (two) ways, namely through non-litigation and litigation. Where in non-litigation and litigation settlements both put forward the principle of restorative justice.

Settlement with the principle of restorative justice means that the settlement of criminal cases involves perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation. The substance of restorative justice contains principles including the participation and participation of perpetrators, victims and the community as well as other related parties, in seeking and formulating solutions to criminal acts that occur that are fair to all parties.

This restorative justice is a sentencing concept, but as a sentencing concept it is not only limited to criminal law provisions (formal and material). Restorative justice must also be observed from the perspective of criminology and the penal system. From the existing facts, the existing penal system has not fully guaranteed

integrated justice, namely justice for perpetrators, justice for victims, and justice for society.[12]

Settlements out of court using a restorative justice approach can be carried out by deliberation, which in practice is designed in such a way that it can be resolved amicably involving related parties. The concept of restorative justice is not only applied to out-of-court settlements, but is also applied to the examination process at the investigative and prosecutorial levels. The regulations governing restorative justice in the Police are in the form of the Chief of Police Circular Letter Number: SE/8/VII/2018 concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases[13], and in the Prosecutor's Office with the Prosecutor's Office Regulation of the Republic of Indonesia No.15 of 2020 concerning termination of prosecution based on restorative justice.[14]

The concept of a restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for the perpetrators of criminal as well as the victim himself. Restorative justice is a way to resolving criminal cases involving the community, victims and perpetrators of crimes with the aim of achieving justice for all parties so that it is hoped that conditions will be the same as before the crime occurred and prevent further crimes from occurring.[15]

Several things that limit the implementation of restorative justice are seen from the degree of severity of the perpetrator's guilt, meaning that if the perpetrator's level of guilt is relatively severe, restorative justice cannot be enforced. Then based on the type of criminal act, restorative justice can be applied to all criminal acts, except for the crime of murder, the crime of sexual violence against children, the crime of narcotics; criminal acts that cause widespread unrest in society, such as blasphemy against religion, crimes against the state, such as corruption and terrorism, and or recidive crimes.[16]

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[12]Bagir Manan, "Restorative Justice (An Introduction), in Reflection on the Dynamics of Legal Thought Series in the Last Decade". Jakarta : Republic of Indonesia State Printing Corporation. 2008, pp. 4.
[13]Chief of Police Circular Letter Number: SE/8/VII/2018 concerning the Application of Restorative Justice in Settlement of Criminal Cases
[14]Republic of Indonesia Attorney Regulation No. 15 of 2020 concerning termination of prosecution based on restorative justice
[15]Ressa Ria Lestari, Maria Kristiana Olivia, Lasma Natalia H. Panjaitan, Hana Kurniasih, Hani Nur Syifa, Rangga Rizki, "Guidebook for Assistance in Cases of Violence Against Women", *Legal Aid Institute (LBH)* Bandung. Pp. 17
[16]Edi Setio Budi Santoso, Agus Surono, "Application of Restorative Justice in Solving Crime Problems by Bhabinkamtibmas Polri in Lampung Province.proceeding". *National Conference For Law Studies: Legal Development Towards a Digital Society Era*. pp. 864-865

The settlement of cases of psychological violence in the household in practice in the field is very difficult to prove, because when viewed from the analysis of the case, the consequences cannot be easily identified with the naked eye, such as the consequences of physical violence. To prove it requires an expert witness in the field of clinical psychology.

Restorative justice that is applied to psychological violence in the household has several approaches that must be taken, namely first, imposing sanctions on the basis of responsibility to recover victims' losses as a consequence of criminal acts; second, rehabilitation and reintegration of perpetrators; and third, strengthening the public safety and security system.[17]

In this case the interests of the victim must be prioritized. There are several things that can be sought to get victims, namely as follows:

a. There is special assistance that can restore the emotional stability and fear of the victim;
b. There is assistance that ensures the fulfillment of the victim's rights;
c. There is assistance that is oriented towards recovering immaterial losses from victims;
d. There is an apology from the perpetrator and a promise not to repeat it again;
e. There is a guarantee of the safety of the victim from the perpetrator.
f. Spiritual guidance service.

Considering that this restorative justice approach provides an opportunity for victims to get repairs, a sense of security, and allows the perpetrators to understand and understand the causes and consequences of their actions towards victims and to be willing to take responsibility for this. Therefore, in order to achieve this, the participation of all parties involved is needed, namely in the context of realizing out-of-court settlements and creating the goals of restorative justice.

Restorative justice has the concept of an effective solution to be applied to domestic violence, which is carried out by deliberation to get the best solution, including those relating to the continuity of the marriage between the victim and the perpetrator. In connection with the legal facts on the ground where there were several cases of domestic violence that occurred, there were 2 (two) possibilities, namely staying together or separating.

[17]Yul Ernis, "Diversion and Restorative Justice in the Settlement of Juvenile Justice System in Indonesia", *Scientific Journal of Legal Policy* vol. 10, no. 2, pp.166, July 2016.

The factors that usually cause victims of violence to choose to remain with the perpetrator as a partner are because they feel pity, they still feel love, they get family support and also the economy depends on their partner. As for victims who prefer to be separated from the perpetrators, due to a deep sense of trauma, opposition from the family, fear of a repeat of what happened to them in the future and vigilance to protect the safety of themselves and their children.

The factors mentioned above are the reasons for the fate of the marriage entered into by the victim and the perpetrator if the relationship is husband and wife and they continue to live together in the same house or not between the victim and the perpetrator.

VI. CONCLUSION

In essence, psychological violence is different from other types of violence, namely in the form of verbal violence or treatment that puts pressure on the victim resulting in a decrease in mental strength, excessive thinking and fear, which has elements 1). committed by a stronger party against a weaker party; 2). non-physical actions; and 3). resulting in a loss of self-confidence, a feeling of helplessness and psychological suffering for the victim. While the factors that cause psychological violence are economic factors, emotional instability factors, household disharmony factors and others. Regulations regarding Domestic Violence are specifically regulated in Article 45 of the PKDRT Law which constitutes a complaint offense with criminal threats and fines, so that cases can be prosecuted depending on whether or not there is a report from the victim. The settlement of psychological violence in the household with the Restorative Justice approach contains the principles of the participation of the perpetrator, victim, family and community as well as other related parties in seeking and formulating a fair settlement of cases for all parties. Completion with a restorative justice approach provides an opportunity for victims to get improvement, a sense of security, including in terms of household continuity between the victim and the perpetrator.

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Implementation of Restorative Justice in *Colong* Marriage in the Banyuwangi *Osing* Community

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ABSTRACT: The phenomenon of customary marriage should not need to be questioned anymore, because in certain customary matters, the community considers it a normal thing to happen and its continuation is acceptable. One of these traditional marriages is the traditional 'colong' marriage practiced by the Osing Banyuwangi community. As it is known that marriage cases are civil matters that should be private matters. But in the colong marriage practiced by the Osing Banyuwangi community, there is a criminal element in it, namely running away a daughter. In this context, it is possible for the woman's family to bring the matter to the realm of law. However, this 'colong' marriage case always ends in peace, the climax of which is the implementation of the marriage between the two parties. The presence of 'plug' in this traditional marriage plays an important role in the success of this peace. This condition shows that there are restorative justice efforts played by the indigenous people of Osing Banyuwangi. This paper will describe how restorative justice is played by the indigenous people of Osing Banyuwangi? And what is the effect of restorative justice in the perspective of the Osing custom on the Indonesian national legal order? This paper uses qualitative and socio-juridical methods as its approach. The results of this study show that the negotiation method practiced by colok (traditional mediator) has a very important role in easing the tension that has occurred. The role of traditional leaders or traditional elders turned out to have a significant influence on solving problems between the two parties. With a humane and persuasive negotiation settlement model, tensions that occur can be resolved. The Restorative justice model from the perspective of Osing's adat can be a recommendation in solving various problems in this country, including within the scope of the state legal system.

KEYWORDS: Restorative Justice, Colong Marriage, Osing Society, National Legal System

I. INTRODUCTION

Indonesia as a legal state as well as a country that is thick with its plurality of customs and culture makes this country also closely related to the legal pluralism contained therein. The existence of custom and culture in Indonesia has made customary law serve as a guideline and legal benchmark for indigenous peoples.[1] This is a legal consequence that grows and lives in society. Customary law in its existence contains living social rules, such as religious rules, decency rules, decency rules as well as legal rules that serve as guidelines or have a function to regulate how humans should behave in society so as not to harm others and themselves.[2]

On the other hand, as a society that obeys the rules of national law, it is imperative for indigenous peoples not to run into codified rules in the form of legislation in Indonesia. This is in line with what Marcus Tullius Cicero said, namely ubi societa ibi ius (where there is society there is law).[3] Included in this context are customary issues surrounding marriage. Traditional marriages are often considered to be an ordinary problem, perhaps not even among members of the community who try to make an issue out of it. This condition is considered as something that is commonplace. When something has been valued as customary, then there is a possibility that there will be a sense of anxiety that is felt if it violates the custom. fear of being socially sanctioned by society, for example. Even though it may be, instinctively humans have conflicting sides that occur, if the custom continues to be carried out. One of the marriage customs that can be used as an illustration is the *colong* marriage custom practiced by the Osing Banyuwangi community.[4]

The *colong* marriage which is then considered as something that naturally happens to the people of Osing Banyuwangi, can be used as an example. The *colong* marriage, as mentioned in previous studies, that this model of marriage is played by a man who takes a woman 'run away' to then serve as his future wife. Often this incident creates tension (tention) between the two parties, especially from the woman's family. How could it not be, the families of the women who were rushed away were often not prepared, both mentally, financially, and so on, to bring the direction of the relationship to the level of marriage.

However, no matter how great the tension is, so far there has been no information indicating that the incident was under the law. Even though it could

[1] Mufidah, Rizal Maulana, Lia Fauziyyah Ahmad, *Peradilan Adat Sebagai Kerangka Restorative Justice Dalam Penyelesaian Perkara Pidana Di Indonesia*, MIZAN Journal of Islamic Law, Vol. 6 No. 2 (2022), hal. 228

[2] Sudikno Mertokusumo, Mengenal Hukum (Yogyakarta: Liberti, 1991), hal.3.

[3] Zainal Asikin, Pengantar Ilmu Hukum, (Jakarta: Raja Grafindo Persada, 2012), hal.16.

[4] Ramdan Wagianto, *TRADISI KAWIN COLONG PADA MASYARAKAT OSING BANYUWANGI PERSPEKTIF SOSIOLOGI HUKUM ISLAM*, Jurnal Al-Ahwal, Vol. 10, No. 1, Juni 2017, hal. 63

have been the woman's family to report the incident to the police. And the reality is that the majority of the tension as a result of running away the daughter ends in peace, and the climax is that the marriage between the two "disputing" parties will be carried out as soon as possible. Conditions like this are inseparable from the role of negotiators or customary mediators who in practice involve traditional elders, traditional leaders. In the traditional context of the Osing Banyuwangi community, the presence of a mediator in order to stretch the tension is known as 'plug'. Colok's presence as a mediator or negotiator can be said to be restorative justice within the framework of customary marriage law.

Restorative justice is the right way to solve every case. In matters of customary law, a restorative justice framework that theoretically relies substantially on values that are Indonesian in character such as harmony, harmony, harmony, balance (evenwicht or harmonie), peace that guarantees the sustainability of life together in the community. Therefore, this paper will describe and see how restorative justice is played to overcome the problem of traditional colong marriages in the Osing Banyuwangi community. And next, we will see the influence and implications for the legal system in Indonesia.

II. METHODOLOGY

This research is a qualitative research. in this qualitative research, the researcher has a duty as a key instrument. Therefore researchers must have the provision of theory and broad insights, power of analysis and construction of arguments objectively on the problems studied. The essence of this qualitative research is to observe customary law with its developmental interactions associated with restorative justice. 14 Bogdan and Biklen suggest that the characteristics of qualitative research are (1) natural, (2) descriptive data not numbers, (3) inductive data analysis, and (4) meaning is very important in qualitative research. In addition, this scientific research also uses a socio-juridical approach. First, a sociological approach, formulating in a clear, systematic, and comprehensive manner the role of colok in the practice of colong marriage with a restorative justice frame, Second, a juridical approach to review the extent to which customary law is applied in Indonesia with the national legal system.

III. CUSTOMARY LAW AND CUSTOMARY MARRIAGE : IN THE FRAMEWORK OF RESTORATIVE JUSTICE

In the study of customary law and restorative justice, it is not new in the world of law in Indonesia, for example, is research conducted by Sri Wahyuni et al, entitled Restorative Justice for the crime of "elopement" of customary law in the construction of positive Indonesian criminal law. In this paper, Sri Wahyuni states that studying the study of elopement in the construction of criminal law in Indonesia, studying the legal system using a research study locus approach in the

village of Mataram Marga, Sukadana sub-district, East Lampung, Sade village, Central Lombok, West Nusa Tenggara and Tengangen Karangasem, Bali. . He stated that the first finding is that customary law (legal-culture) in determining the meaning of adult (legal and legitimate) is different from the meaning of adult according to the positive law of the Criminal Code and Law 1/1974. Second, that the legal-structure of positive criminal law is more supreme than customary law or living-law (tradition) in the construction of restorative justice through "elopement" legal events. Third, the substantive norms of positive law (legal-substance) of Article 322 Paragraph (1) number 2 of the Criminal Code which impose sanctions on imprisonment are legitimate in comparison with customary law norms which impose social sanctions through traditional ceremonies. Article 322 paragraph (1) number 2 of the Criminal Code and Law No. 1/1974 are different but quite harmonious in their relationship and fulfill the principles of forming statutory regulations. Although it has not fully translated restorative justice.[5]

In other research, for example, is research conducted by Sumardi Efendi, entitled Criminal Law and Social Development in Aceh, which basically explains that changes in people's lives and social development will have an impact on legal changes in all aspects of life, because these aspects are interrelated. Social changes and developments in society demand a change in the concept of crime in criminal law. Therefore, crime itself is a means of overcoming crime, and crime itself is the result of social change and development. The existence of criminal law with all its concepts and characteristics is essentially a reaction to various destructive social phenomena that occur in society. If people are not "guarded" by criminal law, they will be in a state of chaos. The aim is to see, through a literature review method, which combines conceptual and historical methods, how the social life of the Acehnese people has contributed to changes in the concept of criminal law that has existed so far. faced. changing social reality.[6]

In addition, research that is very new in this dimension, for example, is Hans Tangkau's study entitled Reverse Proving in the handling of corruption crimes with a restorative justice approach which explores reverse proof of corruption crimes. In this case it is very detrimental to the defendant because his rights are less protected. But in other ways it will benefit many people, because it can reduce criminal acts of corruption which have harmed the country so much. The

[5] Sri Wahyu Kridasakti, Abd Majid, dan Henny Yuningsih, "Restorative Justice Tindak Pidana 'Elopement' Hukum Adat dalam Konstruksi Hukum Pidana Positif Indonesia," *Jurnal Supremasi*, 2022, 94–110.

[6] Yusi Amdani, "Implications of Criminal Law Deviation on Violence and Murder in Aceh from the Perspective of Helsinki Memorandum of Understanding," *PADJADJARAN JURNAL ILMU HUKUM (JOURNAL OF LAW)* 5, no. 2 (2018): 331–48; Zainul Fuad, Surya Darma, dan Muhibbuthabry Muhibbuthabry, "Wither Qanun Jinayat? The legal and social developments of Islamic criminal law in Indonesia," *Cogent Social Sciences* 8, no. 1 (2022): 2053269; Dedy Sumardi, Ratno Lukito, dan Moch Nur Ichwan, "Legal pluralism within the space of Sharia: Interlegality of criminal law traditions in Aceh, Indonesia," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 5, no. 1 (2021): 426–49.

research that is similar to what the researcher is doing is a study written by Eric entitled "Batak Toba customary law as restorative justice in resolving criminal acts of fighting in the Batak Toba community. This study aims to determine the role of customary law as part of restorative justice in solving criminal cases of fighting committed in the village community of Pengaloan, Naigolan sub-district, Samosir regency. And it turns out that customary law is the best way in the study of restorative justice in criminal acts of fighting in the Toba Samosir Batak customary law.[7]

In another study also conducted by Ferdy Saputro who wrote about the application of restorative justice through customary institutions for children in conflict with the law in the city of Lhoksemawe, the contents of which were to introduce the concept of diversion which aims to provide protection for children in conflict with the law, children who are victims of crime. , and society in general as a form of diverting the settlement of child cases from the judicial process to processes outside the criminal justice in order to realize restorative justice.[8]

In other research, there is also something interesting about the study of adat and restorative justice, namely the study conducted by Abdul Jaelani who wrote about the application of the concept of restorative justice in the process of resolving the Ngata Toro customary crime. The purpose of writing this study is to find out the existence of the Ngato Toro customary criminal law in Kulawi sub-district and secondly is to find out the application of the settlement of the Ngato Toro customary crime in the concept of restorative justice and the results of the research are that the Ngato Toro customary criminal law still exists and is an important part of life. the indigenous people of Ngato Toro. The criminal law is also applied, respected and carried out by the Ngato Toro indigenous people themselves or outsiders who commit these criminal acts and are resolved by deliberation using the traditional house as decision-making.[9]

Meanwhile, the research conducted by Rosdiana and Ulum Jannah stated that the application of restorative justice in the crime of adultery in the old customary

[7] Lastuti Abubakar, "Revitalisasi hukum adat sebagai sumber hukum dalam membangun sistem hukum Indonesia," *Jurnal Dinamika Hukum* 13, no. 2 (2013): 319–31; Yusi Amdani, "Konsep Restorative Justice dalam penyelesaian perkara tindak pidana pencurian oleh anak berbasis hukum islam dan adat Aceh," *Al-'Adalah* 13, no. 1 (2016): 81–76; RESTORATIVE JUSTICE dan APPLICATION IN TRADITIONAL LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT," t.t.

[8] Abdul Jaelani, Andi Purnawati, dan Maisa Maisa, "PENERAPAN KONSEP RESTORATIVE JUSTICE DALAM PROSES PENYELESAIAN TINDAK PIDANA ADAT NGATA TORO," *Jurnal Kolaboratif Sains* 2, no. 1 (2019); Elwi Danil, "Konstitusionalitas Penerapan Hukum Adat dalam Penyelesaian Perkara Pidana," *Jurnal Konstitusi* 9, no. 3 (2016): 583–96; JUSTICE dan LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT."

[9] Jaelani, Purnawati, dan Maisa, "PENERAPAN KONSEP RESTORATIVE JUSTICE DALAM PROSES PENYELESAIAN TINDAK PIDANA ADAT NGATA TORO."

Kutai community stated that awareness of the settlement carried out through formal justice was felt to be insufficient for victims, criminal witnesses and here customary law works in the midst of Public.[10] In her research, Nure Rochaeti stated that the legal culture of restorative justice in the Juvenila criminal justice system in Indonesia states that children have different rights, especially with adult human rights. Based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, it explains the judicial process for children in conflict with the law.

This study aims to answer two problems: first, why is restorative justice needed in the juvenile justice system, and secondly, how is the implementation of the juvenile justice system restorative justice in Indonesia. Research locations in Medan and Bali. Using the socio legal research approach method. The purpose of this research is to find a model of handling children who are against the law in Indonesia. The results of this study are that restorative justice is needed to minimize stigma and the best interests of the child. The implementation of restorative justice in the juvenile justice system in Indonesia is also an effort to optimize living law.[11]

Whereas in other studies, the criminal justice system emphasizes an offender-oriented paradigm, such as how to impose appropriate and fair punishments on perpetrators. On the other hand, victims have no rights in the criminal justice system, with a unique role as key witnesses. This article is based on research that has been conducted in Baduy, Banten – Tangerang Indonesia. This research is based on a socio-legal research approach using a hermeneutic philosophy. The results of the research are as follows: The values contained in restorative justice practices in Baduy culture can be identified in the criminal justice process, such as 1) Victims and their families have the same position as perpetrators in the judicial process; 2) All processes in the decision aim to restore all damage and injuries, restore and cleanse the perpetrator's mind, and restore peace, cosmos, and social cohesion; 3) All proceedings will end with restitution, pardon, and punishment, if the conference can prove the offender's wrongdoing and guilt.

The criminal justice system currently implemented in Indonesia is based on an old concept that only focuses on perpetrators and less on victims. Restorative justice practices in Baduy culture can be applied in adjudication. There are two types of adjudication in criminal cases: family deliberations and customary criminal courts. All types of decisions must involve victims and their families. This concept of restorative justice can be applied in reforming the criminal justice

[10] Jaelani, Purnawati, dan Maisa.
[11] Fuad, Darma, dan Muhibbuthabry, "Wither Qanun Jinayat?"

system to achieve substantive justice for all parties. This research was conducted by Umi Rozah.[12]

The various literature above indicates that the study of customary law and the concept of restorative justice can very well be harmonized in the dimensions of national law. Sometimes researchers see a fundamental difference and state that customary law still does not provide justice in the concept of restorative justice as contained in existing national laws, but it also turns out that many researchers have provided in-depth studies of customary law, and many have argued that restorative law justice in customary law is more humane in providing legal justice and humanity that is present in the midst of Indonesian society has laws that vary from tribal customs to cultures and various languages in Indonesia.

IV. IMPLEMENTATION OF RESTORATIVE JUSTICE IN COLONG TRADITIONAL MARRIAGE IN BANYUWANGI OSING COMMUNITIES

Colong marriage is a marriage model whose existence is still recognized by the indigenous people of Banyuwangi, East Java. Not all sub-districts apply this marriage model, but only occurs in a few sub-districts, such as Glagah, Kabat, Rogojampi sub-districts, where the Osing tribe lives, where colong marriage is also known. However, this type of marriage seems to be more dominant in villages that have been designated as traditional villages, such as Kemiren Village in Glagah District.

In practice, colong marriages usually occur because they are initiated by several factors that trigger them, such as social status factors, economic problems, and the woman's family disapproves of the relationship between the two. Colong mating is considered as an alternative solution that can be done. Although, the risk he faces will cause social tension that occurs between the two families. However, the tension that occurs will gradually subside after the presence of a Colok.

Plug (negotiator or mediator) has a very important role. This is because for women's parents, they are described as people who are experiencing the disaster of "kepetengen" (Darkness) when they lose their daughter. Therefore, someone was sent to "illuminate" (Colok) the woman's family within 24 hours. A "Colok" chosen is someone who has the skills to speak and argue. They are sometimes also taken from local community leaders, so that their presence does not cause anger on the part of the women. This is as stated by the Osing community leaders as follows;

[12] Moch Nurfahrul Lukmanul Khakim, Afifah Rahmantika Furzaen, dan Ezra Imanuel Suwarno, "Aceh Women's Contribution of Military Affairs During Western Colonialism in Indonesia," dalam *International Conference On Social Studies, Globalisation And Technology (ICSSGT 2019)* (Atlantis Press, 2020), 220–28.

> "*Kadong onok kasus kawin colong, kudu onok colok hang morok neng keluarga lare wadon hang dicolong iku mau, biasane hang dijaluki tolong kanggo dadi colok iku pak RT, Mbah Kaum / tokoh masyarakat, onone colok iku tujuane kanggo ngedem-ngedemi keluarga, myakne heng bingung, lan nemu dalan hang paleng apik kanggo hubungane lare keloron iku*."[13]
>
> (if there is a case of colong marriage, then a colok must be sent to meet the woman's family. usually the role of plug in is the RT or other community leaders -who are considered to have good communication skills-. The presence of plugs aims to cool the atmosphere, so that the woman's family is not confused. In addition, to find the best solution for the continuity of the relationship between the two parties)

In addition, Colok, as a negotiator, came to the women's side, usually saying that a girl named 'A' had been brought to the house of a man named 'B'. With words like this it has become sign language that the girl has been exploited by someone. and the job of colok is to cool the atmosphere in the women's family so that complicated debates do not occur. Convincing the woman's family is also something that is often done. An example is the case of the colong marriage experienced by the Muslih and Poniti families.

> "*isun bengen nyolong dek poniti iku sak durunge sabenere yo owes janjian olong, ngko ketemu neng kene. Waktu iku isun njalok tolong neng kakang isun supoyo morok neng keluargane dek ponitik kanggo ngeyakino wong tuweke kadong anake wes digowo wong lan kepingin rabi*."[14]
>
> (At that time I stole a woman named poniti, in fact we both had agreed to meet somewhere. At that time I asked my sister for help, to tell the poniti's family to convince her parents that their child had been taken away and to be married)

The presence of a plug for a woman's parents will melt her stubbornness. Usually, after plugging in as long as both parents make sure they go to the man's house where their daughter is hidden. Then, after that the two families of the man and woman meet to determine the right date to hold the wedding. Colong marriage as a tradition that lives on in the Osing community from the past until now is inseparable from implications or impacts, both negative and positive impacts for the family and social life of the doers of colong marriage themselves. The positive implications of colong marriage include; First, the loss of the wangkot (stubborn) nature of the female family. In the case of colong marriage, the woman's parents are likened to a person who has lost a torch (lamp or lighting) so he needs a torchlight to make it bright again. In this case what is meant is the role of an intermediary (colok). This is what causes the parents' hearts to melt, because those who initially feel shocked and even angry when they hear that their daughter has been robbed by someone will be relieved or

[13] Wawancara dengan mbah kaum bapak Muniri, tanggal 26 november 2022
[14] Wawancara dengan bapak Muslih, tanggal 26 november 2022

their shock or anger will subside after negotiations with envoys from the male side.

In relation to this heartbreak, the author borrows M. Nur Yasin's term for male superiority and female inferiority. He said that in terms of eloping (kawin colong), the male thief was a man who seemed very strong, controlled and able to tame the socio-psychological condition of his future wife. Regardless of whether it is consensual and pre-planned or unplanned, elopement (kawin colong) still provides strong legitimacy for male superiority. On the other hand, it describes an attitude of inferiority, namely the powerlessness of women for all the actions they experience.

V. RESTORATIVE JUSTICE IN OSING CUSTOM MARRIAGE : ITS INFLUENCE AND IMPLICATIONS ON NATIONAL LEGAL PROCEDURE

Restorative justice is an approach to justice that focuses on reconciliation. It sees criminal or inappropriate acts as violations of people and relationships rather than simply violations of rules or laws. The restorative justice approach is based on the idea that punitive measures or forced surrender do not result in an increased likelihood that the person will subsequently comply with social norms. This suggests that such an approach can build resentment in the offender and contribute to aggression. Supporters of the Restorative Justice Initiative (RJI) further believe that such an approach rarely addresses damaged relationships between individuals which can lead to hatred and enduring feelings of hurt and hostility for victims. For example, if a child steals a piece of candy from someone else, and they are forced to apologize and ask for a time-out, will that result in that child never stealing the candy again? Does the child whose candy was taken feel better about the situation? Supporters of restorative justice believe that positive outcomes are far more likely when focus is placed on dialogue between offender and victim and reconciliation with accountability rather than punishment and forced apologies. The restorative justice approach focuses on the damage done to the relationship and engages both parties, as well as trained professionals, in accountability, healing, and growth.[15]

[15] Amdani, "Konsep Restorative Justice dalam penyelesaian perkara tindak pidana pencurian oleh anak berbasis hukum islam dan adat Aceh"; Kridasakti, Majid, dan Yuningsih, "Restorative Justice Tindak Pidana 'Elopement' Hukum Adat dalam Konstruksi Hukum Pidana Positif Indonesia"; Kridasakti, Majid, dan Yuningsih; Amdani, "Konsep Restorative Justice dalam penyelesaian perkara tindak pidana pencurian oleh anak berbasis hukum islam dan adat Aceh"; Department of Justice Government of Canada, "Department of Justice - Restorative Justice," 13 Januari 2000, https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html; JUSTICE dan LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT"; Sumiadi Sumiadi, Laila M. Rasyid, dan Romi Asmara, "Restorative justice hakim terhadap anak yang berkonflik dengan hukum di pengadilan negeri lhokseumawe," *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* 29, no. 1 (2017): 45–53.

Restorative justice is defined as an approach to justice that focuses on repairing harm done by socially unacceptable behavior rather than just punishment for breaking rules or laws. It combines perpetrator accountability (reparations, such as financial compensation, physical repairs, and/or public apology) and efforts to repair damaged relationships between perpetrators and victims, led by a trained professional. This meaning of restorative justice originates with indigenous peoples around the world as a means of living in harmony as a community, and the term was coined by Mark Yantzi in the 1970.[16]

There are many examples of restorative justice. This has become a common approach to discipline in schools, and has taken root in many criminal justice programs, known as restorative criminal justice. Instead of suspension and revocation of privileges in a school setting or fines or imprisonment in a community setting, restorative justice focuses on accountability and reparation for all those involved in or affected by the behavior.

Some examples of restorative justice are as follows. Theft: 1) Return or exchange of stolen property, 2) Small group, facilitated by trained counsellors, including perpetrator and all those affected by the crime, where victims can explain how they were affected and perpetrators can apologize for their actions. Vandalism: 1) Help repair, clean, or replace damaged items, with affected workers, 2) Apologies to those affected, either in group discussions or via letters. Absenteeism: 1) Students must complete missed lessons, 2) Hold group meetings with students, parents, school personnel, and trained facilitators, to identify reasons for truancy, 3) The guilty student conducts interviews with students who dropped out of school about their experiences and what they want them to do. Fighting/assault: 1) Small groups, facilitated by trained counselors, including all those involved in the physical altercation and all those affected by the crime, where the victim can explain how they were affected and the perpetrator can apologize for his actions, 2) The perpetrator reads the text assignment according to topic (eg anger management, self-control), 3) Participants complete a report or presentation on what they learned. Bullying/harassment: 1) Small groups, facilitated by trained counselors, assisting the individual who is perceived as the bully to identify the reasons behind the behavior, 2) Small groups, facilitated by trained counselors,

[16] Government of Canada, "Department of Justice - Restorative Justice"; Amdani, "Konsep Restorative Justice dalam penyelesaian perkara tindak pidana pencurian oleh anak berbasis hukum islam dan adat Aceh"; Kridasakti, Majid, dan Yuningsih, "Restorative Justice Tindak Pidana 'Elopement' Hukum Adat dalam Konstruksi Hukum Pidana Positif Indonesia"; Handar Subhandi Bakhtiar, "Pengertian Restorative Justice (Keadilan Restoratif)" (Working Paper November 2014, https://handarsubhandi. blogspot. co. id/2014 …, 2014); Gianluca Sarà dkk., "The synergistic impacts of anthropogenic stressors and COVID-19 on aquaculture: A current global perspective," *Reviews in Fisheries Science & Aquaculture* 30, no. 1 (2022): 123–35.

including all those involved in the bullying, where the victim can explain how they were affected and the perpetrator can apologize.[17]

The implementation of restorative justice theory will look different in different settings. It is designed to be a flexible program that can be adapted to the needs of specific communities, individuals and offences. However, the key components of restorative justice theory will be found in some variation within each version of the program. The main components are as follows: first Invite full participation: All people affected by the incident, both perpetrators and victims, are included in the recovery process. The focus is maintained on interpersonal relationships. Second, Repair what has broken: Repair or replacement of any item damaged or stolen in the event is included. Third, Seek full/immediate accountability: The perpetrator is held accountable for restitution and participation in the process of rebuilding a damaged relationship. Fourth, Reuniting what has been separated: Repairing damaged relationships due to prioritized events or behaviors in the process. Fifth, Strengthening the community to prevent future harm: Opportunities are sought for actors to contribute to the community through teaching, advising, or promoting better behavior.[18]

In the dimension of this paper, restorative justice can be seen in the edition of the colong marriage concept in Banyuwangi district, as it has been explained that the colong marriage process in the Osing Banyuwangi custom is the process of a traditional man kidnapping or stealing (stealing a prospective bride who is a resident of osing's custom is also to be made a wife, most of these incidents occur due to one of the parents not approving the relationship they are having and want to get married in a deeper process that what the man does is still considered customary if after stealing or stealing the woman, the woman is taken to the man's house, not to another place.[19]

Meanwhile, in other customs, for example in Lombok and in Lampung, colong marriages that are carried out by a man to a woman must be carried out and invited to the traditional house of the traditional leader, as an effort to ensure that women are still highly respected in these customs, in Lombok, this is interesting.

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[17] Sumiadi, Rasyid, dan Asmara, "Restorative justice hakim terhadap anak yang berkonflik dengan hukum di pengadilan negeri lhokseumawe"; JUSTICE dan LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT"; Bakhtiar, "Pengertian Restorative Justice (Keadilan Restoratif)"; Government of Canada, "Department of Justice - Restorative Justice."

[18] Bakhtiar, "Pengertian Restorative Justice (Keadilan Restoratif)"; Government of Canada, "Department of Justice - Restorative Justice"; Mochamad Isnaeni Ramdhan, *Jabatan Wakil Presiden Menurut Hukum Tata Negara Indonesia* (Sinar Grafika, 2022); JUSTICE dan LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT."

[19] Khakim, Furzaen, dan Suwarno, "Aceh Women's Contribution of Military Affairs During Western Colonialism in Indonesia"; Wagianto, "Tradisi Kawin Colong Pada Masyarakat Osing Banyuwangi Perspektif Sosiologi Hukum Islam," 2017; Wagianto.

as well as in Lampung also women must be lodged in the traditional house of the customary leader concerned (the man).[20]

Meanwhile, in Banyuwangi, specifically in the customs of the Osing people, it is more about the people's belief in men that women who are dicholonged will be well looked after by the men. Besides that, after the colong marriage took place, the two traditions or the man's family would conduct a friendly visit and inform the parents of the woman that the daughter was being bullied by her son so that the man's parents ordered a colok to inform about the incident in immediately the concept of colong marriage took place all communication had to go through plugs that had been appointed by the adat board and the two existing families, in the development of colong in the past it was said that someone was most respected in the Osing indigenous people, in the development of a plug it could be contents by religious leaders and several community leaders who can ensure that this customary process runs fairly and correctly and provides very representative justice in the colong marriage process.[21]

Colok plays a very important role as a traditional tool through a restorative justice approach in a deeper dimension, an osing customary law in Banyuwangi. For the sake of the ongoing process, it provides distributive justice that will happen to the bride and groom. Thus the restorative justice process occurs in the context of Colok, in the customary marriage process, Osing gives a court and a proper assessment and continues the Colong marriage process. Colok also has the legal right to evaluate the process. This colong marriage is going well and still follows the corridors of religious and state customs and can be accepted by a wide audience of the existing Osing indigenous people in the midst of the existing Osing society.

VI. CONCLUSION

In this study, the first is that the concept of restorative justice and legal culture has occurred in the midst of Indonesian society. Research that supports this, for

[20] Rabiatul Adawiyah dkk., "Perempuan Nyurlembang Dalam Tradisi Merarik," *Jurnal Kajian Ruang Sosial-Budaya* 2, no. 2 (2018): 35–58; Ahmad Fathan Aniq, "Potensi Konflik pada Tradisi Merarik di Pulau Lombok," *Al Qalam: Jurnal Keagamaan dan Kemasyarakatan* 28, no. 3 (2011); Firdausi Nuzula dan Siti Rahmatia, "Pengaruh Merarik Kodeq terhadap Keharmonisan Keluarga Studi Kasus di Dusun Griya Utara, Lingsar Kabupaten Lombok Barat," *Al-Insan: Jurnal Bimbingan dan Konseling Dakwah Islam* 1 (t.t.); Widodo Dwi Putro, "Perselisihan Sociological Jurisprudence Dengan Mazhab Sejarah Dalam Kasus" Merarik"," *Jurnal yudisial* 6, no. 1 (2013): 48–63.

[21] Wagianto, "Tradisi Kawin Colong Pada Masyarakat Osing Banyuwangi Perspektif Sosiologi Hukum Islam," 2017; Baiq Desy Anggraeny, "Keabsahan perkawinan hukum adat lombok (merarik) ditinjau dari perspektif undang-undang nomor 1 tahun 1974 tentang perkawinan dan hukum islam (studi di kabupaten lombok tengah)," *Journal de Jure* 9, no. 1 (2017); Government of Canada, "Department of Justice - Restorative Justice"; Sarà dkk., "The synergistic impacts of anthropogenic stressors and COVID-19 on aquaculture."

example, is research on ancient society, Toba custom and Ngata Koro.[22] Second, what is meant by restorative justice is restorative justice is defined as an approach to justice that focuses on repairing the harm done by behavior that is socially unacceptable rather than just punishment for violating rules or laws. It combines perpetrator accountability (reparations, such as financial compensation, physical repairs, and/or public apology) and efforts to repair damaged relationships between perpetrators and victims, led by a trained professional. This meaning of restorative justice originates with indigenous peoples around the world as a means of living in harmony as a community, and the term was coined by Mark Yantzi in the 1970.[23] And in the dimension of the indigenous people, there is a colok who becomes the arbitrating judge and becomes an important point in the concept of restorative justice in the dimension of the Osing customary marriage in Banyuwangi district. The authority and authority exercised by a colok is a restorative justice process which is very dominant and very helpful in resolving osing customary cases in the marriage dimension.[24]

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Anggraeny, Baiq Desy. "Keabsahan perkawinan hukum adat lombok (merarik) ditinjau dari perspektif undang-undang nomor 1 tahun 1974 tentang

[22] Jaelani, Purnawati, dan Maisa, "PENERAPAN KONSEP RESTORATIVE JUSTICE DALAM PROSES PENYELESAIAN TINDAK PIDANA ADAT NGATA TORO"; Amdani, "Konsep Restorative Justice dalam penyelesaian perkara tindak pidana pencurian oleh anak berbasis hukum islam dan adat Aceh"; Kridasakti, Majid, dan Yuningsih, "Restorative Justice Tindak Pidana 'Elopement' Hukum Adat dalam Konstruksi Hukum Pidana Positif Indonesia."

[23] Sumiadi, Rasyid, dan Asmara, "Restorative justice hakim terhadap anak yang berkonflik dengan hukum di pengadilan negeri lhokseumawe"; JUSTICE dan LAW, "RESTORATIVE JUSTICE (KEADILAN RESTORATIF) DAN PENERAPANNYA DALAM HUKUM ADAT"; Yasser Arafat, "Penyelesaian Perkara Delik Aduan Dengan Perspektif Restorative Justice," *Borneo Law Review* 1, no. 2 (2017): 127–45; Government of Canada, "Department of Justice - Restorative Justice."

[24] Wagianto, "Tradisi Kawin Colong Pada Masyarakat Osing Banyuwangi Perspektif Sosiologi Hukum Islam," 2017.

perkawinan dan hukum islam (studi di kabupaten lombok tengah)." *Journal de Jure* 9, no. 1 (2017).

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Criminal Law Reform of Sentencing for Juvenile Delinquency : a Restorative Justice Approach

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ABSTRACT: Child delinquency is one of the tendencies of a child's attitude to do bad things. but there is child delinquency, which is an act against the law such as stealing, raping, and killing. In Indonesian criminal law, the punishment of children is still in the nature of grief (giving the effect of suffering), so it does not have a good impact on being able to improve the psychology of children who have committed acts against the law. Punishment of children should not be equated with punishment of adults, considering that children still have a future that must be corrected after they have committed an unlawful act. The restorative justice approach is an alternative to punishment by prioritizing the value of justice in society. In terms of criminal justice, the restorative justice approach is used as a method for carrying out more humane punishments. The concept of restorative justice in sentencing children is known as "diversion." However, the implementation of diversion is not easy to do, considering the inherent stigma given by Indonesian society to criminals, especially child perpetrators, namely someone who has been convicted and is a bad person. the concept of implementing diversion with the principle of restorative justice for children as perpetrators of criminal acts. This research uses socio-legal research in order to have a deeper understanding of a problem by not being limited to studying related legal norms or doctrines but also looking at the complete context of norms and their application using social science and law. The goal of this research is to provide one of the scientific contributions to child punishment.

Keywords: children, punishment, restorative justice.

I. INTRODUCTION

The Indonesia Criminal Code (KUHP), in maintaining justice and harmony in society, must follow the development of the dynamics of society itself. The justice aimed at in Indonesian society is communal justice. The definition of communal justice is "justice that can be accepted by everyone where no party is harmed by justice formed or decided by the chairman or community leaders." Communal justice must be upheld in Indonesia because the foundations of Indonesian people's lives are largely determined by consensus deliberation. Deliberation for consensus is the foundation for the Indonesian people to make decisions so that the decisions taken are not one-sided or detrimental to other parties, in accordance with the 4th principle of Pancasila. Considering that deliberation for consensus is the basis for Indonesian society to make a decision, it is only natural that deliberation for consensus is used as a basis for resolving a problem that occurs in society.

Deliberation for consensus in the settlement of a criminal case is often carried out by means of mediation. A number of legal products have separately regulated mediation in resolving a criminal case based on deliberation for consensus. This regulation is, of course, very important to do considering that Indonesia is a country of laws. The implementation of mediation must take precedence considering the nature of the criminal law itself, namely the Ultimum Remedium, which is the last resort taken in such a way that if there are no other norms that are clear enough to explain or resolve a purpose of the law, then it is appropriate that the criminal law be the one that is applied. This, of course, implies that the application and use of criminal law may need to be restricted.

Since the enactment of Law Number 11 of 2012 concerning the Juvenile Justice System, the settlement of crimes committed by children, which used to put forward the paradigm that the perpetrators of criminal acts have the right to be repaid with appropriate actions (Ius talionis), has switched to a more humane approach and promoted a restorative justice approach. According to Article 1 of the Law on the Juvenile Justice System, restorative justice is the "settlement of criminal cases involving perpetrators, victims, families of perpetrators and victims, and other related parties to jointly seek a fair solution by emphasizing restoration to the in its original state and not retaliation.[1]

Referring to Article 1 Paragraph 7 of the Juvenile Justice System Law, in essence, diversion is a form of diverting the settlement of juvenile criminal cases outside the criminal justice process in general. Diversion is defined as a persuasive action or approach that allows the actor to change. Given the nature of protection for

[1] Article 1, Paragraph 6, of the Juvenile Justice System Law.

children, the process of resolving child crimes must be completed by juvenile court, but with diversion, the process of resolving child criminal cases can be carried out outside the juvenile justice process in general. The new concept in the SPPA Law is seen as good, especially the concept of diversion, which prevents children from going through litigation. With several new institutions being created, of course, it is hoped that the concept of restorative justice can be implemented effectively.[2]

One of the characteristics of the Juvenile Justice System Act is that all criminal cases committed by children, as long as they are not punishable by imprisonment for more than 7 years and are not repeated crimes, must be sought for settlement by diversion. Of course, diversion will result in a peace decision that must be approved by the victim and/or his family, as well as the willingness of the child and his family. The resulting form of a diversion agreement is a peace agreement between the child offender and the victim, with or without loss, whereby the child offender can be returned to their parents, perform community service, or undergo training for a maximum of 3 months at an educational institution, or LPKS. If the diversion agreement is not implemented or there is no diversion barrier, it will continue through the juvenile justice process in general.

Diversion is used to protect children from society's negative attitudes toward child offenders, so that child offenders can be given the opportunity to become better individuals through non-formal channels that rely on the surrounding community. Diversion can be carried out at all levels of the judiciary so that child offenders, both those who are currently undergoing a judicial process, both at the police and court levels, and those who are about to proceed with criminal justice, can make diversion efforts. This diversion process also applies to children who are already in prison, so that the child offenders can be transferred from prison to social institutions.

Given the magnitude of the influence of diversion on the juvenile criminal justice process, caution is needed when giving diversion to child offenders. The basic principle of diversion is imposing sanctions on child offenders outside the sentencing process so that children can grow up to be better people without the stigma of being bad people in society. However, it should be underlined that the implementation of the diversion process is very difficult. There are numerous impediments, both external and internal, to implementing diversion as a means of imposing sanctions on child offenders. These obstacles greatly impact the

[2] Yutirsa Yunus, *Analysis of the Concept of Restorative Justice Through the Diversion System in Indonesia's Juvenile Criminal Justice System*, Directorate of Law and Human Rights, Jakarta, Rechtsvinding Journal, Vol. 2, No. 2, August 2013, h. 233.

effectiveness of diversion against child perpetrators, so that diversion efforts can be said to have failed to be implemented, even though they do not rule out the possibility that diversion is a system that fails to improve child offenders so that they can grow into better individuals after diversion efforts with victims have been carried out. From the description above, it can be understood that in the implementation of the concept of diversion as a form of renewal of punishment in criminal law with the principle of restorative justice, various problems arise; therefore, this research is to be able to describe the development of the application of diversion in Indonesia, besides that it describes the application of diversion with restorative principles. Justice as a form of re-enforcement of punishment for children who commit crimes.

II. METHODOLOGY

This research is socio-legal, using aspects of social science and law. Socio-legal research is an effort to gain a deeper understanding of a problem by not only studying related legal norms or doctrines but also looking at the complete context of those norms and their application.[3] socio-legal study of juvenile crime problems using a restorative justice approach as a method for looking at the application of the rule of law to children in the dynamics of social life, so as to discover the truth about what happened to law enforcement based on restorative justice for children in social life.

III. IMPLEMENTATION OF DIVERSITY IN INDONESIA TOWARD CHILDREN WHO COMMIT CRIMINAL ACTS

The dynamics of life progressed rapidly in the life of the community. However, this progress is not always accompanied by a positive impact on children, but rather by one of the negative impacts. With the rapid development of technology, the mindset of children is greatly influenced by it. In fact, every child in the age range of five to eighteen years is currently able to operate a cellphone or laptop. HP and laptops are the main means of entering the wide and free digital world, and a lot of various information enters the digital world. So if the child is not able to sort out information that has a good or bad impact, it will result in a pattern of behavior. This is also one of the factors that contribute to children's proclivity to commit criminal acts. such as committing criminal acts of theft, rape, and the most dangerous, murder. Information that is too freely available and cannot be prevented from accessing it means that there is a tendency to commit an unlawful act, considering that children, both mentally and psychologically, are still easily influenced by information that has a negative impact on their behavior patterns.

[3] penelitian-sosio-legal-dalam-tun.pdf (wordpress.com). accessed on 02 January 2023, at 03.00 pm.

Children are citizens who must be protected because they are the nation's future leaders who will continue the leadership of the Indonesian nation. Every child, besides being obliged to receive formal education such as schooling, is also required to receive moral education so that they can grow into useful figures for the nation and state. In accordance with the provisions of the Convention on the Rights of the Child, which was ratified by the Indonesian government through Presidential Decree Number 36 of 1990, it was also stated in Law Number 4 of 1979 concerning Child Welfare, Law Number 23 of 2002 concerning Child Protection, and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as Law 11 of 2012), all of which put forward the general principles of child protection, namely non-discrimination, the best interests of the child, survival, growth and development, and respect for child participation.[4]

Diversion was introduced as a vocabulary word for the first time in a report on the implementation of juvenile justice submitted by the President of the Australian Crime Commission in the United States in 1960. Before the term "diversion," the practice of diversion in its current form existed prior to 1960. marked by the establishment of juvenile courts (Children's Courts) before the 19th century, namely the diversion of the formal Criminal Justice System and the formalization of the police to carry out warnings (Police Cautioning). [5] The idea of diversion comes from the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ), or more popularly known as the Beijing Rules (UN General Assembly Resolution 40/33 of November 29, 1985), which are international standards in the administration of the juvenile criminal justice system. The Beijing Rules include provisions for diversion in Rules 11.1, 11.2, and 17.4, which state that children who violate the law must be diverted to informal processes such as returning to social institutions, whether government or non government.[6] Based on recommendations from the meeting of UN experts on children and juveniles in the detection of human rights standards in Vienna, Austria, from October 30 to November 4, 1994, starting from 2000, all countries were urged to implement the Beijing Rules, the Riyadh Guidelines, and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, which are international guidelines on diversion. [7]

[4]https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak. accessed on 29 November 2022, at 10.00 am.
[5] Marlina, *Introduction to the Concept of Diversion and Restorative Justice*, (Medan: USU Press, 2010), h.10.
[6]Setya wahyudi, *Implementation of the Idea of Diversion in the Renewal of the Juvenile Criminal Justice System in Indonesia*, (Yogyakarta : genta publishing, 2011), h.56.
[7] *Ibid*. h.4.

In Indonesia, official diversion was enforced after Law Number 11 of 2012 concerning the Juvenile Criminal Justice Judicial System, replacing Law Number 3 of 1997 concerning Juvenile Courts. Before the existence of the law on children, the juvenile criminal justice system was the same as the adult criminal justice system, namely using the Criminal Code (KUHP) and the Criminal Procedure Code (KUHP), where the principal crime was 1/3 (one third) of the maximum penalty of the principal adult sentence. Then, considering that the physical and psychological conditions of children differ greatly from those of adults, the use of the Criminal Code and the Criminal Procedure Code is seen as irrelevant, especially in the imposition of sanctions and the trial process, and a Special Criminal Law for children is needed. In a national seminar on juvenile justice held by the law faculty of Padjadjaran Bandung on October 5, 1996, the idea of diversion became one of the recommendations in juvenile justice. The idea of diversion agreed upon in the recommendation is to give authority to judges regarding the possibility of stopping, diverting, or not continuing the examination of cases and examinations of children during the examination process before the trial. This proves that the embryo of diversion existed before the birth of the Juvenile Justice Law.[8] However, officially, the new version was included in Indonesian legislation 16 years later, namely on July 30, 2012, in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Then it took effect two years later, namely in 2014.

Diversion is the process of transferring the resolution of cases involving children suspected of committing certain crimes from the formal criminal process to an amicable settlement between the suspect, defendant, or perpetrator of a crime and the victim facilitated by the family and/or community, Child Social Advisors, Police, Prosecutors, or Judges. In a nutshell, diversion is the transfer of child case resolution from the criminal justice system to processes outside of the criminal justice system. The word "diversion" comes from the English word "diversion," becoming the term "diversion," because based on the Indonesian general spelling manual, which is perfected, and general guidelines for the formation of terms, the endings "-sion" and "-tion" are adjusted to "si." Therefore, the word "diversion" in Indonesian becomes "diversion.[9]

There are three types of diversion. The first is warning diversion, which is issued by the police for minor infractions. As part of the warning, the perpetrator will apologize to the victim. The police record the details of the incident and record them in the archives at the police station. Informal Diversion Informal diversion is applied to minor offenders when it is deemed inappropriate to simply give a

[8] *Ibid*. h.5.
[9] *Ibid*. h.56.

warning to the perpetrator and a comprehensive intervention plan is required for the perpetrator. The victims should be consulted (which can be done by telephone) to ascertain their views on informal diversion and what they want in the plan. Formal diversion is carried out if informal diversion is not feasible but does not require court intervention. Some victims will feel the need to tell the child how angry and hurt they are, or they will want to hear it directly from the child. Because problems arise within the child's family, it is better if other family members are present to discuss and develop a diversion plan that is good for all parties who are affected by the act. In PERMA 4 of 2014, it is explained that diversion is applied to children who are 12 (twelve) years old but not yet 18 (eighteen) years old, or 12 (twelve) years old even though they have been married but not yet 18 (eighteen) years old, who are suspected of committing a crime (Article 2). PERMA also regulates the stages of deliberation on diversion, in which the facilitator appointed by the Chief Justice is obliged to provide opportunities for: [10]

1. Children should hear information about the charges.
2. Parents and guardians should convey matters relating to the child's actions and the expected form of settlement.
3. Provide feedback and the expected form of resolution from victims/child victims, parents, and guardians.

If deemed necessary, the diversion facilitator may summon community representatives or other parties to provide information to support settlement and/or may hold a separate meeting (caucus). The caucus is a separate meeting between the diversion facilitator and a party known to the other party. The obligation of the legal apparatus (police, prosecutors, and judges) to seek diversion is regulated in Article 7 paragraph 1 of the Juvenile Justice Law. If there is an agreement failure or the diversion agreement is not implemented at the investigative level, the investigator can submit a diversion at the prosecution level within 7 days and 24 hours. Likewise, if the diversion at the prosecution stage fails to reach an agreement or the diversion agreement is not implemented, the public prosecutor can submit a diversion to the court examination level. The process of determining diversion at the court level is relatively faster, namely 3 x 24 hours.

At the police level, namely the investigation stages, starting from the pre-diversion process before the formal meeting of investigative diversion This pre-diversion process is a verification carried out by investigators to trace the truth of the child's age by examining documents such as birth certificates as well as the results of reports from BAPAS and the Social Service regarding the background of children who have had conflicts with the law. There is no need to develop technical

[10] https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak. accessed on 29 November 2022, at 10.00 am.

guidelines for police diversion just yet. [11] Considering the provisions in the law on the juvenile justice system, they have accommodated the implementation of diversion. However, the existence of technical guidelines will not only support the expected implementation of diversion coordination between agencies, given that the police are members of the child-friendly city task force. When law enforcement officials do not fully understand the principles of restorative justice and the perspective of child protection, it is not impossible that diversion will instead be interpreted as a legalized compromise space without maximum rehabilitation. The absence of diversion implementation regulations in the police institution has a detrimental impact on victims. [12]

At the prosecutor's level, the Attorney General's Regulation No. 006/A/JA/04/2015 concerning Guidelines for the Implementation of Diversion at the Prosecution Level becomes the prosecutor's operational guideline in deciding diversion cases. However, the quality and quantity of understanding about diversion are still minimal there is no knowledge of technical diversion guidelines. The implementation of diversion does not have normative constraints but is constrained by technical diversion, which has to gather many parties in one place.[13] After the diversion agreement, one of the institutions that plays a role is a rehabilitation institution for children who are in conflict with the law. The role of BAPAS is to assist children (actors), who are called child clients, by providing a special unit, namely BKA (Children Counseling Guidance). BAPAS deserves to be said to be at the forefront of the implementation of diversion. Because BAPAS accompanies and monitors child clients from the start of the investigation up to 3 months after the diversion agreement is established. However, challenges were found, including those regarding the facilities, budget, and human resources of social workers, which were still lacking. Even though the number of children who are perpetrators of criminal acts and are undergoing rehabilitation at the Rehabilitation Center is greater than its capacity to accommodate, and the children who need to be monitored after completing rehabilitation live quite far away and are scattered, So that in order for diversion to run well, the implementing technical regulations at the police and prosecutorial levels must be formed immediately, and for technical implementation, the government must immediately provide a budget and facilities for diversion because diversion also requires financing and

[11] Iva Kasuma, Ian Aji, Melly Setyawati, *Problems of Implementing Diversion for Children Confronting the Law in Child-Friendly Cities: Studies on Law Officials, City Government, and Communities in Depok and Surakarta,* University of Indonesia, Jakarta, IUS Jounal, Vol VIII No 2, 2020, h.361.
[12] *Ibid.*
[13] *Ibid,* h.362

accommodation, and limited funds and facilities are also one of the obstacles to diversion. Diversion is being implemented.

IV. RESTORATIVE JUSTICE APPROACH AS A MODEL OF CRIMINAL REFORM AGAINST CHILDREN WHO ENGAGE IN CRIME

The criminal law system in Indonesia has experienced several developments, which are manifested by reforms in criminal law. This renewal is marked by the introduction of a penal system that does not merely promote legal certainty but also achieves the value of justice in society with the aim of improving and restoring conditions after an act that violates the rule of law. This is known as restorative justice. Restorative justice is different from retributive justice, which emphasizes only retaliation, such as compensation. In its evolution, criminal law has developed an approach to perpetrators and victims; this is one of the formulas for achieving justice, which focuses not only on legal punishments but on factors that influence all the actions of perpetrators, which become the object of its study, and the victims it studies, how can the victim recover to the state before the criminal act occurred against him.

Based on the provisions of Law 15 of 2020 concerning the Prosecutor's Office Regulations of the Republic of Indonesia concerning Termination of Prosecution Based on Restorative Justice, the Restorative Justice approach in the legal system in Indonesia has begun to be enforced however, law enforcement officials, particularly prosecutors, must seek settlement through non-legal channels at all stages of the legal process. According to Muladi, restorative justice, or "restorative justice," is a theory that emphasizes recovering losses caused or incurred by criminal acts, and the recovery of these losses will be achieved by the existence of cooperative processes that include all interested parties.[14] Based on the definition of restorative justice above, it can be seen that restorative justice is a theory of justice that emphasizes the recovery of losses caused by criminal acts. The solution is considered best when the parties work cooperatively to decide how to solve the problem. It is hoped that this will lead to the transformation of people, relationships, and communities. According to several psychologists and experts on child behavior patterns, the implementation of restorative justice in the punishment of children must involve all institutions in the criminal justice system.[15] Diversion is a diversion or removal from the judicial process into an alternative process of settling cases, namely through deliberations on recovery or mediation.[16]

[14] Muladi, *Criminal Law Select*, (Semarang : University of Diponegoro, 1995), h.125
[15] Yutirsa Yunus, *Op Cit*, h.234.
[16] Wagiati soetedjo, *Juvenile Criminal Law*, (Bandung : Refika Aditama, 2013), h. 135.

Diversion and restorative justice have an interrelated relationship. Diversion is a formal criminal law institution and can also be seen as a form of restorative justice, whose forerunner cannot be separated from the purpose of implementing diversion in the juvenile justice system. In diversion, the implementation carried out is one of the stages in achieving justice by paying attention to the sense of justice between the parties, both victims and perpetrators. In the spirit of restorative justice, a settlement mechanism is needed whose end result will have a positive impact not only on the suspect and victim but also on society as a whole, namely by using the concept of diversion. In this case, diversion can be said to be an instrument for realizing restorative justice. Or, conversely, restorative justice is the goal of implementing diversion in the juvenile justice system. There is joint participation between perpetrators, victims, and community groups to resolve an event or crime. Placing perpetrators, victims, and community groups helps resolve an event or crime. Placing perpetrators, victims, and communities as stakeholders who work together and immediately try to find a solution that is seen as fair for all parties (a win-win solution).

As a result, diversion, particularly through the Principle of Restorative Justice, becomes a critical consideration in resolving criminal cases involving children. If the diversion agreement is not fully implemented by the parties based on reports from the correctional center's social advisor, the judge will continue examining the case in accordance with the juvenile criminal justice procedure law. The judge, in making his decision, must consider the implementation of some of the diversion agreements.[17] If the diversion agreement is not fully implemented by the parties based on a report from the social counselor at the correctional center, the judge will continue examining the case in accordance with the Juvenile Criminal Justice Procedure Code. The judge, in making his decision, must consider the implementation of some of the diversion agreements.

[17] Dahlan sinaga, *Law Enforcement Using a Diversionary Strategy* , (Yogyakarta : Nusa Media, 2017), h. 51.

In principle, diversion efforts are part of law enforcement efforts, the purpose of which is to obtain justice. In terms of law enforcement, of course, it is also influenced by law enforcement factors. Lawrence Meir Friedman stated that the success or failure of law enforcement depends on legal substance, legal structure (or institutions), and legal culture. In detail, the author can explain as follows: [18]

a. Legal substance: referred to as the "substantive system" that determines whether or not the law can be implemented. Substance also means the product produced by people who are in the legal system, which includes the decisions they issue and the new rules they draft. Substance also includes living law, not just legal rules (law books).
b. Legal Structure/Legal Institution: referred to as the structural system that determines whether or not the law can be implemented properly. The legal structure under the Criminal Procedure Code includes: police, prosecutors, courts, and criminal execution agencies (Lapas). This structure relates to the authority of law enforcement agencies guaranteed by law so that, in carrying out their duties and responsibilities, they are independent from the influence of government power and other influences.
c. Legal Culture: Legal culture is the human attitude towards law and the legal system, including its values, thoughts, and expectations. The atmosphere of social thought and social forces that determine how law is used, avoided, or misused is referred to as legal culture. Legal culture is closely related to the level of legal awareness in society. The greater the community's legal awareness, the better the legal culture that will be created, which has the potential to change the community's attitude toward law thus far. In simple terms, the level of public compliance with the law is an indicator of the functioning of the law itself.

However, even though the implementation of diversion with the Principle of Restorative Justice experienced several obstacles, one of which was the public's view of children after committing a crime, In accordance with the results of the interviews conducted for the study, there are still many people who give bad labels or stamps to children who are in conflict with the law, even though the case has

[18] Lawrence M. Friedman, *American Law: An Introduction, Translation from American Law: An Introduction, 2nd Edition*, Translated by Wisnu Basuki, (Jakarta : Tatanusa, 2001), h. 6-8.

been resolved through diversion. [19] The label of naughty and bad children will continue to be attached and remembered by the community for children who become perpetrators and get solutions through diversion until they are adults. [20] The community is also reluctant to give confidence to the perpetrators of child crimes to mingle with the community, especially with children who are the same age as the perpetrators of these crimes. The community also considers that settlement through diversion also does not create a significant deterrent effect, considering that many perpetrators of crimes that are punished by imprisonment for a certain time repeat their actions.

This is in line with the labeling theory according to Edwin M. Lemert, which states that a person becomes deviant because of the process of getting nicknames, stamps, etiquette, and brands that society gives him. [21] This label is a social "stamp," meaning that a person will experience a change in role and tend to behave like what other people say about him. Labeling theory is a theory that arose from society's reaction to a behavior that was outside the bounds of common sense; society assigns a negative stamp or label to certain people or actors who are judged to be outside the bounds of common sense. The community's labeling of someone who was carrying out an action at the time, who did it and who was the victim, as well as the public's perception of the consequences of the action he carried out, This theory is the basis for giving a stamp to the perpetrators of crimes. Included in the interactionist school of thought in criminology, which approaches social reactions to crime, This labeling theory sees criminals as individuals who previously had bad status as a gift from the criminal justice system and society at large, rather than as evil people who commit wrongdoing.

The current condition of the general public tends to isolate and alienate children who have been involved in crime. Even though the child is no longer committing

[19] The results of direct interviews with 32 correspondents in Benculuk Village, Cluring Village, and University Students 17 August 1945 Banyuwangi on October 20, 2022, from 13.00 WIB to 15.00 WIB and 16.00 WIB to 17.00 WIB for 12 University Students 17 August 1945 Banyuwangi, along with the results of 20 correspondents in Benculuk Village and Cluring Village, feel that diversion has not provided a deterrent effect on perpetrators of child crimes, and nine correspondents from among the students also share the same opinion.

[20] The results of direct interviews with 20 correspondents in Benculuk Village and Cluring Village on October 20, 2022, from 13 a.m. to 15 a.m. WIB, with 19 correspondents answering that children who commit crimes and are diverted are not deterrents and will repeat criminal acts in the future.

[21] Muhammad Mustofa, *Criminology: The Sociological Study of Crime, Deviant Behavior, and Law Violations*, (Jakarta : Fisip UI Press, 2007) h. 86.

crimes or criminal acts, the community is still suspicious and aware of the person's presences no longer committing crimes or criminal acts, the community is still suspicious and aware of the person's presence. People's suspicion of perpetrators of crimes is sometimes too high; for example, if a problem such as theft occurs, then in society the person who is first accused is a child who has committed a crime and lives in the area. The suspicion of society toward children who have committed crimes will always exist because society does not want to accept children who have committed crimes returning to being good citizens. Although a child who has been involved in a crime must try very hard to convince them that they have changed and want to be a good child to achieve a better future, However, there are still local people who have not been accepted where they live. Children with backgrounds that have been involved in crimes still often receive discriminatory treatment; even their families who are not involved in becoming criminals also feel it.

The label that society has assigned to children who have been involved in a crime has caused many of these children to struggle to adapt and be accepted by society. This difficulty also has an impact on the child's future, specifically when the child has committed a crime, grown up, and is having difficulty finding work. This label is so firmly attached that it is difficult for children to get the opportunity to become good people. If this continues without getting support from society to stop committing crimes, then there is a high probability that children will return to commit even more serious crimes. The labeling carried out by the community is in line with the view expressed by Lawrence Meir Friedman regarding factors that can influence law enforcement, one of which is the legal culture of the community. Legal culture is an atmosphere of social thought and social forces that determine the evaluation of the law. Legal culture exists as a response, action, and community behavior towards laws that occur in the dynamics of people's lives. Labeling children who have committed criminal acts is a legal culture in Indonesian society today; society still does not accept children who violate the provisions of established norms. The label is a manifestation of the sanctions given by society to children who violate legal norms.

According to Prof. Sacipto Rahardjo, legal thinking needs to return to its basic philosophy, namely, law for humans. Based on this thought, in carrying out a law, it must be oriented toward humans and not the other way around, where humans must serve the law. Law is thought to be of high quality if it benefits human welfare. [22] Actors in progressive law can make changes by making creative interpretations of existing regulations without having to wait for regulatory

[22] Bernard L, Legal Theory of Orderly Human Strategy across Space and Generations,(Yogjakarta : Gentha Publishing, 2010), h.212.

changes. The characteristic of progressive law is that it expects that the presence of law will always be related to social empowerment, so that law is considered close to social engineering. Human-oriented laws can be found in restorative justice by making diversion efforts for crimes committed by children.[23] Diversion efforts, of course, have great hopes for improving the future of child offenders so that they are not labeled as convicts due to their ignorance of the actions they are taking, but this is not in line with society's view of child offenders who receive diversion. Of course, more emphasis should be placed on law awareness and knowledge in the community surrounding these child offenders so that the community understands what diversion is and the future impact on these child offenders. In addition to knowledge of the law, it is also necessary to emphasize social knowledge regarding community participation in creating a harmonious and safe environment for child perpetrators and victims of child crime so that perpetrators can develop self-awareness to become even better individuals.

V. CONCLUSION

Diversion in Indonesia is enforced in accordance with the provisions of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Diversion is the transfer of cases involving children suspected of committing certain crimes from the formal criminal process to an amicable resolution between suspects, defendants, perpetrators of criminal acts, and their victims, facilitated by family and/or community, Child Social Advisors, Police, Prosecutors, or Judges. Apart from that, diversion is a means of diverting the settlement of child cases from the criminal justice process to processes outside the criminal justice system that must be enforced by law enforcement officials, but at this time, diversion still does not have implementing regulations as a basis for legal certainty for law enforcement officials to carry out diversion against children who committed a crime.

Diversion is a solution that is carried out to prevent child offenders from receiving general punishment in ways that are agreed upon by all parties, both victims and perpetrators, and law enforcers. However, the implementation of diversion meets an impediment when society labels or labels "naughty children," and it is difficult to change the perpetrators of juvenile crimes; there is still doubt about the effectiveness of this diversion to the deterrent effect received by juvenile crime perpetrators. Legal and social awareness need to be increased in the community so that the implementation of diversion can run smoothly and have an optimal impact on both victims and perpetrators of child crimes and society.

[23] *Ibid*. h.213

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Alleged Violation of Vertical Integration in Digital Business by Online Transportation Service Providers in Indonesia

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ABSTRACT: Article 14 of The Law Number 5 of 1999 highlights vertical integration as a prohibited form of agreement. One of the alleged cases of vertical integration practices is in The Case Number 13/KPPU-I/2019 involving PT GRAB Teknologi Indonesia (GRAB) and PT Teknologi Pengangkutan Indonesia (TPI), GRAB is suspected of giving privileges and priorities to TPI. This case is predicted to affect the regulation of the digital economy in the future, including investment in the digital economy sector. This paper uses normative juridical research methods with regulation UU No 5 of 1999 as primary legal material .This study concludes: *First*, the Investigator stated that the agreement between GRAB and TPI led to vertical integration and discrimination due to actions taken in the form of giving special treatment that harmed other GRAB Partners who were competitors of TPI. *Second*, the legal consequences of violating the provisions of Article 14 of The Law Number 5 of 1999 for Business Actors are subject to sanctions in the form of Administrative Measures, Basic Criminal Sanctions, and Additional Criminal Sanctions. Meanwhile, according to Article 118 of The Law Number 11 of 2020, the sanction given to business actors who are proven to have carried out vertical integration is the imposition of Administrative Measures. *Third*,. The application of the principle of restorative justice has basically been practiced in a civil law enforcement system known as Alternative Dispute Resolution (ADR) is less effective considering that the target of business competition law enforcement is competition in a market-based economy Where business actors, both companies and sellers, freely strive to get consumers to achieve certain business goals or companies they establish.

Key Word : Vertical Integration, Discriminations, Impact of the agreement.

I. INTRODUCTION

The enactment of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition (Law Number 5 of 1999) is an effort to ensure a healthy business competition climate. This law contains a ban on monopoly practices, unfair business competition, an explanation of actions that can hinder business competition, sanctions and law enforcement procedures, as well as an elaboration of a business competition law enforcement commission called the Business Competition Supervisory Commission (KPPUThe purpose of the establishment of this Law is not only to protect consumers and business actors, but to maintain the competition process itself. [1] The Act aspires to be a fair "level playing field" for all businesses. Law Number 5 of 1999 in one of its articles highlights vertical integration as a prohibited agreement. Vertical integration is regulated in the eighth section of Article 14 which states:

> "Business actors are prohibited from entering into agreements with other business actors that aim to control the production of a number of products included in the production series of certain goods and or services where each series of production is the result of processing or advanced processes, either in a direct or indirect series, which can result in unfair business competition and or harm the community."

Based on Article 14 of Law 5 of 1999, vertical integration can be interpreted as a condition or transaction carried out with the aim of mastering a number of products included in the production series of certain goods or services where each series of production is the result of processing or advanced processes, either in a series directly or indirectly.

The practice of vertical integration, although able to create goods and services at low prices, can result in unfair business competition and can damage the economic joints in society. Activities with these characteristics are prohibited as long as they cause unfair business competition and or cause community losses. An example of a vertical integration case that has been decided by KPPU is contained in the decision numbered 13/KPPU-I/2019 concerning monopolistic practices carried out by PT GRAB Teknologi Indonesia (GRAB) and PT Teknologi Pengangkutan Indonesia (TPI) in the alleged unfair business competition that prioritizes TPI driver partners in providing certain benefits, so that TPI partners are considered to be more advantageous than other GRAB partners. There are three articles that are allegedly violated by GRAB and TPI, namely Article 14, Article 15 Paragraph (2), and Article 19 letter D in Law Number 5 of 1999. The case began with the establishment of a cooperation agreement between GRAB and TPI on June 5, 2017. The scope of the agreement is the guarantee provided by TPI in the form of certainty for driver partners to use the GRAB App in carrying out rental

[1] Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia* (Jakarta: Gramedia Pustaka Utama, 2004) at 7.

transportation services to end users. For this guarantee, GRAB provides privileges and service priorities to TPI so that partners under TPI benefit more from product promotion, programs, working hours, and intensives than Non-TPI partners.

The case is interesting to review and review because the legal considerations contained in the ruling are predicted to affect the regulation of the digital economy in the future, including affecting the development and investment climate in the digital economy sector.Referring to the background and legal issues raised by the author, there are several issues that need to be discussed. First, Is the cooperation agreement carried out by the online transportation service providers a vertical integration? Secondly, What are the legal consequences for ride-hailing providers that are proven to be vertical integration? Third, Can the principle of Restorative Justice be used in resolving cases of alleged violations of Vertical Integration in Digital Business by Online Transportation Service Providers in Indonesia?

II. METHODOLOGY

This research uses normative legal research with a statutory approach and a conceptual approach. The sources of legal materials used in this paper include primary legal materials such as laws and regulations, and secondary legal materials such as books, journal articles, and research relevant to the legal issues raised. The data analysis method used in this study is the deductive method, which is to look at a problem from the most general to something of a special nature. [2]

III. ANALYSIS OF ELEMENTS OF VIOLATIONS OF VERTICAL INTEGRATION IN COOPERATION AGREEMENTS FOR ONLINE TRANSPORTATION SERVICE PROVIDERS IN INDONESIA

The regulation prohibiting vertical integration agreements in business competition has been regulated in Article 14 of Law Number 5 of 1999. The arrangement contains provisions whereby some form of vertical integration agreement is viewed as a form of prohibited agreement, although from an economic point of view it is considered a profitable corporate strategy, . Vertical integration is able to stimulate companies to make maximum use of resources so that resource allocation becomes more efficient, integration allows for quality assurance of raw materials needed and saves external costs in a company. A form of vertical integration agreement that is prohibited in competition law is an agreement that leads to anti-competition, that is, one that aims to control a certain amount of goods and services, or in other words, control the market. One example of a form of market control that rejects or prevents competitors from competing in the relevant market by discriminating against these business actors. In analyzing the negative impact of activities carried out by KPPU business actors through the Investigator

[2] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2017) at 35 & 177.

Team using a rule of reason approach. The approach aims to evaluate the consequences of a particular agreement or business activity in order to determine whether an agreement or activity is anti-competitive or pro competition.[3] The rule of reason approach considers competitive factors and the determination of whether or not a competitive obstacle is suspected of interfering, influencing or even hindering the competitive process. Article 14 of Law Number 5 of 1999 which is formulated in a rule of reason implies that the Investigating Team has an obligation to prove that the reasons for the perpetrators who committed these actions are unacceptable (unreasonable) .[4]

This is in line with the concept of the rule of reason approach adopted in competition law, although an act is declared to have fulfilled the formulation of the article, but there are objective reasons that can be the justification for the action, then the act is not included in the violation. So that the outline of this approach is the consequences of an action, whether the action has given rise to monopolistic practices and unfair business competition. The application of law according to the paradigm of the rule of reason approach focuses on the rationalization of why an action is carried out by business actors.

The rule of reason approach is used in violations of vertical integration because vertical integration can not only have a positive impact on business actors, but also has the potential to have a negative impact on competition. In short, business actors are not limited in cooperating with other business actors about control of the production of a certain amount of production and set forth in the form of an agreement as long as the act does not adversely affect business competition or harm the public interest. The agreement is required to have reasonable reasons.[5]

Thus, the Investigator Team uses the rule of reason approach in Article 14 on vertical integration implies that in addition to fulfilling the elements of the article, the Investigating Team must also be able to prove whether the action has hindered competition by showing its consequences for the competition process, and whether the action is absolutely unfair or has other considerations. [6]

During the research and investigation process of alleged violations of business competition in Case Number 13 / KPPU-I / 2019, the Investigator Team found problems in the cooperation agreement carried out by GRAB as an application provider with TPI as a transportation service provider, the two business actors allegedly tried to control market from upstream to downstream, causing

[3] *Ibid* at 75.
[4] *Ibid* at 75.
[5] *Ibid* at 75.
[6] Lihat Putusan KPPU Nomor 13/KPPU-I/2019.

discrimination against other transportation service providers who cooperate with GRAB.[7] The Investigating Team postulated that the allegations were proven because the implementation of the agreement had fulfilled the elements of Article 14 of Law Number 5 of 1999 as follows:

1. Elements of Business Actors
2. Elements of the Agreement
3. Elements of Other Business Actors
4. Elements of Production
5. Elements of Goods/Services
6. Elements of Unfair Business Competition

In addition to the six compliances of the article, the Investigator Team also mentioned that the implementation of the cooperation agreement involving GRAB and TPI has caused competition obstacles in the form of giving preferential treatment by GRAB to TPI as a partner company. This preferential treatment has resulted in an increase in TPI's competitive ability compared to its competitors such as the Indonesian Rental Entrepreneurs Association Service Cooperative, the Indonesian National Police Cooperative Parent, the Trans Business Partner Cooperative, and PT Cipta Lestari Trans Sejahtera. The provision of privileges includes the implementation of the Loyalty Program to TPI driver partners, while non-TPI partners are not given a Loyalty Program. Loyalty Program is a program that allows a driver partner to acquire a vehicle for rent to him if the driver is loyal, behaves well, and there is no fraud and other things for 5 (five) consecutive years. also by paying a deposit of IDR 2,500,000.00 which will be returned after the rental period ends. In addition to acquiring a vehicle, driver-partners will also get life insurance and vehicle insurance, and free vehicle engine maintenance. In addition to the provision of the Loyalty Program, other preferential treatments such as promotional grants, incentive hours, and incentive calculations were also found. [8]

The Investigator team also found that during the period 2017 to 2019 there was a significant surge in the number of drivers who became TPI partners, but on the other hand Non-TPI partners experienced a decrease in driver partners, including the Indonesian Rental Entrepreneurs Association Service Cooperative and PT CSM Corporation. The surge in the number of drivers who become TPI partners is also evidenced by the addition of TPI car unit purchases for the 2019 period of 200 cars. At the same time, it was discovered that from mid-2018 to 2019 GRAB was implementing a moratorium on the acceptance of new drivers, thus The

[7] Ibid. at 211.

[8] Moratorium adalah kebijakan pemerintah yang mengharuskan pelaku usaha yang bergerak di jasa penyediaan angkutan khusus untuk melakukan penghentian sementara rekrutmen sopir taksi online

Investigator Team concluded that GRAB gave preferential treatment to TPI by keeping new drivers open, while other Non-TPI partners imposed a moratorium.

The surge in the number of TPI Partner drivers in the view of the Investigator Team is considered as clear evidence that the agreements carried out by GRAB and TPI have a bad impact on business competition. In addition, it was found that Non-TPI Partners were discriminated against through priority orders which caused the number of orders of TPI partners to be more than Non-TPI partners, the deduction was obtained by the Team Investigators based on data on the number of orders given by GRAB to drivers, both TPI drivers and individual drivers. There are fundamental differences in the provision of driver orders in four regions, namely Jabodetabek, Makassar, Medan, and Surabaya. In this data, Non-TPI partners have a larger number of drivers than TPI, however, orders given by GRAB to Non-TPI partners tend to be inversely proportional where the most orders are actually obtained by TPI.

Based on the facts mentioned above, the Investigating Team is of the view that the provision of special treatment given by transportation service application providers to certain transportation service providers as an implication of implementation, A cooperation agreement can have a negative impact on a conducive competitive climate, where business actors should compete fairly in pursuit of profits so that end consumers are not harmed from these business activities.

IV. LEGAL CONSEQUENCES FOR ONLINE TRANSPORTATION SERVICE PROVIDERS THAT ARE PROVEN TO CARRY OUT VERTICAL INTEGRATION

The legal consequence born from the implementation of the vertical integration agreement in violation of the provisions of Article 14 of Law Number 5 of 1999 for business actors is the imposition of sanctions in accordance with the provisions of the regulations perUndang-Undangan. Business actors may be subject to sanctions if the implementation of the agreements they make leads to vertical integration which results in the closure of willingness access for competitors to enter the relevant market, a decrease in the quality of goods/products, waste for the company, and the absence of other options for consumers to buy goods/products.

Legal sanctions against business actors who carry out vertical integration agreements are contained in Law Number 5 of 1999 which contains sanctions in the form of administrative actions, basic criminals, and additional criminal acts. Business actors who violate Article 14 of Law Number 5 of 1999 are threatened with the following sanctions:

1. Administrative Actions

a. Order to business actors to stop vertical integration as referred to in Article 14, such activities include activities that may result in unfair business competition and or harm the community. The order includes the cancellation of the agreement, the transfer of the company to other business actors, or the change in the form of the production series.
a. Payment of indemnity.
b. Giving a minimum fine of Rp. 1,000,000,000.00 (One Billion Rupiah) to a maximum of Rp. 100,000,000,000.00 (One Hundred Billion Rupiah).

2. Basic Criminal

Minimum penalty of Rp. 25.000.000.000,00 (Twenty-Five Billion Rupiah) to a maximum of Rp. 100.000.000.000,00 (One Hundred Billion Rupiah).

3. Additional Criminal

a. Withdrawal of business licenses; or
b. Prohibition to hold the position of director or commissioner for a minimum of 2 years and a maximum of 5 years; or
c. Termination of certain activities or actions that are declared to have harmed the other party.

The imposition of sanctions on business actors who are proven to violate Article 14 as described above has changed as a consequence of the enactment of Law Number 11 of 2020 concerning Job Creation (Law Number 11 of 2020) on October 5, 2020. The quo law contains several changes to the provisions of Law Number 5 of 1999, especially regarding the criteria for sanctions, types of sanctions, and the amount of fines. The changes can be seen in the Article 118 of Law Number 11 of 2020 which contains editorial changes to Articles 44, 45, 47, 48, and 49. Referring to Article 118, the Provisions in Article 47 are amended to be as follows:

1. The Commission has the authority to impose sanctions in the form of administrative actions against business actors who violate the provisions of this Law.
2. Administrative Actions as referred to in paragraph (1) may be:
    a. determination of cancellation of the agreement as referred to in Article 4, Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 1 1, Article 12, Article 13, Article 15, and Article 16;
    b. an order to business actors to stop vertical integration as referred to in Article 14;
    c. orders to business actors to stop activities that are proven to cause monopolistic practices, cause unfair business competition, and/or harm the community as referred to in Article 17, Article 18, Article 19, Article 20, Article 21, Article 22, Article 23, Article 24, Article 26, and Article 27;

d. an order to business actors to stop the abuse of the dominant position as referred to in Article 25;
e. determination of cancellation of the merger or amalgamation of business entities and takeover of shares as referred to in Article 28;
f. determination of payment of indemnities; and/or
g. imposition of a fine of at least Rp1,000,000,000.00 (one billion rupiah).

3. Further provisions regarding the criteria, types, amount of fines, and procedures for imposing sanctions as referred to in paragraphs (1) and (2) are regulated by a Government Regulation.

Violation of the provisions of Article 41 of this Law is punishable by a maximum fine of Rp5,000,000,000.00 (five billion rupiah) or a maximum imprisonment of 1 (one) year as a substitute for a fine.The changes contained in the three articles above imply that the sanctions given to business actors who are proven to have carried out vertical integration according to Law Number 11 of 2020 are only subject to administrative sanctions. However, if business actors are uncooperative in enforcing business competition, they are still threatened with criminal sanctions. Regarding the amount of fines, Law Number 11 of 2020 also removes the maximum fine limit as regulated. in Law Number 5 of 1999. Furthermore, the calculation of the amount of fines that must be paid by business actors has been regulated in Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopoly Practices and Unfair Business Competition.

V. RESTORATIVE JUSTICE AND CASE RESOLUTION OF ALLEGED VIOLATIONS OF VERTICAL INTEGRATION IN ONLINE TRANSPORTATION BUSINESS IN INDONESIA

The definition of Restorative Justice is the resolution of criminal acts by involving the perpetrator, victim, family of the perpetrator, victim's family, community leaders, religious leaders, traditional leaders, or stakeholders to jointly seek a fair solution through peace by emphasizing re-election to the original situation. The definition of restorative justice is contained in Article 1 letter 3 of the National Police Regulation Number 8 of 2021. The meaning of restorative justice is an alternative to the settlement of cases with mechanisms that focus on punishment which is transformed into a process of dialogue and mediation involving all relevant parties. The basic principle of restorative justice is the recovery of victims who have suffered from crimes by providing compensation to victims, peace, perpetrators doing social work and other agreements. In the implementation of restorative justice, the perpetrator has

The application of the principle of restorative justice has basically been practiced in a civil law enforcement system known as Alternative Dispute Resolution (ADR)

which was later also formulated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

This alleged Violation of Vertical Integration is a competition case based on Business Law in particular and the Law Civil in general. However, in resolving business competition cases based on the provisions of Article 4 paragraph 2 of Perma 1/2016, disputes that are excluded from mediation obligations include disputes whose examination at the trial is determined by a grace period for resolution, including objections to the decision of the Business Competition Supervisory Commission as an institution authorized to examine and supervise business competition in Indonesia. Another argument is that the objectives of enforcing the Competition Law are :

1. Protect business actors, especially business actors who are not dominant.
2. Prevent abuse of economic power and protect consumers from high-cost economies where consumers are avoided from expenses (costs) that do not correspond to the quality of products received
3. Protect the country from inefficiencies in economic activities that may reduce national welfare.
4. Protecting the business competition process itself in the sense of protecting a reasonable system of market mechanisms based on the enactment of the natural laws of supply and demand so as not to be disturbed by an action by business actors or Government policies.

So that dispute resolution in the form of alternative dispute resolution (ADR) is less effective considering that the target of business competition law enforcement is competition in a market-based economy, where business actors, both companies and sellers, freely strive to get consumers to achieve certain business goals or companies they establish.

VI. CONCLUSION

In Case Number 13/KPPU-I/2019 involving PT Solusi Trasportasi Indonesia (GRAB) as a transportation service application provider company and PT Teknologi Pengangkutan Indonesia (TPI) as a transportation provider company, KPPU imposed sanctions on GRAB and TPI for violations of Article 14 and Article 19 (d) of Law Number 5 of 1999. Regarding vertical integration, the sanctions are based on the findings of the Investigating Team regarding the fulfillment of the elements of Article 14 in the implementation of the GRAB and TPI agreements that cause discrimination which leads to the creation of unfair business competition that harms other GRAB Partners who are TPI competitors. The legal consequence born from the implementation of the vertical integration agreement in violation of the provisions of Article 14 of Law Number 5 of 1999 for business actors is the

imposition of sanctions in accordance with the provisions of the regulations. According to KPPU Regulation Number 5

In 2010 concerning Guidelines for the Implementation of Article 14 on Vertical Integration, violations of vertical integration are threatened with sanctions in the form of Administrative, Basic Criminal, and Additional Criminal Actions. Meanwhile, according to the editorial changes of Article 47, Article 48, and Article 49 of Law Number 5 of 1999 contained in Article 118 of Law Number 11 of 2020, then The sanctions given to business actors who are proven to have carried out vertical integration are only limited to the imposition of Administrative Actions. The principle of Restorative Justice, which in civil law enforcement is known as Alternative Dispute Resolution (ADR), is not suitable to be applied in business competition dispute resolution because creating a healthy market cannot be resolved case by case privately, but must be resolved comprehensively through institutions that are indeed

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Resolving Sexual Violence Using Restorative Justice: *Das Sollen* and *Das Sein*

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ABSTRACT: This study discusses the efforts to fulfill women's rights in the Indonesian justice system using the concept of Restorative Justice. Sexual violence has a physical and psychological impact on the victim. The application of restorative justice was originally intended as an effort to restore the psychological condition of the victim. However, this is misinterpreted by many parties, especially the authorities such as the police, in resolving cases of sexual violence. Marrying the victim to the perpetrator of the rape or expelling the victim from their community still occurs in the name of community harmony and the good name of the victim (and family). Victims are often forced to withdraw reports and resolve cases of sexual violence in a family way through peaceful mediation. The author found that the application of restorative justice that had been implemented by many parties, especially the authorities, is very contrary to the initial purpose of implementing restorative justice in favor of the victim. This study uses normative research methods on efforts to fulfill the rights of victims of sexual violence based on the positive law in the Indonesian legal system. The conclusion is that according to the Act on the Crime of Sexual Violence, victims of sexual violence are entitled to treatment, protection, and recovery since the occurrence of a criminal act of sexual violence where the fulfillment of the rights of victims is the state's obligation and carried out according to the conditions and needs of the victim. Therefore, it is necessary to make implement regulations for the application of restorative justice in Indonesia.

Keywords: *Restorative Justice, Sexual Violence, Misinterpreted*

I. INTRODUCTION

One form of legal study that is very important and related to our lives is the study of criminal law. We can see from criminal law that the formulation in it contains orders and prohibitions or also a requirement where if it is not complied with or violated then the violator can be subject to criminal sanctions in the form of sanctions (legal consequences). Criminal law is divided into two parts, the first is material criminal law, the contents of which are instructions and various descriptions of how the crime was committed and formal criminal law, namely regarding the ways of a State with its intermediaries, namely its officials to exercise their rights in imposing crimes. It is this act which is considered and proven to have violated the rules constitutes a criminal act.[1]

One of the crimes that often occurs in society is the crime of sexual violence in which the victims of this crime of sexual violence tend to be and are mostly experienced by women.[2] Women are still seen as weak creatures, this is because physically, men are stronger than women and women have a softer side than men. Even though we can feel the contribution they have made in almost all spheres of everyday life.

Sexual Violence is one of the many types of Gender-Based Violence (GBV). GBV itself is violence that occurs due to gender inequality so there are assumptions that encourage someone that violence is appropriate for that person. The definition of sexual violence in the Draft Law on the Elimination of Sexual Violence (RUU PKS) is any act of humiliating, humiliating, attacking and/or other acts against the body, a person's sexual desire and/or reproductive function, forcibly, against the will of a person who is unable give consent in a free condition because of unequal power relations and/or gender relations which result in physical, psychological, sexual suffering or misery, economic, social, cultural, and/or political losses.[3]

According to Mansour Fakih, gender bias between men and women is manifested in various forms of injustice, including: marginalization, subordination, and the formation of stereotypes or negative labeling, violence, more workload and socialization of the ideology of gender role values.

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[1] Teo Dentha Maha Pratama, Anak Agung Sagung Laksmi Dewi, & Ni Made Sukaryati Karma, "Tindak Pidana Pemerkosaan dalam Perspektif Perlindungan Hukum Perempuan" (2020) 1:2 juinhum 191–196 at 192–193.

[2] P A F Lamintang, *Dasar-Dasar Hukum Pidana Indonesia* (Bandung: Citra Aditya Bakti, 1997).

[3] Draft Rancangan Undang-Undang Penghapusan Kekerasan Seksual (RUU PKS)

In this regard, Ita F. Nadia also said that the impoverishment of women is the result of injustice and gender inequality in society, which closes women's access to opportunities, information and economic resources. This will become an obstacle for women to enter into all sectors of life, such as socio-economic, political and cultural. In such conditions and positions, women lose their rights as human beings and become objects of violence, such as:

1. Marginalization of women
2. Subordination
3. Stereotypes
4. Rape
5. Pornography
6. Trafficking in women
7. Forced contraception
8. Sexual harassment[4]

The violence that occurs against women is currently an individual problem or a national problem, but it is already a global and even transnational problem. This is because violence against women is related to human rights issues which are rights that are inherent naturally since humans are born and without them, humans cannot live as human beings normally. These human rights include civil and political rights, social, economic, and cultural rights, and the right to develop.[5]

Violence experienced by women is an obstacle or obstacle to development because it will reduce women's self-confidence, hinder women's ability to participate fully in social activities, interfere with women's health, and reduce women's autonomy in the economic, political, social, cultural and physical fields. This can cause women's ability to take advantage of their physical, economic, political and cultural lives to be disrupted.[6]

The data recorded in the 2020 National Commission on Violence against Women (CATAHU) illustrates that in a period of 12 years from 2008 to 2019 violence against women increased by 792% (almost 800%) meaning that violence against

[4] G Widiartana, *IDE KEADILAN RESTORATIF PADA KEBIJAKAN PENANGGULANGAN KEKERASAN DALAM RUMAH TANGGA DENGAN HUKUM PIDANA'* (Disertasi, Universitas Diponegoro, 2011) [unpublished] at 12.
[5] Utami Zahirah Noviani P et al, "MENGATASI DAN MENCEGAH TINDAK KEKERASAN SEKSUAL PADA PEREMPUAN DENGAN PELATIHAN ASERTIF" (2018) 5:1 Jurnal Penelitian & PPM at 50.
[6] Yonna Beatrix Salamor & Anna Maria Salamor, "Kekerasan Seksual Terhadap Perempuan (Kajian Perbandingan Indonesia-India)" (2022) 2:1 Balobe Law J 7 at 8.

women in Indonesia for 12 years increased by almost 8 fold. This phenomenon is still said to be like an iceberg, which can be interpreted that in the actual situation, the condition of women is far from experiencing an insecure life.

Whereas in the 2021 Komnas Perempuan Annual Notes (CATAHU) that the number of violence against women has decreased by around 31.5% from the previous year. What is important to note is the decrease in the number of cases in 2020 (299,911 cases consisting of 291,677 cases in the Religious Courts and 8,234 cases originating from questionnaire data from service provider institutions) compared to the previous year (431,471 cases – 416,752 cases in the Religious Courts and 14,719 questionnaire data), does not mean the number of cases decreased. In line with the survey results on the dynamics of VAW during the pandemic, the decrease in the number of cases was due to 1) the victims were close to the perpetrators during the pandemic (PSBB); 2) victims tend to complain to their families or remain silent; 3) technological literacy issues; 4) a complaint service model that is not ready for pandemic conditions (has not adapted to turning complaints online). For example, due to the pandemic, the religious courts have limited their services and court proceedings (this has caused the divorce rate to fall by 125,075 cases from last year). In addition, the number of returned questionnaires decreased by almost 100 percent from the previous year.[7]

Sexual violence results in victims experiencing material, physical and psychological losses. Often, in its resolution, many people still take it for granted. There are those who settle it by means of the perpetrator paying compensation with money, there are those who marry the victim to the perpetrator, and there are even those who pay fines to the community, such as paving roads and so on. Even though it is absolutely not able to return the victim to its original state. The trauma experienced requires a very long time, especially by marrying the perpetrator, the victim will live with the perpetrator for life and there is still the potential for the perpetrator to commit further violence against the victim.[8]

Sexual violence in positive law can be charged with several articles, namely Law No. 23 of 2004 concerning the Elimination of Domestic Violence, Law No. 23 of

[7] *Perempuan dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak, dan Keterbatasan Penanganan di Tengah Covid-19*, by Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan), Lembar Fakta dan Poin Kunci Catatan Tahunan Komnas Perempuan Tahun 2020 (Jakarta: Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan), 2021).
[8] Asit Defi Indriyani, "PENDEKATAN RESTORATIVE JUSTICE DALAM MELINDUNGI KORBAN KEKERASAN SEKSUAL" (2021) 2:2 IJouGS, online: <https://jurnal.iainponorogo.ac.id/index.php/ijougs/article/view/3284> at 46.

2002 concerning Child Protection, articles 284-290 of the Criminal Code and others. Even so, there are still many types of sexual violence that cannot be prosecuted because there are no regulations or laws that accommodate these types of violence.

In the construction of criminal law which is built on a retributive view, the suffering or loss of the victim has been abstracted and compensated for by the threat of criminal sanctions that can be imposed on the perpetrator. Settlement of criminal acts that occur is entirely the authority of law enforcement officials. The abstraction of the loss or suffering of the victim and the authority to resolve criminal acts in legal channels which are only owned by law enforcement officials cannot be separated from the notion of a crime which according to a retributive view is conceptualized as an act that violates state law. With this conception, the state, whose legal rules have been violated by the perpetrators of criminal acts, positions itself as a victim and thus also has the right, through its law enforcement officers, to prosecute and impose sanctions on the perpetrators. In a retributive view, the construction of a settlement of a crime will confront the perpetrator, as a party who violates the rule of law, against the state, as a party whose rule of law has been violated. In such a construction of criminal law, all the wishes of the victim relating to the settlement of criminal acts that befall him are not even accommodated. Even though it has been agreed morally and juridically that legal justice is given to people or parties whose rights have been violated. Judicial institutions, including criminal justice, are institutions that provide guarantees for the upholding of justice aimed at people or parties whose legal rights have been violated, which are referred to as victims. In reality, the decisions of the judiciary often disappoint the victims' feelings about the justice they desire.

In contrast to the retributive view which focuses more on punishing the perpetrator as retaliation or recompense for the mistakes he has made, the view of restorative justice focuses more on or focuses on repairing or recovering the victim's suffering as a form of accountability for the perpetrator without prejudice to the interests of rehabilitation for the perpetrator and the interest to create and maintain public order. The view of restorative justice also provides opportunities for victims to be actively involved in the process of resolving their cases.[9]

In our criminal law system today, in terms of solving criminal acts, it prioritizes a restorative justice approach. In accordance with the decision letter issued by the Supreme Court Number 1691/DJU/SK/PS.00/12/2020 concerning the

[9] G. Widiartana, *supra* note 4 at 13–14.

Enforcement of Guidelines for the Implementation of Restorative Justice which also includes Cases of Women in Conflict with the Law.[10]

Restorative Justice is an approach to justice that focuses on the needs of victims and perpetrators of crime, and involves the participation of the community, not on carrying out the principle of punishing the perpetrators accompanied by the judge's considerations.

Everyone has the right to receive protection for himself and his family, dignity, honor and property that he owns and has the right to feel comfortable and protected from various threats which are regulated in Article 28 G paragraph (1) of the second amendment of the 1945 Constitution.

The principle of Restorative Justice is the process of resolving unlawful acts that occur by bringing victims and perpetrators together to speak. Restorative Justice is an approach to justice that focuses on the needs of victims and perpetrators, as well as the communities involved, not on carrying out the principle of punishing perpetrators. The Restorative Justice process has the following objectives:[11]

1. Take responsibility for the consequences of recording actions and commit to repairs.
2. Steps for victims to agree to be involved in processes that can be carried out safely, understanding that their actions have affected victims and others, to then produce satisfaction.
3. Flexible violation agreed by the parties emphasizing to repair the damage done and as soon as possible also prevent the violation.
4. Offenders make their commitment to repair the damage and do and seek to overcome the factors of their behavior; and
5. Victims and perpetrators both understand the dynamics that lead to certain incidents achieving outcomes and integration/reintegration into society

Restorative justice does have a very good goal, namely the return to its original condition after a crime has occurred. But can this then guarantee that it can bring a sense of justice to victims of sexual violence, bearing in mind that there is still very little handling of cases of sexual violence that provides recovery and a settlement that is in favor of the victim. Because in the records of Data and Facts of

[10] Lihat lebih lanjut dalam Lampiran SK Dirjen Badan Peradilan Umum No. 1691/DJU/SK/PS.00/12/2020
[11] Andro Giovani Ginting, Vici Utomo Simatupang, & Sonya Arini Batubara, "RESTORATIVE JUSTICE SEBAGAI MEKANISME PENYELESAIAN TINDAK PIDANA KEKERASAN DALAM RUMAH TANGGA" (2019) 1:2 jurnalrectum 180 at 180–181.

Sexual Violence in Indonesia, 57% of the respondents did not get a settlement, other cases were resolved by paying a sum of money, marrying the perpetrator, and only by way of reconciliation.[12]

It is from these various dilemmas and problems that the author will review the restorative justice approach in protecting victims of sexual violence. The purpose of this paper is to examine and reflect back on the restorative justice approach in handling cases of sexual violence from the victim's perspective. So that the choice of method of handling criminal acts of sexual violence can really provide a sense of justice for victims, especially so that victims can recover to their original condition and are protected from various threats and potential repetition of violence.

II. METHODOLOGY

1. Type and Nature of Research

Research is the application of the method that has been determined in making thesis. The type of research used by the author in this thesis is a normative research method. Normative legal research or library research is research that examines document studies, namely using various secondary data such as laws and regulations, court decisions, legal theory, and can be in the form of opinions of scholars.[13]

The nature of the research used in this thesis is the nature of descriptive research, where the nature of this research reveals laws and regulations related to legal theories as research objects. Likewise the law in its implementation in society with regard to the object of research.[14]

2. Sources of Legal Materials

The sources of legal materials used in this study consist of:[15]

a. Primary legal materials, namely legal materials that are binding and include laws and regulations related to the issues to be examined, such as: Law Number 12 of 2022 concerning the Crime of Sexual Violence, Law number 11 of 2012 concerning the Juvenile Criminal Justice System, Law number 23 of 2004 concerning the Elimination of Domestic Violence and the Book Criminal Law Act.

[12] Arsa Ilmi Budiarti, Gladys Nadya Arianto, & Marsha Maharani, *Data dan Fakta Kekerasan Seksual di Indonesia 2021*, cetakan pertama ed (Jakarta: Indonesia Judicial Research Society (IJRS), 2022) at 19.
[13] Z Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2016) at 53.
[14] *Ibid* at 55.
[15] P M Marzuki, *Penelitian Hukum* (Jakarta: Prenadamedia Group, 2016) at 4.

b. Secondary legal materials are legal materials related to primary legal materials such as Court Decisions, scientific works of scholars, research results related to Criminal Liability.
c. Tertiary legal materials are materials that provide instructions and explanations of primary and secondary legal materials such as legal dictionaries, encyclopedias, and so on.

3. Data Collection Techniques

The technique of collecting legal materials used in this study is library research, namely through tracing laws and regulations, documents and books as well as other scientific works that are in accordance with the object to be studied.[16]

4. Data Analysis

A process or effort to process data into new information so that the characteristics of the data become easier to understand and useful for solving a problem, especially those related to research.[17]

III. THE CONCEPT OF RESTORATIVE JUSTICE

To be able to provide a more detailed description of restorative justice, the following is the opinion of several experts on this matter:

1. Tony F. Marshall

According to Tony F. Marshall, restorative justice is an approach to solving crime problems between parties, namely victims, perpetrators, and society, in an active relationship with law enforcement officials.[18] It is said that to solve the crime problem, restorative justice assumptions -assumptions as follows:

a. The source of crime is social conditions and relations in society;
b. Crime prevention depends on the responsibility of society (including local and central government in relation to social policies in general) to deal with social conditions that can cause crime;
c. The interests of the parties in the settlement of criminal cases cannot be carried out be accommodated without providing facilities for personal involvement;
d. Justice measures must be flexible to respond to important facts, personal needs, and resolution in each case;

[16] Amirudin & Z Asikin, *Pengantar Metode Penelitian Hukum* (Depok: Rajawali Press, 2020) at 17.
[17] A Efendi, D O Susanti, & R I Tektona, *Penelitian Hukum Doktrinal* (Yogyakarta: LaksBang Justitia, 2019) at 42.
[18] G. Widiartana, *supra* note 4 at 20.

e. Cooperation among law enforcement officials as well as between officials and the community is considered important to optimize the effectiveness and efficiency of the way to resolve cases.
f. Justice is achieved with the principle of a balance of interests between the parties.[19]

2. John Braithwaite

In short, John Braithwaite provides the notion of restorative justice as victim recovery. Furthermore, it is said that what is meant by victim recovery consists of:

a. Restore property loss;
b. restore injuries;
c. Restore sense of security;
d. Restore dignity;
e. Restore sense of empowerment;
f. Restore deliberative democracy;
g. Restore harmony based on a feeling that justice has been done; h. Restore social support.[20]

3. Mark Umbreit

Although he does not explicitly state the meaning, according to Mark Umbreit, restorative justice is a way of thinking or understanding crime and victimization that is very different from retributive understanding.[21]

In a retributive sense, the state is considered to be the party that suffers the most when a crime occurs. Therefore, in the sentencing process, victims and perpetrators are placed in passive roles and positions. Meanwhile, in the view of restorative justice, crime is understood as a conflict between individuals. Therefore, those who are more directly related to the occurrence of crimes, namely victims/actors and communities, should be given the opportunity to be actively involved in efforts to resolve the conflict.[22]

[19] *Ibid*.
[20] *Ibid* at 21.
[21] Mark S Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment" (1998) 1:1 Western Criminology Review 1–28.
[22] *Ibid*.

4. Cornier

Cornier, as quoted by Brian Tkachuk, provides the notion of restorative justice as an approach to upholding justice that is focused on repairing or recovering the suffering caused by crime. [23]

Cornier also says that in this restorative justice the mechanism for holding perpetrators accountable is carried out by giving opportunities to the parties, namely the victim; perpetrator; and society, to identify and determine their interests related to the consequences of crime, seek solutions aimed at healing, repair and reintegration, as well as preventing future suffering.[24]

From the opinions mentioned above it appears that in restorative justice, actors; victim; and society are considered as parties who have an interest in the settlement of criminal acts, in addition to the state itself. The involvement of these parties, especially the perpetrators; victim; and society, in the settlement of criminal acts is considered of high value. In addition, the perspective of restorative justice requires collaborative efforts between the community and the government to create an environment that allows victims and perpetrators to reconcile conflicts and resolve their losses and at the same time create a sense of security in society. Nevertheless, the involvement of the victim in the sentencing process needs to be regulated carefully so as not to cause secondary victimization which will add to the severity of the victim's suffering after the person concerned has suffered as a result of the crime.

The underlying assumption of the current Criminal Justice System (SPP) is that criminal conflict is a social problem and therefore must be managed in a way that can provide "just deserts" and can also send a message to the general public to avoid similar actions. Although there is an opinion that there is nothing wrong with this assumption, factors such as court burden, prison population, costs and recidivism often shift the focus of the criminal justice system, namely from what should be "delivering justice" to "processing cases". As a result, this type of justice ignores the needs of the victims and is seen as paying little attention to them perpetrator reintegration. Retribution has always been the philosophy that underlies SPP throughout the world, whether adversarial or inquisitorial systems. In recent decades there has been an effort to bring about a new approach that

[23] Brian Tkachuk, "Criminal Justice Reform: Lessons Learned Community Involvements and Restorative Justice | Office of Justice Programs", online: <https://www.ojp.gov/ncjrs/virtual-library/abstracts/criminal-justice-reform-lessons-learned-community-involvements-and>.
[24] *Ibid*.

changes the way we view dealing with delinquent behavior. These efforts introduced a new model of criminal justice called restorative justice.[25]

From a number of debates, it is known that the term Restorative Justice was first introduced in contemporary criminal justice literature and practice in the 1970s. However, Gavrielides[26] states that there is some strong evidence to show that the roots of the concept of restorative justice have started from ancient times, namely going back to most traditional societies, customs and religions. In fact, according to him, some people claim that these values of restorative justice are based on traditions of justice as old as the ancient Greek and Roman civilizations. Furthermore, Gavrielides[27] stated that since the 70s, restorative justice has created a phenomenon of global interest originating from a number of stakeholders both inside and outside the criminal justice system. The rebirth of restorative justice according to Gavrielides[28] does not come from formal structures and legislation, but from voluntary action by enthusiastic and dedicated practitioners from around the world.

According to the Guidebook on Restorative Justice Programs published in 2006 by the United Nations Office on Drugs and Crime (UNODC), restorative justice is a way of responding to criminal behavior by balancing the needs of society, victims and perpetrators. Since it was first "reborn" in the 70s, this concept has been growing and giving rise to several different interpretations in different countries, which of course do not always have a perfect consensus. According to UNODC, this is also because there are many challenges in translating concepts into different languages, various terminologies are often used to describe the restorative justice movement, including "communitarian justice", "make amends", "positive justice", "relational justice", "reparative justice", "community justice" and "restorative justice". According to the UNODC definition, a restorative process is:

"Any process in which the victim and the perpetrator and, if necessary, any individual or member of the community affected by a crime actively participate together in solving problems arising from the crime, generally with the assistance of a facilitator."

[25] Theo Gavrielides, *Restorative justice theory and practice: addressing the descrepancy*, Publication series / European Institute for Crime Prevention and Control, affiliated with the United Nations 52 (Helsinki: European Institute for Crime Prevention and Control, 2007).
[26] *Ibid*.
[27] *Ibid*.
[28] *Ibid*.

It was explained by UNODC that the restorative justice program functions to complement rather than replace the existing SPP. Restorative interventions can be used at any stage of the criminal justice process, although in some cases amendments to existing laws may be required. In general, there are four main points in the SPP where a restorative justice process can be successfully initiated, namely: (a) at the police (pre-charge) level; (b) at the prosecution/prosecutor level (post-fee but usually before trial); (c) at the court level (either at the pretrial or sentencing stages); and, (d) correction (as an alternative to detention, as part of a non-custodial sentence, during detention, or after release from prison. At one of these points, the relevant authorities have the opportunity to exercise their discretion and refer the offender to a restorative justice program. In some countries, restorative interventions may be possible in conjunction with prosecution.

In the UNODC guidebook it is also said that the restorative process can also be started by bringing certain cases of crime or conflict to the attention of the criminal justice system. For example, school-based programs use mediation or other restorative processes to deal with misdemeanors that occur within the school community. In addition, restorative programs can also operate in a mediation center setting. Furthermore, police officers can often informally incorporate restorative justice principles into decision-making when they are asked to intervene on the ground or at the scene of an incident, in misdemeanor situations or conflicts or in specific contexts, such as schools. In general, cases involving more serious incidents are referred to restorative justice processes at a later stage in the criminal justice system. A comprehensive approach to implementing restorative justice programs within a national system will usually provide a number of programs designed for referral from various points in the criminal justice process.

There is a great deal of variability among existing programs. They cover a variety of processes centered on a restorative approach. This is partly due to different interpretations of conflict and perspectives on how it is handled and resolved. The main categories of programs are: (a) perpetrator-victim mediation; (b) community conferences and family groups; (c) circle penalty; (d) circle of peacemakers; and, (e) reparative probation and community boards and panels. Existing programs vary widely in formality; how they relate to the criminal justice system; how they are operated, on the level of involvement they encourage from various parties, or in the main goals they pursue. The view adopted in the UNODC handbook is that a balance must always be struck to suit the circumstances in which a program is

being developed (e.g. limits on existing legal framework, limited support from criminal justice officials, cultural barriers, limited public support, limited means).[29]

Restorative Justice or often translated as restoration justice, is an approach model that emerged in the 1960s in efforts to settle criminal cases. Unlike the approach used in the conventional criminal justice system, this approach emphasizes the direct participation of perpetrators, victims and the community in the process of resolving criminal cases.[30]

The principle of restorative justice is (Restorative Justice) is one of the principles of law enforcement in the settlement of cases that can be used as an instrument of recovery and has been implemented by the Supreme Court in the form of policy enforcement (Supreme Court Regulations and Supreme Court Circular Letters), but its implementation is in the Indonesian criminal justice system still not optimal.[31]

Restorative Justice is an alternative settlement of criminal cases in which the mechanism of criminal justice procedures focuses on punishment which is transformed into a dialogue and mediation process that involves perpetrators, victims, families of perpetrators/victims, and other related parties to jointly create an agreement or settlement fair and balanced criminal cases for victims and perpetrators by prioritizing restoration to their original state, and restoring the pattern of good relations in society. The basic principle of restorative justice is recovery for victims who have suffered as a result of crime by providing compensation to victims, peace, perpetrators doing social work and other agreements. A just law in restorative justice is certainly not one-sided, impartial, not arbitrary and only sides with the truth in accordance with applicable laws and regulations and takes into account equality of rights, compensation and balance in every aspect of life. Perpetrators have the opportunity to be involved in restoration (restoration), the community has a role to preserve peace, and the court has a role to maintain public order.[32]

Liebmann simply defines restorative justice as a legal system that aims to restore the welfare of victims, perpetrators and communities damaged by crime, and to

[29] *Ibid*.
[30] Hanafi Arief & Ningrum Ambarsari, "PENERAPAN PRINSIP RESTORATIVE JUSTICE DALAM SISTEM PERADILAN PIDANA DI INDONESIA" (2018) 10:2 Al-Adl 173 at 18.
[31] *Ibid*.
[32] Lihat lebih lanjut dalam Lampiran SK Dirjen Badan Peradilan Umum No. 1691/DJU/SK/PS.00/12/2020

prevent further violations or criminal acts. Liebman also provides a formulation of the basic principles of restorative justice as follows:

a. Prioritize victim support and healing.
b. Violators are responsible for what they did.
c. Dialogue between the victim and the perpetrator to reach an understanding.
d. There is an attempt to properly put the losses incurred.
e. Offenders must be aware of how to avoid crime in the future.
f. The community helps in integrating the two parties, both victims and perpetrators.[33]

Restorative Justice in Settlement of Sexual Violence Cases in Several Countries

In the previous section it has been explained that restorative justice and restorative practices have developed throughout the world over the last two or three decades, both in countries that adhere to civil law and common law systems, in countries with strong social systems and in countries -countries that do not, either through top-down or bottom-up policies or initiatives. So far, restorative justice has developed rapidly, especially to deal with delinquent behavior (adolescents) and for crimes that fall into the category of minor or less serious crimes. There is a view that the adoption of this practice is because such restorative justice programs are "an easier sell" mainly due to the reluctance of politicians and some practitioners to try something new. However, most experts agree that restorative justice can also be used for adults and for even the most serious crimes (extraordinary crimes, including mass violence such as crimes against humanity and genocide), including sexual violence. In fact, there are some who argue that restorative justice practices should be used primarily for the last form of crime. This is due to the importance for victims of explanation, reparation and re-humanization.

Rwanda for example, in its trial for the crime of genocide, which included sexual violence against Tutsi women, they established a National Unity and Reconciliation Commission (NURC) to implement restorative justice practices that are more inclined to "seek the improvement of social relations. and peace rather than retribution against the offender." One of the initiatives undertaken by NURC is Gacaca, which is a traditional form of Rwandan communal justice, in which local judges are elected by the community to preside over court proceedings. This tradition was revived in 2003 under the presidency of Paul Kagame, to put on trial the 120,000 people who have been arrested since 1994 in connection with the Genocide. The aims of the Gacaca trials were "to enable truth-telling," "to promote reconciliation," "to eradicate a culture of impunity," "to expedite the trials of

[33] Marian Liebmann, *Restorative Justice: How it Works* (Jessica Kingsley Publishers, 2007) at 26.

genocide suspects," and "to demonstrate Rwanda's own problem-solving capacity." These "trials" encouraged perpetrators to confess, made public apologies, and offered reparations, thereby facilitating the perpetrators' reintegration back into Rwandan society.[34]

In Belgium, Penal Mediation is offered by justice assistants (civil servants), while a small number of NGOs are contracted by the government to provide other restorative justice services throughout the country. Services are also differentiated based on the age of the offender, so there are separate services for teenagers and adults. Meanwhile Mediation for Redress can be facilitated for any crime reported to the police involving an identifiable victim, and at all stages of the criminal justice process including after sentencing. Depending on the type of restorative justice program, the offender, whether juvenile or adult, must accept some degree of responsibility to be considered for the restorative justice process to take place. For Mediation for Redress, once a crime has been reported to the police, victims and offenders (adult ages) are informed of their right to seek mediation in addition to a police investigation and a restorative justice process can be initiated by both. In contrast to juvenile offenders, decisions regarding referral of cases are made by the prosecution service or the presiding judge, and mediation is often used as a diversionary measure. Referral of juvenile offenders to mediation services is best practice in Belgium, as a written explanation must be provided by the prosecution service to the court if a case is not referred for mediation. Next for more serious crimes, the practice of justice restorative services operate in conjunction with and not as an alternative to conventional criminal justice processes. However, restorative justice interventions provided by the Center for Child Sexual Abuse (*Vertrouwenscentra Kindermishandeling*) in the Flemish region of Belgium can be administered independently of the criminal justice system when sexual abuse is intrafamilial.[35]

In Ireland, the practice of restorative justice is largely the initiative of a small number of organizations in the humanitarian sector and individual practitioners in private practice. Within the scope of legislation, caution has become the norm, with the National Commission for the Restoration of Justice (2009) recommending that certain serious offenses, such as sexual violence, be excluded from the initial phase of implementation. Meanwhile, child sexual abuse has been a prominent

[34] Mark R Amstutz, "Is Reconciliation Possible After Genocide?: The Case of Rwanda" (2006) 48:3 Journal of Church and State 541–565.
[35] Marie Keenan, Estelle Zinsstag, & Caroline O'Nolan, "Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations" (2016) 4:1 Restorative Justice 86–114.

case in Ireland in the last few decades and a form of restorative justice is one of the interventions that continues to be developed today. Restorative justice in sexual assault cases is also facilitated by a non-profit organization called One in Four which is funded from a variety of sources, including charitable donations, government funding, and in some cases, contributions from their clients. Due to resource constraints, "One in Four" can only facilitate a small number of restorative mediations each year; most relate to intrafamilial sexual abuse although in rare cases they have facilitated restorative meetings between victims and representatives appointed by diocesan authorities or religious communities.

While restorative alerts and conferences are a feature of the juvenile justice system in Ireland, the Garda Diversion Office (Irish Police) does not routinely seek to implement restorative interventions in response to harmful sexual behavior by juveniles. Although in the adult criminal justice system, access to restorative intervention is limited, recently more serious offenses have been referred to probation services and one victim-offender mediation has been conducted with parties to serious post-release sexual crimes.[36]

In Norway, especially with regard to juvenile offenders, for several decades there has been support for the need to develop alternative responses to crime. The Norwegian mediation service started as a pilot project in 1981 and since 1991 it has been implemented nationwide. The administrative center of the National Mediation Service (*Konfliktraadet*) is located in Oslo and oversees the work of 22 local mediation offices, which are staffed by 600 volunteer or 'lay' mediators. Over time, the seriousness of cases handled by mediation services has increased and they now handle a small number of cases of violence including domestic and sexual violence.

There has been some political reluctance to push the program forward, although with increasing experience and the emergence of international research, that attitude has gradually changed. The practice of referring sexual assault cases to mediation services relies on contact and communication with agencies outside the criminal justice arena rather than from within the criminal justice system itself. There are two main sources of referrals to mediation services. The first is the police service, which refers cases to mediation services as an alternative to criminal sanctions. The second source of referrals is from the civilian population, which can include prison detainees. Most cases of sexual violence handled by mediation services are not referred by the police. In general, referrals can come from victims

[36] *Ibid.*

or perpetrators; however, the pilot project on date rape took only cases initiated by the victim. The Norwegian government provides funding for mediation services.[37]

In the US, Cyphert [38], said that the application of restorative justice to resolve cases of sexual violence, especially sexual violence on campus is still considered controversial. According to him, some advocates fear that these restorative justice practices will signal to higher education institutions that they are free to take sexual violence on campus as something less serious. Furthermore, they are also worried that the practice of restorative justice will actually become an escape mechanism for higher education institutions to avoid being responsible for resolving cases thoroughly.[39]

Cyphert stated that this fear or concern is natural, especially because so far many higher education institutions have failed to address sexual violence on campus. However, what needs to be noted is that restorative justice is not the only option for victims to resolve their cases. According to him, in accordance with the legal provisions in force in the US, every higher education institution is encouraged to have a policy on preventing and overcoming sexual violence on campus and in this policy, victims are also given choices regarding resolving cases, whether through the criminal justice system or the restorative justice process.[40]

Cyphert later also said that another criticism of the practice of restorative justice is that it allows perpetrators to remain on campus and potentially commit the same crime. Although this criticism raises serious concerns, according to Cyphert there is great hope for continuing to practice restorative justice. argument that What he points to is the success of the RESTORE program in Pima, Arizona. He said that the program had been running for four years and of the dozens of cases that had implemented restorative justice, only one perpetrator had committed the same crime. The perpetrator was identified as someone with dementia symptoms due to his advanced age.[41]

According to Cyphert, in the end, restorative justice can still provide hope with a set of beliefs that humans can change through a process of rehabilitation for

[37] *Ibid*.
[38] A Cyphert, "The Devil Is in the Details: Exploring Restorative Justice As an Option for Campus Sexual Assault Responses Under Title IX" 96:1 Denver Law Review 2018.
[39] *Ibid*.
[40] *Ibid*.
[41] *Ibid*.

perpetrators and recovery for victims, provided that all parties must do so voluntarily or without any coercion.

Cyphert went on to say that victims of campus sexual assault have unique needs that can be met by restorative justice practices, including the need to tell their own story, the need to "observe the perpetrator's remorse for harming them," and the need to have choice and agency in charting resolution path. Therefore Cyphert argues that many theorists, researchers, practitioners and feminists support restorative justice programs as a response to sexual violence on campuses in the US, especially because restorative justice is considered to provide a more empowering and survivor-oriented approach than traditional ones. criminal justice system.[42]

Furthermore, Cyphert says that restorative justice provides a culturally sensitive restoration of historically marginalized groups, and its emphasis on addressing power dynamics in society, thus making it one of the more promising methods of dealing with issues of racial bias in campus disciplinary proceedings.[43]

IV. SEXUAL VIOLENCE AND VICTIM'S RIGHTS

Violence or violence is a term consisting of two words, namely "vis" which means (power, strength) and "latus" means (to bring), which is then translated as bringing strength. The Big Indonesian Dictionary provides an understanding of violence in a narrow sense, which only includes physical violence. According to the KBBI, violence is an act that can cause injury or death to another person or cause physical damage or other people's property.[44]

Sexual violence itself is a physical or non-physical sexual act by someone who has power over the victim with the aim of fulfilling the perpetrator's sexual desires that the victim does not want. According to the National Commission on Violence against Women (Komnas Perempuan), there is a concept of morality related to women that develops in society. Women are considered a symbol of purity and honor. This concept makes women often seen as a disgrace when they experience acts of sexual violence. Not only that, women are often the ones to blame for these

[42] *Ibid*.
[43] *Ibid*.
[44] M H S Tency & I Elmi, *Kekerasan Seksual dan Perceraian* (Malang: Intimedia, 2009) at 17.

actions. This, too, is the reason many women in Indonesia who experience sexual violence choose to remain silent.[45]

The definition of sexual violence in the Draft Law on the Elimination of Sexual Violence (RUU PKS) is any act of humiliating, humiliating, attacking and/or other acts against the body, a person's sexual desire and/or reproductive function, forcibly, against the will of a person who is unable give consent in a free condition because of unequal power relations and/or gender relations which result in physical, psychological, sexual suffering or misery, economic, social, cultural, and/or political losses.[46] Forms of sexual violence in the PKS Bill itself include:

1. Sexual harassment
2. Sexual exploitation
3. Forced contraception
4. Forced abortion
5. Rape
6. Forced marriage
7. Forced prostitution
8. Sexual slavery and
9. Sexual abuse

Victims usually experience suffering both physically, psychologically, and even economically social consequences resulting from an action. The definition of a victim in Law No. 13 of 2006 concerning the Protection of Witnesses and Victims is a person who experiences physical, mental suffering and/or economic loss as a result of a crime.

Article 5 of Law No. 13 of 2006 concerning Protection of Witnesses and Victims states that victims have the right to:

1. Obtain protection for personal security, family and property, and be free from threats related to testimony that will be, is being, or has been given
2. Participate in the process of selecting and determining forms of security protection and support
3. Give information without pressure
4. Get a translator
5. Free from ensnared questions
6. Obtain information regarding the progress of the case

[45] Hadibah Zachra Wadjo & Judy Marria Saimima, "Perlindungan Hukum Terhadap Korban Kekerasan Seksual Dalam Rangka Mewujudkan Keadilan Restoratif" (2020) 6:1 belo 48–59 at 49.
[46] Lihat dalam Draft Rancangan Undang-Undang Penghapusan Kekerasan Seksual

7. Obtain information regarding court decisions
8. Knowing in terms of the convict being released
9. Got a new identity
10. Getting a new residence
11. Obtain reimbursement of transportation costs as needed
12. Obtain legal advice and/or
13. Obtain temporary living expenses assistance until the protection deadline expires[47]

The Law on Sexual Violence Crimes stipulates that the victim has the right to treatment, protection, and recovery after the crime of sexual violence occurred. Article 67 Paragraph (2) of the Law on Sexual Violence Crimes stated that fulfillment of victims' rights is a state obligation and is carried out in accordance with the conditions and needs of victims.

According to Article 68 of the Law on Sexual Violence, the victim's right to treatment is translated into 7 forms, the details of which are:

a. the right to information on all processes and outcomes Treatment, Protection and Recovery;
b. the right to obtain documents on the results of handling;
c. the right to legal services;
d. the right to psychological reinforcement;
e. The right to health services includes examination, action, and medical treatment;
f. the right to services and facilities in accordance with special needs of Victims; and
g. the right to remove sexually charged content for cases of sexual violence with electronic media.

According to Article 69 of the Law on Sexual Violence, victims' rights to protection as referred to in Article 67 paragraph (1) letter b include:

a. provision of information regarding rights and facilities Protection;
b. provision of access to information implementation of Protection;
c. Protection from threats or violence by perpetrators and other parties and the repetition of violence;
d. Protection of identity confidentiality;
e. Protection from the attitude and behavior of enforcement officers laws that humiliate victims;

[47] Lihat dalam Undang-Undang Nomor 13 Tahun 2006 tentang Perlindungan Saksi dan korban

f. Protection against job loss, transfer employment, education, or access to politics; and
g. Protection of victims and/or reporters from criminal charges or civil lawsuits for criminal sexual violence that has been reported.

Reffered to Aricle 70 of the Law on Sexual Violence, victim's rights to recovery include :

1) The Victim's Right to Remedy as referred to in Article 67 paragraph (1) letter c includes:
   a. Medical rehabilitation;
   b. Mental and social rehabilitation;
   c. social empowerment;
   d. Restitution and/or compensation; and e. social reintegration.

2) Recovery before and during the judicial process includes:
   a. provision of health services for Recovery physique;
   b. psychological reinforcement;
   c. provision of information about Victims' Rights and judicial process;
   d. provision of information about Recovery services for Victims;
   e. legal assistance;
   f. provision of proper accessibility and accommodation for Victims with Disabilities;
   g. provision of transportation assistance, consumption, temporary living expenses, and temporary housing that is appropriate and safe;
   h. provision of spiritual and spiritual guidance;
   i. provision of educational facilities for Victims;
   j. provision of population documents and other supporting documents required by the Victim;
   k. the right to information in the case of a convict having finished serving his sentence; and
   l. the right to remove sexually charged content for cases of sexual violence by electronic means.

3) Recovery after the judicial process includes:
   a. monitoring, examination, and physical and psychological health services for Victims periodically and continuously;
   b. strengthening community support for Victim Recovery;
   c. assistance with the use of Restitution and/or compensation;
   d. provision of residence documents and other supporting documents required by Victims;

e. provision of social security services in the form of health insurance and other social assistance according to needs based on an integrated team assessment;
f. economic empowerment; and
g. provision of other needs based on results identification of UPTD PPA and/or Community-Based Service Provider Institutions.

V. RESTORATIVE JUSTICE APPROACH IN PROTECTING VICTIMS OF SEXUAL VIOLENCE

The case of the rape of a minor committed by six teenagers in Brebes Regency, Central Java (Central Java), which went viral on social media (social media) because it was resolved through mediation or kinship, sparked reactions from a number of quarters, one of them from LBH APIK Semarang. The director of LBH APIK Semarang, Raden Ayu Hemawati, believes that the mediation of solving cases of sexual violence or rape by mediation is very dangerous for the lives of victims and other women. This is because settling cases of sexual violence out of court will not have a deterrent effect on perpetrators and will potentially repeat their bad actions

Restorative justice is actually no stranger to criminal justice in Indonesia. This system has been recognized in the Law on the Juvenile Criminal Justice System, which is better known as "diversion". In principle, it is the same as restorative justice. However, this diversion must be carried out or is mandatory in handling cases of children dealing with the law. Meanwhile, in other cases, including cases of violence sexual, naturally, it is more to the suggestion. Since the issuance of the Supreme Court Decree Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Application of Restorative Justice, this approach has been implemented by pay attention to the important things contained in the guideline.[48]

In the Supreme Court Decree Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of the Guidelines for the Implementation of Restorative Justice (Restorative Justice) it is explained that in adjudicating cases of women dealing with the law they must pay attention to the history of violence from the perpetrators against the victims, the power relations that result in the victims not being powerlessness, psychological and physical powerlessness of the victim, the psychological impact experienced by the victim, discrimination, unequal legal protection which has an impact on access to justice and unequal social status between the litigants.

[48] Asit Defi Indriyani, *supra* note 8 at 52.

Sexual violence has many negative consequences, especially if the victim is a child who still needs time to grow and develop. This act of violence will definitely leave a lasting impression both physically and mentally. Forms of sexual violence are generally carried out by means of coercion and the desire of one of the parties to seduce, poke, hug, squeeze body parts, and all kinds of other forms of harassment until the main goal is to have forced intercourse. Sexual violence can occur for a number of reasons, ranging from wrong family parenting patterns, uncontrolled distribution of pornography on social media, to uncontrolled proper sexual education from an early age. This makes the child become incapacitated filter information that should be found so that children tend to make mistakes.[49]

Attention to recovery for victims of sexual violence and punishment for the perpetrators needs to be commensurate with our concern for preventing the incident from recurring. The actions taken by victims can drastically change their lives with various impacts, including stress that leads to depression, trauma, and other illnesses so that victims can end their own lives.[50]

Victims of sexual violence experience enormous losses, so it is necessary to receive commensurate protection. The losses experienced by victims can be said to be sequential, namely starting from physical, psychological and social losses. In addition, the victim was also pre-trial, during the trial process until after the trial was over. Therefore victims of sexual violence need protection in order to feel safe and comfortable from all forms of threats and the potential for repetition of violence and the victims are assured of the recovery process.

According to the author, the restorative justice approach cannot be used as a way out for solving sexual violence cases because apart from not being able to protect victims, this will result in the emergence of thoughts or the notion that what the perpetrators did can be resolved with only compensation and the perpetrators are free to roam anywhere again. In addition, there is no guarantee of safety for the victim if there is a threat from the perpetrator. Most of the perpetrators of sexual violence are the closest people to the victims and even their own families. According to Komnas Perempuan's 2021 Annual Records (CATAHU), in the personal domain, the most perpetrators of sexual violence were girlfriends with 1074 cases and this has been consistent for the past 3 years. Apart from boyfriends as perpetrators of sexual violence, biological fathers as perpetrators of sexual violence were 165. So when the perpetrator has paid compensation and is free of

[49] Hadibah Zachra Wadjo & Judy Marria Saimima, *supra* note 45 at 51.
[50] Eprina Mawati, Lies Sulistiani, & Agus Takariawan, "Kebijakan Hukum Pidana Mengenai Rehabilitasi Psikososial Korban Tindak Pidana Terorisme Dalam Sistem Peradilan Pidana" (2020) 5:2 belo 34–56.

course this will have the potential that the victim will experience repeated violence by the perpetrator.[51]

This restorative justice approach can be used as an approach to solving cases of violence only if the perpetrator is a child, because the child as the perpetrator here is actually also a victim of his environment which shapes his behavior. In addition, because children cannot think clearly which ones can be done and which ones cannot be done. This is in accordance with the mandate of the special law on juvenile justice. Komnas Perempuan also has views regarding restorative justice in handling cases of violence as in the excerpt of its position statement in response to the Coordinating Ministry for Political, Legal and Security Affairs in February 2021 as below:

"Considering that various practices in the name of Restorative Justice can put women, victims of violence, into multiple layers of injustice, Komnas Perempuan invites the Coordinating Ministry for Political, Legal and Security Affairs and all parties to continue to supervise the implementation of Restorative Justice, whether implemented through law enforcement institutions or in the midst of society. Also, to jointly carry out a more thorough study of Restorative Justice, including regarding efforts to deal with past human rights violations, to strengthen its concepts, policies and implementation guidelines. This strengthening is needed so that within the framework of Restorative Justice, in addition to building harmony among citizens, it also prioritizes fulfilling the rights of victims, especially women victims of violence, to truth, justice and recovery."[52]

VI. CONCLUSION

Based on the discussion above, it can be concluded that sexual violence is a crime that can have many negative impacts on victims. In addition to victims experiencing physical, material and social suffering and losses, victims also experience psychological suffering whose recovery takes quite a long time, even for a lifetime. Victims also still have to bear the burden of the negative stigma that society gives to victims. The restorative justice approach cannot be used as a way out for solving sexual violence cases because apart from not being able to protect

[51] Komisi Nasional Anti Kekerasan terhadap Perempuan (Komnas Perempuan), *supra* note 7 at 18.

[52] Komnas Perempuan, "Pernyataan Sikap Komnas Perempuan pada Pemberitaan Pernyataan Menkopolhukam tentang Restorative Justice (20 Februari 2021)", online: *Komnas Perempuan | Komisi Nasional Anti Kekerasan Terhadap Perempuan* <https://komnasperempuan.go.id/pernyataan-sikap-detail/pernyataan-sikap-komnas-perempuan-pada-pemberitaan-pernyataan-menkopolhukam-tentang-restorative-justice-20-februari-2021>.

victims, this will result in the emergence of thoughts or the notion that what the perpetrators did can be resolved with only compensation and the perpetrators are free to roam anywhere again. In addition, there is no guarantee of safety for the victim if there is a threat from the perpetrator. The concept of restorative justice should continue to be strengthened so that it prioritizes fulfilling the rights of victims of violence and obtaining their right to recover from trauma and social conditions. Because the interests of victims are the most important thing of all things.

More and more international examples of restorative justice are being used in cases of sexual violence because of their very specific characteristics and consequences. Restorative justice in cases of sexual violence can be an alternative solution as well as an additional effort for victims to achieve justice, together or separately from the conventional criminal justice process. It also provides perpetrators with mechanisms to pay a moral debt and to engage humanely and honestly with those most affected by crime in an effort to repair the damage, and offers the community an opportunity to work towards the reintegration of the perpetrator.

Although the use of restorative justice practices in cases of sexual violence is not without debate, challenges and controversy, and is certainly not sufficient for everyone, it has great potential to be implemented in Indonesia. Furthermore, the State must be committed to making sexual violence a national issue and enacting laws that can be used as the umbrella of national law which regulate the use of restorative justice to resolve sexual violence should not make the criminal charges cancelled. Because, the victims needs recovery both in physical and psychological aspects, the victims needs closure that the perpretators get the appropriate punishment, as well.

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Ecocracy Theory for Upholding Environmental Sovereignty: Restorative Justice Perspective

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ABSTACT: This paper aims to analyze two critical issues related to environmental sovereignty which are now globally harmed. First, does restorative justice also define the environment as a 'victim' of environmental harm which can be the result of both illegal or legal human activity? Second, what are the future prospects and challenges in enforcing restorative justice? Through the socio-legal method with a statutory, case, and comparative approach, this paper argues that the government collapses in interpreting the environment as the main 'victim' of environmental crime. The tangible evidence of damage in mining areas, land acquisition for palm trees, pollution, and marine waste in Indonesia shows that restorative justice has frequently been ruled out by the court. Otherwise, the court was focused on providing compensation for affected communities, without restoring environmental functions. At a philosophical and practical framework, restorative justice is better aligned with ecocentric and ecocracy approaches to redefining what constitutes environmental harm and environmental justice, through changing norms in the environmental sector.

Keywords: ecocracy, ecocentric, restorative justice, and environmental justice.

I. INTRODUCTION

Humans always make changes and developments in any way, one of which is in carrying out development using the abundant natural resources available in Indonesia. Natural resources are expected to continue to be enjoyed by the next generation. Basically, concern for the environment cannot materialize by itself if there are no regulations governing protecting the environment. Simultaneously with the existence of the notion of liberation or freeing humans from natural restrictions, in this case, coupled with the existence of the philosophical notions of individualism and also liberalism that has developed throughout the world which intends to liberate humans in thinking and opinion, supporting efforts are highly needed in upholding environmental sovereignty by enforcing the law.

In this regard, the issue of the environmental crisis that occurred can be examined using the socio-legal method with a law, case, and also comparative approach. One of the popular ideas in cases of critical environmental issues is restorative justice, the use of the concept of restorative justice is because the mechanism of this concept is a process or also a way that has the goal of recovering damage, loss, and recovering suffering. In studying environmental issues, the concept of restorative justice is combined with environmental sustainability. Environmental issues that occur and in their resolution apply restorative justice such as the recovery of environmental crimes, resolution of environmental problems, and corporate responsibility for pollution and environmental damage that is carried out due to the impact of the waste produced or damage to the work process. The format of the restorative justice concept offered can be in the form of reparation, restitution, and compensation. While in reality, the current enviromental tribunal still tends to focus on compensating the affected community, not focusing on restoring environmental functions that have been damaged. The purpose of writing this work is to uphold environmental sovereignty by using the ecocracy theory.

The purpose of this paper is to study environmental issues that occur a lot and also review government regulations in enforcing environmental sovereignty that has been undermined. This paper can be used as a space for alternative narratives, redefining regulations on the environment, and being more open in viewing nature as not an object of environmental damage but rather the environment as the subject of environmental damage.

II. METHODOLOGY

This study uses the socio-legal method to examine the intersection between the environmental laws in Indonesia and how the government deals with environmental cases. For this purpose, theoretical analysis that combined with analytical approaches based on the available primary and secondary sources best suited current research. The data was collected through an extensive

literature survey, library research, and internet news search. The goal of this study is to provide recommendations to improve environmental policy with a restorative justice perspective.

III. THE LEGAL CONCEPT OF 'ECOCRACY'

In legal science, it is known that the holders of sovereignty in the system of power are the sovereignty of God, the sovereignty of kings, the sovereignty of law, and also the sovereignty of the people[1]. Apart from the known sovereignty, there is a new theory of environmental sovereignty, or also known as ecocratic sovereignty. In the 2008 Ecuadorian constitution which provides constitutional rights to the natural environment, seen from the Ecuadorian constitution which makes the environment hold its rights and powers independently. Therefore environmental sovereignty is equivalent to human sovereignty, environmental sovereignty becomes its own subject apart from other sovereignty.

Ecocracy is closely related with ecocentric according to Jimly Asshiddiqie, as ecocracy seeks to put ecocentric principles into practice by prioritizing environmental protection in political decision-making[2]. In teoritical framework, ecocracy has define as a political system that prioritizes the protection of the environment and natural resources as a fundamental principle of governance. While ecocentrism, on the other hand, is a philosophical and ethical perspective that places intrinsic value on the natural world and ecosystems, rather than solely on human interests. Therefore, the concept of ecocentrism is the main principle for the implementation of the ecocracy policy because it is understood in the context of the balance of relations between God, Nature and humans[3]. It involves the integration of ecological considerations into all aspects of policy-making and aims to balance human needs with the health and sustainability of the planet.

The emergence of ideas about ecocracy theory in environmental sovereignty is a tool in generalizing the concept of democracy applied by humans[4]. So far, the

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[3] Elly Kristiani Purwendah, "THE EKO-TEOCRACY CONCEPT IN DISPOSAL SETTLEMENT OF OIL POLLUTION IN THE SEA BY TANKER SHIP", *Ganesha Law Review,* Volume 1 Issue 1, May 2019, p.21. Online: <https://ejournal2.undiksha.ac.id/index.php/GLR/article/view/15/17>
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subject of repairing environmental damage is only humans, humans who are called the people who are only used as the starting point and the only concern in repairing environmental damage. With the existence of the concept of democracy, namely freedom by humans themselves, it is in enjoying this freedom that ultimately makes humans act arbitrarily beyond their limits. In the concept of democracy, humans are free to act without control which also results in nature and the environment in general being victims. The concept of democracy applied by humans directly or indirectly makes humans exploit nature with all their efforts including using violence which is carried out only for the sake of pursuing economic benefits for themselves without thinking about the impact of the damage to nature that is caused.

Judging from the impact of implementing the concept of democracy, the implementation of ecocracy theory will be a counterbalance. With the implementation of ecocentric understanding, all actions taken will consider ecocentric perspectives. Likewise, government and state policies must involve ecocentric perspectives, where currently the government is only focused on fulfilling restorative justice for affected humans, and does not look at the affected environment. In fact, if the theory of democracy and ecocracy balance each other, a unified system will be created that reaches a point of balance or *equilibrium*.

In relation to the government and also the state in the system of state power, the environment must also have its own supreme sovereignty, if it is linked to the concept of sovereignty then the idea of environmental sovereignty will be formed, and in fulfilling the concept of sovereignty that already exists, namely the sovereignty of God which is studied by theocracy, Sovereignty of the people which is studied by democracy, and sovereignty of law which is studied by nomocracy, then environmental sovereignty is studied by ecocracy. Therefore, in realizing this idea, it is necessary to have assistance from scientists as well as legal experts as an effort to help raise a sense of awareness about the importance of the environment in sustainable development, human belief in sustainable development can be exemplified in the French constitution that was recently amended. And in the contents of the changes in 2005, the charter for the environment of 2004 contained in the preamble to the constitution parallels the declaration of the rights of man and of the citizen in 1789. With this the idea of environmental sovereignty which is the principle of sustainable development has a very high position, environmental rights also enter into the basic human rights to a healthy environment and also the rights of future generations to obtain a healthy environment.

IV. ECOCRACY IN UPHODING ENVIROMENTAL SOUVEREGEINTY

1. Restorative Enviromental Justice

The pathetic experience of various environmental damage cases in Indonesia being a proof that environmental restoration policies are still very challenging. Traditional environmental responses, such as regulations and enforcement, have often failed to effectively address environmental harm and social injustice, particularly in communities that are disproportionately affected by environmental pollution and degradation. Restorative environmental justice provides an alternative approach that addresses the root causes of environmental harm and seeks to repair the harm caused to affected communities. It is important to adress the environmental justice because oftenly it is impact on marginalised communities who bear the burden of environmental harms, while being at the same time at the frontline of environmental defence, and protection[5].

Restorative environmental justice is a framework for addressing environmental harm and social injustice by restoring ecological systems and repairing the harm caused to communities and individuals affected by environmental degradation. It involves recognizing and addressing the historical and ongoing impacts of environmental injustices, and empowering affected communities to participate in decision-making and restoration efforts. The principles that drive restorative justice such as relational definitions of harm, participation, harm reparation and healing[6].

This study refers to the development of the concept of restorative justice in the environment than solely applying restorative justice in environmental cases. In comparison to restorative justice, environmental justice places greater emphasis on the structural causes and consequences of uneven distribution of harms across time, space and demographics[7]. Restorative justice, focuses more on repairing harm caused to individuals or communities and restoring relationships between affected parties.

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[5] EFRJ, "Restorative Enviromental Justice", *Article,* online: <https://www.euforumrj.org/sites/default/files/2020-05/EFRJ_Thematic_Brief_Restorative_Environmental_Justice.pdf >

[6] *Ibid.*

[7] Miranda Forsyth, et.al, "A future agenda for environmental restorative justice?", The International Journal of Restorative Justice 2021 vol. 4(1), p.24. Online: <https://regnet.anu.edu.au/sites/default/files/publications/attachments/2021-04/A_future_agenda_for_environmental_restorative_justice.pdf>

2. Restorative Justice in Placing the Environment as Victims of Environmental Damage

The central question concerning the restorative environmental justice is how to identify the victims of environmental harm and who should have a voice in the restorative processes?. Restorative justice is believed to be an alternative way of enforcing criminal law on environmental damage which aims to make efforts to restore environmental damage that has already occurred. The opinion of a geographer, Preston, in his writing has content that offers an overview of the implementation of restorative justice on environmental issues. The issue of environmental damage occurs globally, but the focus of this paper is on national and local environmental issues. This paper places the environment as the main victim in environmental damage, currently the government sees the role of the environment solely as a resource to be managed and exploited or only as an entity that can be disposed of. The environment has the right to obtain restorative justice which must also receive compensation for the damage that has occurred. As stated by criminologist Rob White who argues that the environment is only a victim whose voice needs to be heard and also becomes part of restorative justice.

The concept of restorative justice must be able to become an identification tool for victims of environmental crime which is the main focus in determining policies or decisions later, if you look at all parties who are able to identify with the concept of restorative justice who become victims the same as the view in environmental victimology, even so in carrying out identification if the identification is carried out quickly then it will not provide accurate results for the victim, namely the environment. In Indonesia, the enforcement of environmental criminal law has been stipulated in the law on environmental protection and management. According to the expert's view, Aminudin, who in his view stated that the victims of environmental violations are not only humans but the environment is also the subject of environmental damage. The occurrence of environmental damage correlates with human activities that directly or indirectly use nature. In the concept of human restorative justice, humans are no longer only involved in becoming victims of environmental damage, especially the environment that is a victim. Aminudin also provides an explanation of four factors that are reasons for using the concept of restorative justice in resolving cases of environmental damage, namely:

a. The concept of restorative justice will involve a wide range of parties when compared to mediation between perpetrators and victims (environmental);

b. Using the concept of restorative justice will be more profitable because it will focus on solving problems with compensation and also restoring the environment that has been damaged by the perpetrator (human);

c. The concept of restorative justice will be more easily applied to the criminal justice process that will be carried out;

d. The concept of restorative justice has been widely used by various countries in resolving cases of environmental problems.

One of the environmental damage that occurs in Indonesia is environmental problems caused by oil palm plantations. The result of production from oil palm plantations is palm oil which is one of the largest commodities in Indonesia and is also capable of being the largest source of national income outside the tourism sector.[10] This has a positive impact on the Indonesian economy because the high selling price and also plantation land will open up jobs for the community. But apart from the positive impact resulting from the existence of oil palm plantations, this also turns out to have a negative impact on environmental damage. Such as expanding land for oil palm plantations which results in the conversion of forest areas which will result in land degradation, because this can reduce the level of soil productivity. Burning during land acquisition during deforestation will result in an increase in carbon gas emissions which will cause an increase in the greenhouse effect on the atmosphere.

The most obvious impact Indonesia faces from this palm oil business is forest loss due to forest burning for oil palm plantations. In the last 30 years, there has been significant forest shrinkage on the large islands of Indonesia. There have been various reports and studies documenting the extent of forest shrinkage in Indonesia. The forest area in Sumatra, Kalimantan, Sulawesi, Bali and Nusa Tenggara, and Java Island has decreased by 18%, 20%, 14%, 17%, and 9% over the years[8]. According to data from Global Forest Watch, an online platform that monitors deforestation in near real-time, Indonesia lost approximately 8.8 million hectares of primary forest between 2002 and 2019. By 2021, this figure has increased by losing 203ha of primary forest*, equivalent to 157Mt CO_2 emissions[9].

If this continues to happen, it will have a negative impact on humans and environmental damage. Efforts made by the government to deal with this are by issuing a presidential regulation regarding certification of sustainable oil palm plantations, and regulations made so that oil palm companies run plantations in accordance with sustainable principles that have been set by the government. When viewed from the government's efforts in dealing with this oil palm case, the

[8] Muhamad Aditya, "Guru Besar IPB University Ungkap Penurunan Luas Lahan Hutan Selama 20 Tahun", *Article,* Online:<https://fahutan.ipb.ac.id/guru-besar-ipb-university-ungkap-penurunan-luas-lahan-hutan-selama-20-tahun/> March 2022.
[9] Global Forest Watch, https://www.globalforestwatch.org/dashboards/country/IDN/

Indonesian government has yet to apply the concept of restorative justice to the oil palm plantation environment, this is evidenced by the government has not placed the environment as the subject of environmental damage that occurs.

Cases of settlement of environmental damage that occur locally can be seen in the case of limestone mining in the Jember area. The existence of land clearing was initially welcomed by local residents because they thought that opening mining land would create jobs for local residents, but in fact mining companies prioritized recruiting workers from outside the area, this is because mining companies are more concerned with skills and abilities. workforce according to company standards. Until February 2022 the mining was closed due to protests from local residents who felt disadvantaged because of mining activities which were considered due to mining causing river irrigation for local residents to experience siltation, local residents were also afraid that mining activities would cause natural disasters such as floods and disasters. landslide. The Jember district government together with law enforcers are making efforts to close existing mines and the Jember district government is trying to apply the concept of restorative justice to the environment by making efforts to close mining pits that have been banned from operating, the Jember district government is also appealing to local residents if there are foreigners who want to make efforts to open up mining area to be reported to the local government.

3. Citizen Lawsuit : An Alternative to Enhance The Environmental Justice

in 2019, a group of the "*Gerakan Anti Asap*" (GAAs) in Central Kalimantan filed a lawsuit against the government and several corporations responsible for causing forest fires and contributing to the haze crisis. [10] This kind of lawsuit has also been used in Indonesia to address the issue of air pollution, which is a major public health concern in Jakarta. The lawsuit alleged that the defendants had violated various environmental laws and regulations, and sought compensation for the harm caused to affected communities[11]. These two cases have represent the mechanism of citizen lawsuits that closely relate to environmental justice. However, the critical point is, why should "citizen lawsuit"? and how is a citizen's lawsuit can be realized an enviromental justice?

Environmental justice refers to the fair distribution of environmental benefits and burdens, where all individuals, regardless of their race, income, or social status,

[10] According to the supreme court decision number 3555/K/PDT/2018 in July 2019.
[11] Tempo, "Warga Menang Gugatan, Pemerintah Dinilai Lalai Urus Polusi Udara Jakarta", *Artikel*, selengkapnya dalam:<https://tekno.tempo.co/read/1514837/warga-menang-gugatan-pemerintah-dinilai-lalai-urus-polusi-udara-jakarta>

have the right to live in a clean and healthy environment. Often, marginalized communities, including low-income neighborhoods and communities of color, bear a disproportionate burden of environmental hazards like air pollution. This air pollution issue has been raised in Jakarta in recent months. Jakarta is home to more than 10.5 million people and consistently ranks among the world's worst cities for air pollution[12]. It means, they have once more encountered challenges arising from the escalating issue of air pollution. On August 13, 2023, measurements from entities like IQAir revealed that the city's air quality had reached a global low, raising significant alarm among the populace[13].

In the context of Jakarta, a densely populated and rapidly growing city, there may be instances where certain communities are more exposed to air pollution due to factors such as the location of industrial facilities, traffic congestion, and waste disposal sites. These communities might lack the political and economic power to influence decisions that affect their environment, leading to disparities in exposure to pollution and its associated health risks. So from 2019 until 2021, the people of Jakarta have fought their rights to clean air and health against the government through a citizen lawsuit. In a significant verdict decided in September 2021, the Jakarta court has determined that the Indonesian government did not adequately uphold the populace's entitlement to breathable air. This pivotal decision is anticipated by activists to compel authorities into addressing the well-known issue of haze in the city.

Through this lens, we can conclude that a citizen lawsuit can be an important tool for achieving restorative environmental justice, particularly in situations where government agencies or other entities have failed to adequately address environmental harm or protect affected communities. Citizen lawsuits empower individuals and communities to take direct action when governments or corporations fail to adequately address environmental issues. By holding responsible parties accountable through legal means, these lawsuits help ensure that environmental laws and regulations are enforced. Meanwhile, Legal actions taken by citizens can expedite the pace of environmental change. Lawsuits often compel governments and corporations to take action more quickly than traditional bureaucratic processes, especially when public attention is drawn to the issue. At its core, restorative justice which aims to shift the focus from punishment to healing and reconciliation was suitable for citizen lawsuit, even though it must be ruled by a trial.

[12] https://edition.cnn.com/2021/09/16/asia/jakarta-citizen-lawsuit-air-pollution-intl-hnk/index.html
[13] https://www.nowjakarta.co.id/city-of-smog-jakarta-air-pollution-2023/

V. CONCLUSION

Highlighting the significance of recognizing the environment as a victim of environmental harm and wrongdoing, alongside society is crucial. By adopting a restorative justice framework, the concept of environmental justice can be actualized. This involves comprehending the environment as the primary victim in need of restoration and rejuvenation, going beyond mere financial compensation for impacted citizens. The approach to restorative environmental justice extends beyond court-mandated mechanisms. It encompasses suitable litigation resolutions, including citizen lawsuits, to establish environmental sovereignty and justice for the well-being of global human existence in the times ahead.

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The French Administrative Court, see digitalcommons.wcl.american.edu /cgi/viewcontent. cgi.

The 2004 Charter for the Environment was ratified on 1 March 2005, and was later added

The Charter for the environment of 2004 .See www.conseil-constitutionnel.fr

www.cidce.org/pdf/Charte_ANGLAIS.pdf.

Exemption of Income Tax on Sharing of Collective Rights Over Land on Inheritance

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ABSTRACT: The transfer of property to certain heirs for the joint ownership of the object of inheritance must be transferred by way of the sharing of collective rights, which is based on the APHB. Article 4 paragraph (3) letter b of the Income Tax Law explains that the transfer due to inheritance is exempt from collecting income tax, but in its implementation it must be accompanied by a SKB of Income Tax issued by KPP Pratama. So that in order to get the income tax exemption on the transition, the heirs must apply for the issuance of SKB of Income Tax to KPP Pratama. However, KPP Pratama often refuses issuance of SKB of Income Tax for, this results in the heirs having to pay Income Tax on the transition This needs to find a way out, in order to achieve restorative justice. This study uses a normative juridical method with a statutory approach and a conceptual approach, and legal materials are analyzed using a deductive method. The results of this study indicate that the transfer of land rights by sharing of collective rights on inheritance should be exempted from income tax, because the distribution of collective rights is still included in the series of inheritance processes, so the transfer of income tax collection must be exempted. So that legal reform is needed to provide legal certainty in the exemption of Income Tax on the transition.

Keywords: Inheritance; Land; Tax; Income; Certainty

I. INTRODUCTION

Inheritance is a legal event that occurs when a person dies. This incident resulted in the transfer of assets belonging to the heir to the heirs in blood relations, marriage, and wills.[1] On this basis, the elements of inheritance are the presence of a person who dies, the existence of heirs who inherit, and the existence of inheritance which includes all assets and liabilities belonging to the testator. Inheritance law is closely related to the scope of human life, because every human being will experience a legal event called death. The legal consequences that then arise, with the occurrence of a legal event of a person's death, include the problem of how to manage and continue the rights and obligations of someone who dies.[2]

The individual inheritance system is an inheritance distribution based on individuals or private heirs to be owned individually. Every heir is free to use or transfer the inheritance obtained to other parties.[3] Inheritance is open at the time of the death of the testator, which results in the law of inheritance breaking, namely the transfer of inheritance to all heirs, which results in binding joint ownership.[4] So that to carry out legal actions against the object of inheritance must be carried out jointly by all heirs.[5] Bonded joint ownership often causes problems between heirs, especially if the object of inheritance is land, which has high economic value.[6] Therefore, to avoid disputes in the future, it is better to immediately distribute the inheritance of the object.

The transfer of inheritance in the form of land must be registered with the land office, in order to provide legal certainty over land ownership.[7] The registration of the transfer of land rights in the distribution of inheritance is based on Article 111 paragraph 5 PMNA/KBPN 16/2021 that the implementation of land registration must first be registered with all heirs together. Then the implementation of the distribution of inheritance is carried out by transferring the sharing of collective rights based on the APHB made by PPAT, which is

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1 Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, Jakarta, Indonesia: Sinar Grafika, 2020, P. 43.

2 Mohammad Yasir Fauzi, *Legislasi Hukum Kewarisan Di Indonesia*, Jurnal Ijtimaiya, Vol. 9, Issues. 2, 2016, P. 56.

3 Syahrul Mubarak Subeitan, *Ketentuan Waris Dan Problematikanya Pada Masyarakat Muslim Indonesia*, Al-Mujtahid: Journal of Islamic Family Law, Vol. 1, Issues 2, 2021, P. 117.

4 Syahril Sofyan, *Beberapa Dasar Teknik Pembuatan Akta (Khusus Warisan),* Medan, Indonesia: Pustaka Bangga, 2018, P. 5.

5 Herlien Budiono, *Kumpulan Tulisan Perdata Di Bidang Kenotariatan Buku Kesatu*, Jakarta, Indonesia: Citra Aditya Bakti, 2018, P. 336.

6 Tatik Arjiati dan Latifah Hanim, *Peran Notaris/PPAT Dalam Pembuatan Akta Pembagian Hak Bersama (APHB) Terhadap Pembagian Waris Yang Berbeda Agama Atas Tanah Dan Bangunan,* Jurnal Akta, Vol. 4, Issues. 1, 2017, P. 75.

7 Beatrix Benni, Kurniawarman & Annisa Rahman, *Pembuatan Akta Pembagian Hak Bersama Dalam Pengalihan Tanah Karena Pewarisan di Kota Bukittinggi,* Jurnal Cendikia Hukum, Vol. 5, Issues. 1, 2019, P. 66.

domiciled as evidence of the agreement of all heirs in terms of the distribution of the object of inheritance.[8]

Every transfer of land rights is always tax payable, both for the transferor and the party receiving the transfer. For those who transfer rights will be owed income tax, while for those who receive rights will be owed BPHTB. Income tax is imposed on the basis of income received from the transfer of land rights. In the transfer due to inheritance, the receipt of the object of inheritance is an additional asset for the heirs, but Article 4 paragraph (3) letter b of the Income Tax Law explains that the transfer due to inheritance is not an object of income tax, so that the receipt of inheritance is exempted from income tax. The exemption of the Income Tax must be based on the existence of SKB of Income Tax issued by KPP Pratama where the object of inheritance is based on Article 3 paragraph (1) letter a PDJP 30/PJ/2009. The issuance of this SKB of Income Tax is requested by the heirs in writing to KPP Pratama.

The application for the issuance of SKB of Income Tax can be accepted or rejected by KPP Pratama. If accepted, there are no problems, but when KPP Pratama refuses to issue a SKB of Income Tax, this results in the heirs having to pay income tax. Income tax payments are made to obtain an SSP of Income Tax which is then validated, and will be used as the basis for fulfilling taxation on the registration of transfer of land rights as required for the transfer of land rights as regulated in Article 103 PMNA/KBPN 16/2021. As the facts are illustrated as follows:

> The heirs receive an inheritance in the form of land, and the certificate of title has previously been transferred to all heirs for joint ownership. Then all heirs agree to carry out the distribution of inheritance by giving land rights to certain heirs, so they come to the Notary Office / PPAT for make APHB which is used as the basis for inheritance distribution. In the process of fulfilling the tax requirements, Notary/PPAT submits an application for the issuance SKB of Income Tax to KPP Pratama by attaching the necessary files. However, KPP Pratama officer actually refused the application for the issuance SKB of Income tax for no apparent reason, so in order to further process the registration of the transfer, the heirs paid the Income Tax Final for the transfer of land rights.

As a result of the refusal, the heirs have to pay 2 (two) taxes at once when transferring land rights, namely paying Income Tax and BPHTB, this is of course a double tax borne by the heirs. This causes legal uncertainty regarding

[8] I Gusti Bagus Yoga Prawira, *Tanggung Jawab PPAT Terhadap Akta Jual Beli Tanah*, Jurnal Ius, Vol. 4, Issues. 1, 2016, P. 65.

the exemption of income tax for heirs, besides that the heirs do not feel the benefits of this imposition. So that the imposition of income tax on the heirs does not meet the aspect of justice. Therefore, it is interesting to study the legal certainty of the exemption of income tax on the transfer of land rights by sharing of collective rights on inheritance. Based on this description, the formulation of the problem to be studied is:

1. What is the legal ratio of the imposition of income tax on the transfer of land rights by sharing of collective rights on inheritance?
2. Can the transfer of land rights by sharing of collective rights on inheritance be exempt from income tax?

II. METHODOLOGY

The methodology type of research used is normative juridical, with a statutory approach and a conceptual approach. Normative legal research review and analyze secondary sources of law, regulations written, and closely related to literature. The legal materials used are primary legal materials, secondary legal materials and non-legal materials. In the research conducted, the method of collecting the legal materials is library techniques, namely combining or unifying materials law by reading and recording relevant legal materials problems and then categorized systematically according to problems in research. And which the analyzed method by deductive analysis method.

III. *RATIO LEGIS* TRANSFER OF LAND RIGHTS IN THE DISTRIBUTION OF SHARED INHERITANCE RIGHTS SUBJECT TO INCOME TAX

Every country must have principles that are used as guidelines in implementing the government system, Indonesia holds the principle as a state of law (rechtstaat), as stated in Article 1 paragraph (3) of the 1945 Constitution. As a consequence, everything that applies and will apply must comply with the rule of law, and must be regulated in laws and regulations. The formation of these laws and regulations is through a process of political communication between the government and the people, so legislators must understand the general principles related to regulatory norms in the laws that are formed to provide legal certainty for the community.

The expected legal certainty is the regulation of norms clearly so as not to cause multiple interpretations, therefore every law formation must have clear legal considerations. In line with Bagir Manan's thought that legal considerations (ratio legis) is a legal thought that contains the reasons and objectives of the birth of a legal regulation. So it can be concluded that the formation of legislation must be in accordance with the philosophical values of its formation, which will be

included in the preamble of the law, so that the preamble is the spirit of the formation of the law.

The importance of the preamble is because the philosophical values in it will be described in the norms contained in the articles of the law. So that a well-constructed law will not cause a conflict of norms, a vacuum of norms, or a vagueness of norms, and will not create a gap between das sein and das sollen. The gap between the two is one of the sources of legal problems. In connection with the imposition of income tax on the transfer of land rights by sharing of collective rights on inheritance, the imposition of this income tax is very burdensome for the heirs. In order to understand the legal considerations for the imposition of taxes, it is necessary to first know the legal basis for the imposition of the tax.

As the development of Indonesian economy must be followed by policies that support this progress, including in the field of taxation. The position of tax policy is certainly very crucial in regulating the dynamics of tax policy in Indonesia. Tax law is often referred to as fiscal law, namely a collection of regulations covering the government's authority in tax collection.[9] Tax collection is an activity of taking taxpayers' wealth by the tax authorities which enters the state treasury which is used to finance state general expenditures and national development in order to improve people's welfare both materially and spiritually. To realize this, the state must explore sources of funds both domestically and abroad in the form of taxes.

Tax is the transfer of wealth from the people to the State Treasury to finance routine state expenditures and the surplus is used for public saving which is the main source for financing public investment. Taxes have a very important role for the state, especially in the implementation of development, because taxes are a source of state revenue to finance all expenditures including development expenditures.[10]

In addition, taxes are a very important source of state revenue for the government and national development. So that the Government places tax obligations as a manifestation of state obligations which are a means of financing the state in national development in order to achieve state goals. The importance and strategic role of the taxation sector in the implementation of government can be seen in the annual State Revenue and Expenditure Budget (APBN) submitted by

[9] Waluyo, *Perpajakan Indonesia,* Jakarta:, Indonesia: Salemba Empat, 2018, P. 101.
[10] Mustaqiem, *Perpajakan Dalam Konteks Teori dan Hukum Pajak Indonesia*, Yogyakarta, Indonesia: Mata Padi Press, 2019, P. 33.

the government, namely the increase in the percentage of tax contributions from year to year.[11]

Every tax collection by the state must have a legal basis. If the tax collection does not have a legal basis, the collection carried out by the State is an illegal levy.[12] The legal basis for the collection of taxes to the public by the state is regulated by a collection of laws and regulations regulated in Tax Law. Tax law is a collection of rules that regulate the legal relationship between the tax authorities and the people who are tax subjects. Tax collection by the tax authorities must be based on the law in order to ensure legal certainty for tax subjects.

Taxes function as a regular or regulated, namely taxes as a tool to regulate or implement government policies in the social and economic fields. Taxes have a function to regulate (Regular), in the sense that taxes can be used as a tool to regulate or implement state policies in the economic and social fields with a function to regulate taxes which are used as a tool to achieve certain goals that are outside the field of Finance and its regulatory function.[13]

Tax law must provide legal guarantees and strict justice, both for the state and society. The provisions of Article 23 paragraph (2) of the 1945 Constitution are the basis for tax collection by the state, which explains that the imposition and collection of taxes for state purposes may only be carried out based on the law. The main purpose of the tax law is to create justice in tax collection carried out by the state to the public as taxpayers.[14] In order for this goal to be achieved, in the regulation of legislation regarding taxation, it must meet the legal certainty aspect, the provisions of the tax law must not give any doubts.

Every tax collection by the state must have a legal basis, in order to provide protection to taxpayers in carrying out their tax obligations. The constitutional basis for tax collection in Indonesia is contained in Article 23 paragraph (2) of the 1945 Constitution which explains that the collection of taxes or other levies that are coercive for the needs of the state must be based on law. The goal is to fulfill the legal certainty aspect of the tax law, because tax regulations must not provide doubts that cause multiple interpretations. So that tax collection is expected to be able to realize justice for taxpayers. Due to the large role of the tax, it encourages the government to explore further the potential for taxes that can be received

[11] Enny Agustina, *The Implementation of Law Number 6 Year 2014 on Village Government,* International Journal of Innovation, Creativity, and Change, Vol. 9, Issues 11, 2019, P. 104.
[12] H. Bohari, *Pengantar Hukum Pajak*, Jakarta, Indonesia: Rajawali, 2019, P. 67.
[13] Enny Agustina, *Hukum Pajak Dan Penerapannya Untuk Kesejahteraan Sosial*, Jurnal Solusi, Vol. 18, Issues 3, 2020, P. 407.
[14] H. Bohari, *Op Cit.*, P. 35.

from the community.[15] One source of tax that has a big role in state revenue is Income Tax.

Income Tax is a tax imposed on tax subjects on income received or earned in a tax year. Income is any additional economic capacity that is obtained and adds to the wealth of the taxpayer. Thus, the income can be in the form of business profits, honorarium salaries, gifts and so on.[16] Based on Article 4 paragraph (1) of the Income Tax Law, income tax is imposed on income receipts, namely any increase received by the taxpayer, both from Indonesia and abroad that can be consumed or increase the taxpayer's wealth.

As the legal basis for the imposition of income tax is the Income Tax Law and in accordance with the provisions of Article 16 paragraph (1) of Law no. 17 of 2000 concerning Income Tax, the definition of income tax is a tax imposed on tax subjects on income received or earned in the tax year. Income tax is a tax levied on the income of an individual, company or other legal entity. Income taxes can be applied progressively, proportionally, or regressively.

The purpose and objective of the imposition of income tax are as a function of the source of state revenue or budgetary, namely the government tries to make as much money as possible in the state treasury. Next is the function of regulating or regulated, namely taxes as a tool to regulate and implement government policies in the social and economic fields and achieve certain goals outside the financial sector.[17] The subject of income tax is anything that has the potential to earn income. If the Tax Subject has fulfilled his tax obligations objectively or subjectively, he is called a Taxpayer. According to Article 2 paragraph (1) of the Income Tax Law, those categorized as tax subjects are: 1). private person; 2). Undivided inheritance as a unit; and 3). Body.

While the object of income tax is income. Based on the understanding of income above, income as an object of income tax is defined in a broad sense, namely all economic capabilities that can be consumed or increase the wealth of the taxpayer in any form.[18] Which has been qualified in Article 4 paragraph (1) and Article 4 paragraph (2), what income is the object of income tax. Meanwhile, an income that is not classified as a tax object is regulated in the provisions of Article 4 paragraph (3) of the Income Tax Law.

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15 Niru Anita Sinaga, *Pemungutan Pajak dan Permasalahannya di Indonesia*, Jurnal Ilmiah Hukum Dirgantara Vol. 7, Issues. 1, 2016, P. 143.

16 Adrian Sutedi, *Hukum Pajak*, Jakarta, Indonesia: Sinar Grafika, 2013, P. 51.

17 I Ketut Gede Purnayasa, Ida Ayu Putu Widiati, & Luh Putu Suryani, *Pengenaan Pajak Penghasilan (PPh) Atas Peralihan Hak Atas Tanah dan/atau Bangunan*, Jurnal Preferensi Hukum, Vol. 2, Issues 3, 2021, P. 519.

18 Nadia Githa Wijaya, I Putu Gede Seputra, & Luh Putu Suryani, *Pengenaan Pajak Pada Perjanjian Pengikatan Jual Beli Hak Atas Tanah*, Jurnal Analogi Hukum, Vol. 3, Issues 1, 2021, P. 6.

The meaning of income adheres to the meaning of income in a broad sense, because the tax imposed on an income does not take into account the existence of an income from a particular source, but the meaning is broader, namely on any additional economic capacity. This meaning is considered to be the most relevant indicator to measure the ability of taxpayers to participate directly in assisting the income of the government. Income that is the object of income tax consists of 2 types, namely, final income tax which is the imposition of taxes at a certain rate on the income received, and the imposition when the taxpayer receives income.[19] Meanwhile, non-final income tax is a tax with a general rate and the imposition is accumulated at the end of the tax year together with all income received in one tax year.[20] In addition, there is also income that is not classified as an object of income tax, so the income received is not subject to income tax.

One of the non-tax objects is inheritance. Inheritance is a legal event that occurs when a person dies, resulting in the transfer of assets that originally belonged to the testator to become the property of the heirs left behind. Settlement of rights and obligations from the legal event of a person's death is regulated in inheritance law.[21] Inheritance law is a series of legal provisions to regulate the status of assets left behind by someone who dies and regulates the transfer of assets left by someone who dies.[22] The distribution of inheritance to the heirs is regulated by the inheritance law that applies to the heir. Inheritance Law is one of the private laws, as well as inheritance law is part of family law which plays a very important role, even defining and reflecting systems and forms laws that apply in a society, because the law of inheritance is a law that is closely related with the scope of human life socialize.[23]

The determination of the inheritance law system that applies to the testator is an implication of the absence of legal unification regarding the regulation of inheritance law in Indonesia. Then the distribution of inheritance in inheritance is generally divided by the heirs themselves according to their own will and desires by taking into account the parts that have been determined by the civil law of inheritance which is used as a benchmark.

Inheritance has elements that must be met in order to be called an inheritance event. Inheritance must-have elements of heir, inheritance, and heirs. The heir is the person who inherits the inheritance. Inheritance property is a property that is inherited. Meanwhile, the heir is the person who receives the inheritance.

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19 Waluyo, *Op. Cit.*, P. 103.

20 *Ibid.*

21 Erman Suparman, *Hukum Waris Indonesia*, Bandung, Indonesia: Refika Aditama, 2018, P. 1.

22 Surini Ahlan Sjarif & Nurul Elmiyah, *Hukum Kewarisan Perdata Barat Pewarisan menurut Undang-Undang*, Jakarta, Indonesia: Kencana, 2006, P. 11.

23 Mohamad Aminuddin, *Penetapan Ahli Waris dan Pembagian Warisan*, Jurnal Binawakya, Vol. 13, Issues 6, 2018, P. 1293.

However, if at the time the testator dies, the heirs are present and can act freely on their property, but have not made details of the inheritance, and then changes that occur in the condition of the inheritance make it impossible to comply with statutory regulations. In detailing the inheritance, the separation of the inheritance must be started by making an accurate report regarding the inheritance as left by the testator, regarding the changes that have occurred in this regard since that time, and regarding the situation at that time. To confirm the truth of the report, before a notary, an oath must be sworn in by the person or persons who retain control of the undivided inheritance.

Bonded joint ownership of the object of inheritance if it is in the form of land, which has a high economic value. In order to avoid disputes over the object of inheritance, the distribution of inheritance must be carried out immediately. The distribution of inheritance in the form of land, and the transfer of rights must be carried out by registering the transfer of land rights. The registration of the transfer of land rights must be accompanied by a deed made by PPAT, namely the Deed of Sharing of Collective Rights. APHB is domiciled as proof of the agreement between joint rights holders regarding the distribution of joint rights, which results in the transfer of the status of joint ownership of land to the individual rights of one of the heirs.

Joint ownership is a condition where a property right is owned by more than one person, and has an impact on the authority to act on the property rights owned.[24] Ownership of the inheritance left by the testator is joint ownership which is bound. Joint ownership of inherited assets should immediately be carried out in the distribution of inheritance, in order to clarify the ownership of the rights to the object, especially if the object is land. That legal consequences is the transfer of land rights to the heirs.

The transfer of rights is a legal act that intends to transfer the rights to a movable or immovable object to another person. In relation to land, the land is transferred from the property that transfers to the person who receives the transfer. The regulation regarding the transfer of ownership rights to land is regulated in the provisions of Article 20 paragraph (2) of Law Number 5 of 1960 concerning Basic Agrarian Regulations (hereinafter referred to as the Basic Agrarian Law) that an ownership right on land can be transferred or transferred to a third party. Next on Article 28 paragraph (3) and Article 35 paragraph (3) also stipulates the same thing that a Cultivation Right and Building Use Right can be transferred or transferred to another party.

The purpose of the transfer of land rights is to transfer land rights from one party to another which is carried out legally. It is said to be valid when a legal act of

[24] Herlien Budiono, *Loc. Cit.*.

transferring land rights is carried out in accordance with existing regulations.[25] Based on PP 24/1997 every transfer of land rights must be registered at the land office. The purpose of holding land registration is, first, to provide protection and legal certainty for land rights holders. Second, to provide information to interested parties so that they can easily obtain data related to registered land. Third, for the orderly implementation of land administration.

Every registration of transfer of land rights based on Article 37 paragraph (1) PP 24/1997 stipulates that it must be accompanied by a deed made by the authorized PPAT as proof of the existence of legal action on the transfer. In connection with that, PPAT authority in assisting the community regarding legal actions against land rights based on Article 2 paragraph (1) PP 24/2016 explains that PPAT is authorized to make a deed that is used as the basis for registering changes in data due to legal actions against land rights. PPAT deed is a deed made by PPAT as evidence that certain legal actions have been carried out regarding land rights. The deed in question consists of 8 types of deeds as the basis for the following legal actions: 1). Buying and Selling; 2). Exchange; 3). Grants; 4). Entry Into the Company (Inbreng); 5). Sharing of Collective Rights; 6). Granting Power to Impose Mortgage Rights; 7). Granting Mortgage Rights; and 8). Granting of Building Use Rights/Use Rights on Land Ownership Rights

The transfer of assets as a result of this inheritance will not be subject to income tax as stipulated in Article 4 paragraph (3) letter b of the Income Tax Law, because inheritance is not an object of income tax. So that the transfer due to inheritance in any form will not be subject to income tax. If the object of inheritance is land, it is further regulated in PP 34/2016 regarding the imposition of income tax on income on the transfer of land rights.

In PP 34/2016 it is explained that any income receipts from the transfer of land rights will definitely be subject to a final income tax of 2.5% from NPOP. This income tax is imposed on the party who transfers the rights, on the basis of receipt of income from the transfer. If the land rights transferred are inheritance, then this transfer is excluded from collecting income tax based on Article 6 letter d of PP 34/2016, referring to Article 4 paragraph (3) letter b of the Income Tax Law which explains that inheritance receipts are not tax objects. However, in order for the heirs to be exempted from income tax on the transfer of land rights due to the inheritance, it must be accompanied by a SKB of Income Tax issued by KPP Pratama. In order to get SKB of Income Tax, the heirs must apply for its issuance to the KPP Pratama.

[25] Rofiqah Rahim & Sudjito, *Aspek Yuridis Pendaftaran Peralihan Hak Atas Tanah Karena Pewarisan*, Jurnal Ilmu Hukum, Vol. 9, Issues. 1, 2020, P. 64.

For this application, KPP Pratama conducts formal research on the completeness of the file and the suitability of the application with the type of transition that is exempted from Income Tax as regulated in Article 6 PP 34/2016. Based on this research, KPP Pratama can accept or reject the application for issuance of SKB of Income Tax. If the application is accepted, the Head of KPP Pratama will issue an SKB of Income Tax. However, if the application is rejected, the heirs will not have a SKB of Income Tax as the basis for the exemption of Income Tax on the transfer of land rights.

There are 3 (three) types of registration processes for the transfer of land rights due to inheritance at the land office, namely: 1). Transfer to joint heirs (Article 111 paragraph (4) PMNA/KBPN 16/2021); 2). Sharing of collective rights (Article 111 paragraph (5) PMNA/KBPN 16/2021), and 3). Will grant (Article 112 PMNA/KBPN 16/2021).

In the transfer of rights due to inheritance, registration of the transfer of land rights to all heirs must be carried out jointly first, this has implications for the inclusion of the names of all heirs on the certificate of rights. Then if you want to carry out the distribution of inheritance, testamentary grants or other legal actions, it must be carried out jointly by all heirs.

In the transition due to the distribution of inheritance, based on Article 111 paragraph (3) PMNA/KBPN 16/2021 Jo. Article 42 paragraph (5) of PP 24/1997 explains that after the transfer of all heirs is carried out, then the sharing of collective rights is carried out based on the PPAT deed which contains an agreement between all heirs regarding the sharing of collective rights. Therefore, after the opening of the inheritance and the sharing of collective rights to the object of inheritance, the transfer of land rights must be carried out 2 (two) times. The first is the transfer of rights from the name of the heir to all the names of the heirs together. Then the transfer is carried out in the sharing of collective rights to certain appointed heirs.

However, the norm in Article 4 paragraph (3) of the Income Tax Law and its explanation jo. Article 6 letter d of PP 34/2016 along with its explanation only stipulates that income that is excluded from collecting income tax is a transition due to "inheritance", but explains further about the qualifications of a transfer due to inheritance. This resulted in the Head of KPP Pratama being able to interpret differently the meaning of inheritance in the article, which had implications for the rejection of the application for SKB of Income Tax on the transfer of land rights by sharing of collective rights. If the application for the issuance of SKB of Income Tax is rejected, the heirs in order to fulfill the tax requirements in the registration of the transfer of land rights must pay Income

Tax of 2.5% on the NPOP, to obtain the SSP Income Tax which is then validated by the KPP Pratama which is used as the basis for fulfilling the tax requirements. . On this basis, the implementers of the law impose income tax on the heirs of the transition.

Then in order to understand the intent and purpose of the legislator to collect the tax, it is necessary to review the legal considerations of the relevant laws. The formation of a law cannot be separated from the preamble contained therein, this is because the legislators express the philosophical idea of the application of a rule in the preamble. So the preamble plays a role as a spirit in the formation of the law. The philosophical values contained in the preamble will be described in the norms set forth in the articles of the law. The philosophical element is defined as the aims and objectives that describe the regulation taking into account the legal ideals which include the philosophy of the Indonesian nation which is sourced from Pancasila and the Preamble to the 1945 Constitution.

With regard to income tax, the philosophical value of the Income Tax Law that underlies the collection of income tax on taxpayers is to create welfare for its people, as mandated by the Preamble of the 1945 Constitution, namely to promote the general welfare. In order to achieve a prosperous community life requires substantial financing, therefore the state must carry out tax collection. Tax collection is already a condition qua non (absolute requirement) for the addition of state finances in several developed countries.[26]

With regard to inheritance, the receipt of inheritance by the heirs is indeed an additional economic capability that increases the wealth of the heirs as taxpayers, so the transfer of assets is logical to be subject to income tax. This imposition serves to support state financial income in securing increasing state revenues which are used to finance state general expenditures and national development, with the aim of achieving general welfare.

However, the imposition of income tax on the transfer of land rights in the distribution of shared inheritance rights is very burdensome for the heirs, because they will be burdened with double taxes. Because basically they have been levied BPHTB on the basis of receiving their land rights, then the state should be sufficient in collecting the additional economic capacity of the heirs. However, with the collection of Income Tax also at the transition, it certainly does not provide benefits to the community, especially for people with middle to lower economic class. Therefore, although the state has logical considerations in collecting income tax from heirs, it must also pay attention to aspects of the benefits felt by the heirs.

[26] H. Bohari, *Loc. Cit.*

IV. EXEMPTION OF INCOME TAX ON THE TRANSFER OF LAND RIGHTS BY SHARING OF JOINT INHERITANCE RIGHTS

Legal considerations of income taxs collecting on the transfer of land rights by sharing of collective rights are considered logical, in order to support state financial income which aims to achieve the greatest possible general welfare. The content of Article 4 paragraph (3) of the Income Tax Law which regulates the exemption from the imposition of income tax on certain income does not contain criteria regarding sharing of collective rights, but in letter b of the same article it only states income receipts due to inheritance including income excluded from income tax. So that its implementation, requests for the issuance of SKB of Income Tax by heirs to sharing of collective rights because the heirs are rejected by the head of KPP Pratama, because the transfer of land rights by sharing of collective rights is not strictly regulated either in the Income Tax Law or in its derivative regulations.

Collection of income tax on the transfer of land rights by sharing of collective rights on inheritance is due to the rejection of the application for the issuance of SKB of income tax, so that in order to process the transfer of land rights at the land office, the heirs pay Income Tax in order to obtain a validated SSP of income tax as proof of fulfilling their tax obligations. So this causes the heirs to be burdened with double taxes on the transfer of land rights by sharing of collective rights on inheritance. Basically, the sharing of collective rights is a condition of ending undivided matters involving two or more people over joint ownership of objects. The purpose of the implementation of the separation or distribution of joint rights is to end the undivided situation.[27] This results in the person who is distributed a material right will get full authority over the object to carry out legal actions, both management and ownership.

The sharing of collective rights based on Article 573 BW explains that every division of a material right owned by more than 1 (one) person must be carried out based on the rules regarding the distribution of inheritance. In inheritance based on Article 1652 BW, it is regulated that the methods of inheritance distribution and the rights and obligations that will be issued are determined by the heirs who inherit. Therefore, the distribution of joint rights can be carried out when the parties in the joint ownership intend and agree to end the joint ownership.[28] So that to end the undivided state of an object, it must be based on the will and agreement of all parties, in terms of inheritance it must be agreed upon by all heirs.

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[27] Herlien Budiono, *Loc. Cit.*
[28] *Ibid.*

The sharing of collective rights must be based on a notarial deed that explains the agreement regarding the separation and distribution of all objects. If the object is in the form of land, based on Article 51 PP 24/1997, the distribution must be based on the PPAT deed to confirm the agreement of the joint rights holders regarding the distribution of the joint rights. The deed used as the basis for the transfer is based on Article 136 paragraph (1) letter b PMNA/KBPN 16/2021 that the registration of the transfer of land rights by sharing joint rights must be based on the PPAT deed with a form of the Joint Rights Sharing Deed (APHB). APHB is domiciled as the basis for an agreement between all heirs as joint rights holders to give or surrender their rights to certain heirs who are appointed to receive rights to the land.

The agreement of all heirs to the APHB is an element of an agreement on the implementation of the transfer of land rights, so the implementation of the transfer of land rights is a legal act. Soeroso explained that a legal action is any act desired by a legal subject that gives rise to rights and obligations for them, and as a result is regulated by law.[29] heirs as joint rights holders that give rise to rights and obligations for them. However, even though the sharing of rights with inheritance is a legal action carried out by the heirs, this transition is still classified as a series of legal events from inheritance.

Because based on Article 1083 BW it is regulated that the heirs who receive the distribution of inheritance are considered to inherit directly from the heirs, so that the transfer of rights occurs legally at the time the inheritance is opened, namely when the heir dies. Then based on the Letter of the Minister of Agrarian Affairs/Head of the National Land Agency No. 600-1561 On April 21, 1999, it was explained that the implementation of sharing collective rights on inhertance must be based on the APHB, but the deed did not result in the transfer of rights but only confirmed the agreement of the parties on the distribution of inheritance, while the transfer of rights occurred when the inheritance was opened. So that this emphasizes of the sharing of collective rights on inheritance is a series of inheritance events.

Therefore, the transfer of land rights by sharing of collective rights on inheritance should be interpreted as the transfer of land rights due to inheritance, even though the Income Tax Law does not specifically regulate. As a result, any transfer of land rights by sharing of collective rights on inheritance must be exempted from income tax as stipulated in Article 4 paragraph (3) letter b of the Income Tax Law jo. Article 6 letter d PP 34/2016. So for every application for issuance of SKB of Income Tax on the transfer of land rights by sharing of collective rights on inheritance, it must be accepted and approved by the Head of

[29] R. Soeroso, *Pengantar Ilmu Hukum,* Jakarta, Indonesia: Sinar Grafika, 2020, P. 291.

KPP Pratama with the application notes and attachments completed, and KPP Pratama issues SKB of Income Tax which will be used by the heirs as proof of the exemption of Income Tax on the transfer of land rights at registration of the transfer to the land office.

V. CONCLUSION

Acceptance of the object of inheritance in the sharing of collective rights is an additional economic capability received and increases the wealth of the heirs. So that the implementers of the law in collecting income tax on the transfer of land rights by sharing of collective rights on inheritance are considered logical. to support state financial income as much as possible aimed at achieving general welfare. However, from the heir's perspective, this is very burdensome, because they will be burdened with double taxes on the transition, namely paying Income Tax and BPHTB.

Whereas based on the concept of shared rights distribution, the transition process through the sharing of collective rights is still included in the series of inheritance. Although the process of sharing of collective rights is a legal action for the heirs to hand over land rights to certain heirs, it is stated in the APHB. So that the transfer of land rights by sharing of collective rights on inheritance must be interpreted as a transition that is exempt from collecting income tax as referred to in Article 4 paragraph (3) letter b of the Income Tax Law. Therefore, the heirs who request the issuance of SKB of Income Tax for the transfer of land rights by sharing of collective rights on the inheritance must be accepted, and the Head of the KPP Pratama must issue SKB of Income Tax.

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Principles of Restorative Justice on Land Dispute Settlement in the Perspective of Fair Legal Certainty

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ABSTRACT: The importance of land for human life contains a multidimensional meaning, both from an economic, political, cultural and religious magical standpoint. The importance of land for human life and for a country is regulated constitutionally in Article 33 paragraph (3) of the 1945 Constitution which was passed down to Law Number 5 of 1960. Given that the position of land is a valuable object in society, it is certain that it is prone to disputes or individual disputes within society. in terms of civil, criminal and administrative because all try to own and control. Disputes can occur due to an agreement, ownership, transfer of rights or due to expropriation and forgery. Thus giving rise to disputes and conflicts, both horizontal and vertical conflicts. The interesting legal issues to be studied in this paper are 1). What is the purpose of resolving land disputes in the perspective of the principle of fair certainty? and 2). How is the application of the principle of fair certainty in resolving land disputes? 3) How will land dispute resolution be arranged in the future? To explain and analyze these legal issues, the author uses a normative juridical method with a statutory approach and a conceptual approach, which is related to disputes with criminal elements that can be resolved with a restorative justice approach. The legal facts that occur regarding the settlement of land disputes that have not been resolved by the general court give rise to the perception that they do not provide certainty and justice so that the community does not get benefits. It is hoped that there will be a land dispute settlement model that places the principle of fair certainty as a principle that complements the simple, fast and low-cost principle. The existence of a special land court as a complement to the justice system in Indonesia which is formulated in the 1945 Constitution can be realized.

Keywords: Dispute resolution, fair certainty, restorative justice approach

I. INTRODUCTION

Land as a gift from God Almighty that is given to mankind, as well as being a basic human need, both from birth to death, humans need land for a place to live and a source of life. Because land has economic, social, cultural, political, and ecological dimensions (Bernhard Limbong, 2012). The importance of the existence of land causes many people to try to own it, and it is part of human rights protected by international law and national law.

So the position of land for humans is clear, even though in various cases it raises disputes, conflicts and land matters. These three can arise from three sides, namely the civil, administrative and criminal sides. In this regard, it is important for someone to own land to be regulated in laws and regulations aimed at protecting land rights (Bhim Prakoso, 2021).

Recognizing the importance of land for humans and the state, the founding fathers of the nation stated in the constitution, namely Article 33 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, stating that: "*Earth and water and the natural resources contained therein are controlled by the State and used to the fullest extent possible. prosperity of the people*". As a follow-up to this Article, especially regarding land, Law Number 5 of 1960 concerning Basic Agrarian Regulations, which became known as the UUPA, and MPR Decree No IX/2001 were issued.

UUPA is a breakthrough in efforts to guarantee justice and legal certainty, order and social welfare related to land regulations that apply in Indonesia. Considering that in the era of globalization the position of land is very important for life, such as in planning a development or other use that requires the involvement of individuals in it so that the function of land ownership by individuals is with the existence of legal rules that protect it, then this can be said to be legally valid (Isna Dwi Fatatun , 2016).

Even though the policy cannot be separated from the politics of agrarian law, the passing of the UUPA does not mean that problems in the land sector have disappeared (Hairan and Rahmat Datau, 2020), giving rise to the perception that regulations are considered not to provide certainty and protection for the community. Land issues can be grouped into 4, namely problems related to the recognition of land ownership, transfer of land rights, assignment of rights, and occupation of former private land. Meanwhile, from a criminal point of view, materially in the Criminal Code it is categorized as a land crime with elements of forgery of documents, land grabbing.

There are also widespread violations of spatial planning which often lead to conflicts between the community and the government, improper use of land can

be categorized as a crime. Based on data from the ministry, there are indications that these violations occurred in 38 regencies/cities in Sumatra, 25 regencies/cities in Java-Bali, 15 regencies/cities in Kalimantan, 18 regencies/cities in Sulawesi, 10 regencies/cities in Nusa Tenggara, and 15 regencies / Cities in Maluku and Papua. Spatial audit activities from 2015-2020 are a series of processes to check the suitability of spatial use activities with spatial plans, spatial use permits, and permit requirements, as well as access rights to public property areas, as well as their impact on changes in spatial function, losses incurred, and death of people.

This happens because of the increasing complexity of human interests in a civilization, so that the higher the potential for disputes between individuals and between groups within a certain social population. In the realm of law it is said that a dispute is a problem between two or more people where both of them dispute a certain object. This happened because of a misunderstanding or difference of opinion/ perception between the two which then gave rise to legal consequences for both of them.

This condition has very serious consequences for the pattern of relations between land and humans, and the relationship between humans and humans who are land objects (Erman Rajagukguk, 2000). The emergence of disputes, conflicts and land cases because the number and area of land that is not in balance with the needs of the community will give rise to competition among humans to acquire land, this results in many agrarian conflicts arising. (Iwan Setiawasan, 2018).

So far, the settlement process has used the courts, which has led to a position between winning and losing, where there are still deficiencies, so there is a need for a breakthrough with restorative justice in certain cases. This is because the settlement of litigation disputes in court takes a long time and is tiring starting from the District Court, High Court, maybe even up to the Supreme Court level. As well as requiring a lot of money and can disrupt the relationship of the disputing parties (Rachmadi Usman, 2012).

As the community's need for justice and welfare increases, dispute resolution through litigation is gradually felt to be less effective and costs quite a lot. So it is necessary to elect land cases which then apply the restorative justice model.To achieve fair certainty in its settlement. Considering that Indonesia is a constitutional state, law is placed as a rule in the administration of the state, government and society, which is part of the objectives of the law which include "*...opgelegd om de samenleving vreedzaam, rechtvaardig, en doelmatig te ordenen*" (placed to organize society peaceful, just, and meaningful) (Ridwan HR, 2011). That is, the goal of a rule of law is the creation of a state, government and social activities based on justice, peace and benefit.

The main causes of land disputes, conflicts and cases are due to the inequality of control, ownership, use and utilization of land and other natural resources, resulting in a sense of injustice and legal uncertainty in society. The orientation of national agrarian politics tends to side with big investors and marginalize the small people. Agrarian laws and regulations are sectoral, asynchronous and not harmonious, resulting in overlapping regulations. Because the government bureaucracy that manages agrarian affairs tends to be ego-sectoral, not solid and not synergistic (M. Aulia Reza Utama, 2017).

It turns out that there are still many land issues that have not been resolved and are even increasing, although some have been resolved, there are still many legal efforts being made by the community because certainty and justice have not been created. This legal issue is very interesting to study because there are still many land issues that have not been resolved and have not given the value of justice in society.

Regarding efforts to settle land disputes both at court and outside the court, they often encounter deadlocks and decisions through courts actually trigger new problems, so how important it is to form a land dispute settlement institution by inserting a model of restorative justice, so that the right concept of justice is created and can resolve land cases that put forward a sense of justice that is in accordance with the concept of law enforcement.

Based on the background that has been described above, the author is interested in examining more comprehensively in this article, the legal issues to be studied are:

1. What is the purpose of resolving land disputes in the perspective of the principle of fair certainty using a restorative justice approach?
2. How is the application of the principle of fair certainty in resolving land disputes using a restorative justice approach?
3. How will the settlement of land disputes be arranged in the future?

II. METHODOLOGY

The research method is essentially a series of scientific activities. research must use the scientific method to explore and solve problems or to find something true from facts. The type of research used in this study is normative legal research and refers to legal norms contained in laws and regulations and norms that exist in society. By using a statute approach and conceptual approach. In this article it is interesting to study the application of the concept of restorative justice which is used to settle land disputes that have a criminal element, especially in violations of land use that are not in accordance with spatial planning.

III. THE PURPOSE OF SETTLEMENT OF LAND DISPUTES IN THE PERSPECTIVE OF THE PRINCIPLE OF FAIR ASSURANCE WITH A RESTORATIVE JUSTICE APPROACH

So important is the meaning of land for human life, so that it is stated in Islamic teachings that it is believed that humans themselves come from the land and will return to the land. In everyday human life, there is not a little bloodshed caused by land ownership disputes, sometimes even a family can break up due to land disputes. "*In the Javanese ethnic law society, there is a well-known philosophy which states that no matter how much you cough up the earth, the yen needs to be sprinkled with starch (even an inch of soil needs to be defended to maintain it) death)*" (Showing Anshari Siregar, 2007). So that a temporary conclusion can be drawn that land disputes are not only from a civil and administrative perspective, but also that there is a criminal element in defending land rights.

Disputes or land matters in their settlement cannot be separated from the teachings of legal ideals (*Idee des Recht*), which consist of three elements which are divided proportionally, namely legal certainty (*rechtssicherkeit*), justice (*gerechtigkeit*) and expediency (*zweckmasigkeit*). So law enforcement must fulfill these three principles. The meaning of principle is something that forms the basis of thoughts or opinions and can also mean basic law.

The principles of general law are the basic norms which are translated from positive law and which are not ascribed by the science of law to originate from more general rules. Which prioritizes positive law in a society, so it should not be considered as a concrete legal norm, but must be seen as a general guideline for applicable law (Bhim Prakoso, 2022). So in land matters, legal certainty is needed, which cannot be separated from justice. So that it is seen whether a law has been perceived as fair or not.

The component of formal justice is related to the style of a legal system such as the rule of law and the rule of law, while the substantive component or material justice concerns social rights which characterize the political and economic order in society (Maidin Gultom, 2008). Formal justice, expressed in the application of dispute resolution procedures or decision-making procedures. The benchmark is obedience to procedural law (I Dewa Gede Atmadja, 2013). This means that formal justice is justice that occurs when a person commits an act in accordance with the expected procedure, where a person can voluntarily accept what has been done.

Thus we can see that the law does not only have to find a balance between various conflicting interests to get justice, but in essence it also has to get a balance between the demands of justice and the demands of order. or legal certainty. It is clear here, that law has an obligation to guarantee legal certainty in

society (Sukarno, Aburaera, et al, 2013). Legal certainty will direct the public to have a positive attitude towards state laws that have been stipulated. With the principle of legal certainty, people can be calmer and not experience losses due to violations of the law from other people.

Certainty is essentially the main goal of law, if there is no legal certainty, then the law will lose its identity and meaning, so the law is no longer used as a guideline for everyone's behavior. In the principle of legal certainty there should be no conflicting laws, laws must be made with a formulation that can be understood by the wider community. The definition of the principle of legal certainty is also related to the existence of regulations and their implementation.

In a law, legal certainty includes the first two things, legal certainty in the form of formulation of legal norms and principles that do not conflict with each other either from the articles of the law as a whole or in relation to others. article. other things that are outside the law. Second, legal certainty also applies to the implementation of legal norms and legal principles (Tan Kamelo, 2004). If the formulation of legal norms and principles already has legal certainty but only applies juridically in the sense solely for the sake of law, then such legal certainty will never touch the people. This opinion may be that legal regulations are called death penalty norms (doodregel) only as juridical ornaments in human life (M. Khozim, 2010).

The number of disputes, conflicts and land cases can in fact be a factor in not achieving people's welfare with certainty and justice. What exists is the occurrence of many disputes and disputes in the control, ownership, use and utilization of land. In fact, the occurrence of acts of occupying land or expropriation in the concept is extended not only to the yard. But occupying land in a very large area. This often arises when land conflicts occur. This land issue, of course, also involves a criminal act (straafbaarfiet), not merely being in a civil position. But as long as there is a criminal act that can be seen from his actions. Therefore, there needs to be an opportunity to "claim land disputes" which are regulated by a good mechanism. Crimes that occur, of course, cause losses both material and immaterial economic losses which involve a sense of security and peace in social life. (Romli Atmasasmita, 1997), (Erdianto Effendi, 2011) It can be said explicitly that crime is anti-social behavior.

Cases that often arise in society are the improper use of space resulting in violations of the law committed by the community. This condition will lead to sanctions. This can be interpreted as a response to criminal behavior that focuses on recovery from criminals. And the settlement of problems arising from crimes in which victims, perpetrators and society restore harmony between the parties. Meanwhile, restorative justice is one of the administrative sanctions in spatial

planning regulations, namely the restoration of spatial functions. The focus of this sanction is to restore or restore the function of space as it should have been before the violation was committed.

Meanwhile, restorative justice is one of the administrative sanctions in spatial planning regulations, namely the restoration of spatial functions. The focus of this sanction is to restore or restore the function of space as it should have been before the violation was committed. "So, sanctions are set to restore the function of space that has been violated so that the space is returned to its original function. Referring to the Government having issued Government Regulation (PP) Number 21 of 2021 concerning Implementation of Spatial Planning, to regulate provisions for restoring spatial functions.

The regulation states that restoration of spatial functions is an effort to rehabilitate space so that it can return to the functions set out in the spatial plan. The restoration must be carried out if it is proven that there has been a change in the function of the space caused by the use of the space. If it is not in accordance with the spatial plan, this is the responsibility of the violating party. In the explanation of this PP it is said, the restoration of the function of space is carried out within a certain period of time to ensure that the space can return to function according to the existing plan.

Based on the PP, it is possible to apply restorative justice if the community commits a violation related to the use of space that is not in accordance with the established spatial plan. With the process of stopping the prosecution based on restorative justice, the implementation of which is based on justice; public interest; proportionality; crime as a last resort and; fast, simple, and low cost. The purpose of closing a case is for the sake of law, one of which is done if there is already a settlement of a case outside the court (afdoening buiten process) using a restorative justice approach.

Restorative justice is carried out by pursuing peace efforts offered by the Public Prosecutor to Victims and Suspects without pressure, coercion or intimidation. Conciliation efforts are carried out at the prosecution stage, during the transfer of responsibility for the suspect and evidence (stage two) in which the Public Prosecutor acts as a facilitator. Peace efforts continued until a peace agreement was agreed between the two parties. So that certainty can go hand in hand with justice to become one of the basic values of human life.

Because Justice demands that each case must be weighed alone or Ius suum cuique tribuere. The essence of justice is an assessment of a treatment or action by studying it with a norm which according to subjective views exceeds other norms. Law should contain the value of justice, but the law itself is not

synonymous with justice because there are legal norms that do not contain the value of justice.

IV. APPLICATION OF THE PRINCIPLE OF EQUITABLE CERTAINTY IN SETTLEMENT OF LAND DISPUTES WITH A RESTORATIVE JUSTICE APPROACH

The concept of restorative justice or restorative justice is a model of a new approach in efforts to resolve criminal cases. In contrast to the existing system (traditional criminal system), the approach or concept of restorative justice or restorative justice focuses more on the direct participation of perpetrators, victims and the public in the process of settling criminal cases. Therefore, this popular approach is also known as the "non-state justice system" in which the role of the state in settling criminal cases is minimal or even non-existent. However, the presence of approaches or concepts of restorative justice or restorative justice is colored by various questions both theoretically and practically (Eva Achjani Zulfa, 2009).

The mechanism offered by the approach or concept of restorative justice emphasizes the concept of peace, the concept of "mediation" and the concept of reconciliation in which perpetrators, victims, law enforcement officials and the wider community participate directly in resolving criminal cases, of course, inversely proportional to or contrary to the traditional criminal justice system that has been in place for a long time and is still in effect today. This is motivated by the focus of attention and views on a crime and justice achieved on a settlement of a criminal case (Heru Susetyo, 2012). This concept can be applied in land disputes that intersect with criminal acts of land, especially with regard to spatial planning violations committed by the community.

Based on data obtained from the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, 6,621 cases of spatial use violations occurred in the 2015-2018 period. This number has the potential to increase until the end of 2019. The majority of violations, he said, were committed by legal entities, such as development not in accordance with spatial planning, no development permits to the closure of public access. Of the thousands of existing cases, ten of them indicated the potential for committing criminal offenses. One of them is the construction of an apartment project that is not in accordance with the detailed spatial plan (RDTR) in the Bandung area, West Java (kompas, 2019).

Braithwaite said that: Indonesia is a nation with wonderful resources of intracultural restorative justice. Traditions of deliberation (deliberation) decision by friendly cooperation and deliberation-traverse the archipelago. Adat law at the same time allows for diversity to the point of local criminal laws being written to complement universal national laws (Rufinus Hotmaulana Hutauruk,

2013). This opinion shows that the practice of solving problems with the approach or concept of restorative justice already exists in the culture or culture of the Indonesian nation.

The implementation of the concept of restorative justice in Indonesia can be started from the Supreme Court (MA). This is because the Supreme Court is a state institution that exercises judicial power and is the peak of the judiciary. This is regulated explicitly and clearly in various laws and regulations, for example the 1945 Constitution of the Republic of Indonesia; Law Number 48 of 2009 concerning Judicial Power, Law Number 14 of 1985 as amended by Law Number 5 of 2004 as last amended by Law Number 3 of 2009 concerning the Supreme Court. Thus, given that the Supreme Court is a state institution that exercises judicial power and is the pinnacle of the judiciary, it is appropriate for the Supreme Court to adopt or adhere to and apply the approach or concept of restorative justice (Edi Ribut Harwanto, 2021).

That restorative justice is a form of law enforcement towards a humane trial and there are already guidelines for implementing restorative justice in the general court environment, namely the Decree of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number 1691/DJU/ SK/ PS. 00/12/ 2020 December 22, 2020 Regarding Enforcement of Guidelines for the Implementation of Restorative Justice (Agus Widjojo, 2021)

Imprisonment is not the only punishment that can be given to perpetrators, but recovery of losses, the suffering experienced by victims is the main thing. The obligation to restore crime in the form of restitution and compensation as well as reconciliation and social unification is a form of crime in the concept of restorative justice. (Henny Saida Flora, 2017)

The perpetrators of crimes are considered to have no regard for the general welfare, security and property rights of others. Thus, on the basis of protection for citizens who are dealing with criminals, this is where the victim's position emerges as the party that is basically the most disadvantaged in relation to a crime, losing its role. In this context the definition of crime and the role of the state are different. The concept that crime is a violation of people and relationships between people and violations give rise to obligations and responsibilities, so the principles contained in restorative justice are: 1. Crime is a violation of human relations 2. Victims and society are the center of the justice process 3 The first priority in the justice process is to help victims 4. The second priority is to restore society as much as possible 5. Perpetrators who violate have personal responsibility to victims and to society for crimes that have been committed 6. It is the responsibility of all interested parties (stakeholders) to restorative justice through partnerships for action. 7. The perpetrator will

improve his competence and understanding as a result of his safeguards in restorative justice.

Restorative justice is expected to provide a sense of social responsibility to perpetrators and prevent stigmatization of perpetrators in the future. Thus the concept of restorative justice is expected to at least be able to limit cases that have piled up in court (even though they have not been resolved through out of court settlement) and can be used as a solution in crime prevention.

V. FUTURE LAND DISPUTE RESOLUTION ARRANGEMENTS

The philosophy adopted in the development of national law for approximately forty years is the concept of development law which places the role of law as a means of community renewal. In such a concept, the implementation of legal development has a function as a custodian of order and security, as a means of development, a means of enforcing justice, and a means of public education (Sunaryati Hartono, 2010).

Therefore, if in the implementation of development, law is interpreted as a means to achieve state goals, national legal politics must be based on a basic framework, namely: (Mahfud MD, 2006)

1. National legal politics must always aim at the ideals of the nation, namely a just and prosperous society based on Pancasila;
2. legal politics must be aimed at achieving state goals;
3. legal politics must be guided by the values of Pancasila as the foundation of the state, namely based on religious morality, respecting and protecting human rights without discrimination, uniting all elements of the nation, placing power under the rule of the people, and building social justice;
4. when linked to the legal ideals of the Indonesian state, legal politics must protect all elements of the nation for the sake of integration or national integrity, realizing social justice in the economy and society, realizing democracy (people's sovereignty) and legal sovereignty nomocracy, and creating religious tolerance based on civility and humanity;
5. The direction of legal development is not something that stands alone, but is integrated with the direction of development in other fields that require harmonization. Even though the direction of legal development is based on the outlines of ideas in the 1945 Constitution of the Republic of Indonesia, alignment is needed with the level of development of society that is envisioned to be created in the future. Legal development is not identical and should not be identified with the development of laws or regulations according to terms commonly used in Indonesia.

In relation to the matters mentioned above, the legal changes implemented in Indonesia should be directed towards creating more stable conditions, so that every citizen can enjoy an atmosphere and climate of order and legal certainty with the core of justice. It must also provide support and safeguards for development efforts to achieve prosperity, by way of codifying and unifying laws in certain fields by taking into account the growing legal awareness in society. For this reason, it is necessary to continue steps to compile legislation concerning the basic rights and obligations of citizens in the context of implementing Pancasila and the 1945 Constitution of the Republic of Indonesia. legal certainty. (Abdul Manan, 2009)

In cases of land disputes, especially spatial planning violations that fulfill the elements of a criminal act, the restorative justice system at least aims to restore/restore criminal acts committed by perpetrators with actions that are beneficial to perpetrators, victims and their environment, which involve them directly. in solving problems, and different from the way adults are handled, which will then lead to the goal of the crime itself. Restorative justice is harmonization between citizens, not punishment (Rise Karmilia, 2022).

Penal mediation in criminal law has a noble goal in resolving criminal cases that occur in society. Conceptually, said by Stefanie Trankle in Barda Nawawi Arief, the penal mediation that was developed departs from the following ideas and working principles (Barda Nawawi Arief, 2012): 1). Conflict Handling/Konfliktbearbeitung: The mediator's job is to make the parties forget about the legal framework and encourage them to get involved in the communication process. This is based on the idea that crime has created interpersonal conflict. Conflict is what the mediation process aims at; 2). Oriented to the process (Process Orientation/Prozessorientierung): Penal mediation is more oriented to the quality of the process than the results, namely: making the perpetrators of crime aware of their mistakes, conflict needs are resolved, calming victims from fear; 3). Informal Proceedings/Informalität: Penal mediation is an informal process, not bureaucratic in nature, avoiding strict legal procedures; and 4). There is active and autonomous participation of the parties (Active and autonomous participation/Parteiautonomie/Subjek tivierung): The parties (perpetrators and victims) are not seen as objects of criminal law procedures, but rather as subjects who have personal responsibility and the ability to act . They are expected to act of their own free will.

The main problem for imposing or implementing a restorative justice approach or concept in a legal system in general and in a criminal justice system in particular lies in the settlement mechanism offered by the approach or concept of restorative justice which is different from the settlement mechanism offered by the existing criminal justice system so that it is still difficult to accept.

A violation of criminal law is understood as a conflict between individuals that causes harm to the victim, society and the offender himself. Among the three groups, the interests of victims of crime are the main part, because the main crime is violating the rights of victims (Andrew Ashworth, 1993).

In relation to the issue of sentencing for land cases, what is demanded by the principle of balance is that sentencing must accommodate the interests of the community, perpetrators as well as victims. Punishment should not only emphasize one interest. Or, as Roeslan Saleh said, punishment cannot only pay attention to the interests of the community or the interests of the maker, or also only pay attention to the feelings of the victim and his family (Roeslan Saleh, 1987).

Restorative justice places a higher value on the direct involvement of the parties. The victim is able to restore an element of control while the perpetrator is encouraged to assume responsibility as a step in correcting the wrongs caused by the crime and in building his social value system. Community involvement actively strengthens the community itself and binds the community to values of respect and mutual love for one another. The government's role is substantially reduced in monopolizing the judicial process today. Restorative justice requires cooperative efforts from communities and governments to create conditions where victims and perpetrators can reconcile their conflicts and repair their old wounds (Daniel W. Van Ness, 2006).

In connection with the problems mentioned above, more generally, especially in reforming criminal law, including criminal and sentencing issues, including types of crimes, and more specifically regarding the drafting of a new Criminal Code, it cannot be separated from the idea/policy of developing a national legal system based on Pancasila. as the desired values of national life. This means that the renewal of the National Criminal Law should also be motivated by and oriented towards the basic ideas of Pancasila which contain in it a balance of values/ideas/paradigm, Religious Moral (Divinity), Humanity (Humanistic), Nationality, Democracy and Social Justice (Barda nawawi Arief, 2005).

VI. CONCLUSION

So far, the settlement of criminal cases using a restorative justice approach is the model most often used in human life. This model or system is in practice in various people's lives, when before the completion of a criminal case is taken over by the state or an influential interest group in this case. So restorative justice as an approach used to resolve criminal cases peacefully, of course by empowering the parties. Likewise, in resolving cases of spatial violations committed by the community, the settlement should be carried out peacefully.

This can be done with his willingness to provide compensation to the victim in order to get forgiveness from the victim. Settlement of cases of spatial violations with a restorative justice approach must be carried out by empowering the parties in criminal cases, namely the perpetrators, victims and the community. The parties are expected to be able to deliberate to reach a mutual agreement in order to resolve criminal acts of spatial planning violations that have occurred and through a restorative justice approach the settlement of criminal cases is expected to be beneficial for all parties (win-win solution) as also normalized in Government Regulations (PP) Number 21 of 2021 concerning Implementation of Spatial Planning

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Legal Protection of Community From Impacts of Mining Activities in the Region (Study in Mining Area of East Java Province)

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ABSTRACT: The activity of a mining activity in essence should not be a cause of "loss" for certain parties or the general public. Likewise natural resources should not be disturbed because it will eliminate the balance of the ecosystem, ecology which results in damage to nature/environment. Starting from this thought, there are several problems, namely as follows: What are the forms of impact of mining activities in the areas of the province of East Java. What are the causes of the impact of mining activities in the areas of the province of East Java. What is the model of legal protection for the community from the impact of mining activities in the areas of the province of East Java. This research is legal research that is normative in nature, namely by conducting studies and processing of research data based on legal aspects accompanied by legal theoretical studies supported by empirical facts in the field. This research is oriented towards dogmatic and theoretical content, with a normative juridical research type that refers to the interpretation of anticipation, namely research to answer a legal issue based on a rule and equipped with empirical research for normative analysis. Mining business activity is essentially a basic industrial activity, where its function is to provide raw materials for other industrial needs. The impacts of mining activities in the province of East Java include causing conflicts that arise in the midst of society between the community and mining entrepreneurs. Ecologically, the impact of mining also causes pollution, both water and air pollution, as well as environmental damage in the form of road damage. The causes of the impact of mining activities in the province of East Java, among others, due to weak supervision of the mining business, the AMDAL system that has not been maximized and also the lack of a technological system that can overcome problems in the field.

Keywords: Legal Protection, Community, Impact, Mining.

I. INTRODUCTION

Article 28 paragraph (1) of the 1945 Constitution, implies that the right to a good and healthy environment does not only refer to the physical environment, more than that the right to a proper and clean environment is the essence and existence of human beings to ensure that the fulfillment of the right to human life essentially. For the right to a good and healthy environment in national law, it is expressly stated in Article 65 paragraph (1) of Law Number 32 of 2009 concerning Environmental Protection and Management, stating that: 1). Everyone has the right to a good and healthy environment as part of human rights; 2). Everyone has the right to receive environmental education, access to participation, and access to justice in fulfilling the right to a good and healthy environment; 3). Everyone has the right to submit suggestions/and/or objections to business plans and/or activities that are expected to have an impact on the environment; 4). Everyone has the right to play a role in protecting and managing the environment in accordance with laws and regulations; and Everyone has the right to file a complaint due to allegations of environmental pollution and/or damage.

In general, the provisions above can be interpreted how important the environmental components are in supporting and fulfilling human rights to life. For this reason, environmental management must be in accordance with the principles of sustainable development.

Utilization of natural resources must be carried out optimally to realize the fulfillment of human needs which is the goal of development. Utilization of coal as a natural resource is carried out by mining activities which should be carried out based on the principles of sustainable development. Mining activities carried out must pay attention to environmental and social aspects. Coal mining activities carried out certainly have an impact both on the physical environment and on the community around the mining site.

Mining is part or all of the stages of activity in the context of research, management and exploitation of minerals or coal which includes general investigation, exploitation, feasibility studies, construction, mining, processing and refining, transportation and sales as well as post-mining activities.[1]

The activity of a business activity, mining in essence should not be a cause of "loss" for certain parties or the majority group (general public). Likewise, nature which is the source of mining materials (natural resources) must not be disturbed because it will eliminate the balance of the ecosystem, ecology which results in damage to nature/environment.[2]The state in control of natural resources has the function of making policies, administering, regulating, managing and supervising. These

[1]Mineral and Coal Mining Law No. 4 of 2009.

[2]Nurul Listiyani, *Dampak Pertambangan Terhadap Lingkungan Hidup Di Kalimantan Selatan Dan Implikasinya Bagi Hak-Hak Warga Negara*, Jurnal Al' Adl, s}oμu- IX Nomor 1, Januari-April 2017, ISSN 1979-4940/ISSN-E 2477-0124

functions are manifested in the explanation of the Constitutional Court as follows:[3] 1). The management function (*bestuursdaad*) by the state is carried out by the government with the authority to issue and revoke permits (*vergunning*), licenses (*licentie*), and concessions (*concessie*); 2). The regulatory function by the state (*regelandaad*) is carried out through legislative authority by the DPR together with the government, and regulation by the government (*executive*). 3). The management function (*beheersdaad*) is carried out through a share holding mechanism or through direct involvement in the management of a State-Owned Enterprise or a State-Owned Legal Entity as an institutional instrument through which the state cq the Government utilizes its control over these sources of wealth to be used for the greatest prosperity of the people.

Mining activities both class A, B and C need to maintain the preservation of environmental functions. To guarantee the preservation of environmental functions, all actions engaged in the mining sector are required to do several things. First, mining actors are required to have an analysis of environmental impacts or a study of the major and significant impacts of planned activities on the environment which are required for the decision-making process regarding the implementation of activities.

In the management of mineral and coal mining, citizens' rights to a good and healthy environment must be guaranteed, which is regulated in Article 28H Paragraph (1) of the 1945 Constitution of the Republic of Indonesia that "Everyone has the right to live in physical and spiritual prosperity, to live , and get a good and healthy environment and have the right to obtain health services."[4]

The management and control of natural resources has been developed through the spirit of Article 33 of the 1945 Constitution with the main objective being to maximize the prosperity of the Indonesian people. This mandate of the 1945 Constitution is the basis for the formation of mining policy, namely Law No. 11 of 1967 concerning the principle of mineral and coal mining which was later replaced by Law No. 4 of 2009 concerning Mineral and Coal Mining. According to Saleng[5](2007), the enactment of Law Number 4 of 2009 concerning Mineral and Coal Mining is a consequence of the issuance of Law Number 32 of 2004 concerning Regional Government and Law Number 33 of 2004 concerning Financial Balance of the Central Government and Regional Governments as stipulated in Government Regulation Number 25 of 2000 concerning the Authority of District/City and Provincial Governments as Autonomous Regions.

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[3]Decision of the Constitutional Court Number 001-021-022/PUU-I/2003, on the application for review of Law Number 20 of 2002 concerning Electricity.

[4]Siti Kotijah, "*Pengaturan Hukum Pengelolaan Pertambangan Batubara Secara Berkelanjutan di Kota Samarinda*" https://e-journal.unair.ac.id/YDK/article/viewFile/264/114, accsse on September 09, 2020.

[5]Saleng, Abrar. *Risiko-Risiko Dalam Eksplorasi Dan Eksploitasi Pertambangan Serta Perlindungan Hukum Terhadap Para Pihak Dari Prespektif Hukum Pertambangan*, Jurnal Hukum Bisnis Volume 26 No. 2. 2007.

The subject of the state's right to control is a party or institution that is constitutionally or legally constituted as the most entitled party in matters of control over a certain thing or object. The subject of the state's right to control in the context of coal minerals is the State (Article 33 Paragraph (3).[6]The regulation of coal mining in Indonesia is part of the regulation. Mining law is a translation of the term Mining Law. This means the law governing excavation or mining of ores and minerals in the ground. This definition is only focused on the activity of extracting or mining ore.[7]

According to Soemarwoto[8], provides an understanding of impact as a change that occurs as a result of an activity. These activities can be natural, both chemical, physical and biological. Impacts can be positive in the form of benefits, can also be negative in the form of risks, to the physical and non-physical environment including socio-economic.

As Federick's opinion was quoted by Agustino[9]defines policy as a series of actions/activities proposed by a person, group or government in a certain environment where there are obstacles (difficulties) and opportunities for implementing the proposed policy in order to achieve certain goals. This opinion also shows that the idea of policy involving behavior that has aims and objectives is an important part of the definition of policy, because after all the policy must show what is actually done rather than what is proposed in several activities on a problem.

Matters analyzed include climate and air quality, physiology and geology, water quality, land, flora and fauna, social and public health. Second, mining actors are required to manage waste resulting from operations and activities. Third, mining actors are required to manage hazardous and toxic materials.[10]

Law No. 4 of 2009 concerning Mineral and Coal Mining, this was promulgated on January 12, 2009, consisting of 175 Articles and XXVI Chapters. In considering it, the reasons or basic considerations are stated why the law was born. First, because the minerals and coal contained in the mining jurisdiction of Indonesia are non-renewable natural wealth as a gift from God Almighty who has an important role.

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[6]Nandang Sudrajat, *Teori dan Praktik Pertambangan Indonesia Menurut Hukum*, Pustaka Yustisia, 2007, p. 27.
[7]Muhammad Bakri, *Hak Menguasai Tanah oleh Negara*, Citra Media, Jakarta, 2005, p. 7.
[8]Soemarwoto, O. *Analisis Mengenai Dampak Lingkungan*. Yogyakarta: Gadjah Mada Uversity Press. 2005.p. 34
[9]Augustine, Leo. *Dasar-Dasar Kebijakan Publik*. Bandung: Alfabeta. 2008.p.123.
[10]M. Taufik, *Penegakan Hukum Pidana Terhadap Pelanggaran Izin Lingkungan Dalam Perlindungan dan Pengelolaan Lingkungan Hidup*, Jurnal Nestor Ilmu Hukum, Vol. 3, No. 5 of 2013, p.312

Due to considering national and international developments, Law no. 11 of 1967 concerning Basic Provisions for Mining is no longer appropriate, so it is necessary to amend laws and regulations in the field of mineral and coal mining that can manage and exploit the potential of minerals and coal independently, reliably, transparently, competitively, efficiently and environmentally sound , in order to guarantee sustainable national development.[11]

The negative impacts caused by mining activities include environmental damage. Environmental damage arises because mining companies do not pay attention to the environment in carrying out their activities. In addition, mining waste is also not treated properly so it pollutes the environment. In this case it can have an impact on communities around mining as a result of mining activities, so it is important to protect these communities.

From every mining activity, the company actually prepares a program namely Corporate Social Responsibility (CSR). Friedman[12], the Nobel prize-winning economist, is pessimistic about any attempt to make corporations an instrument of social ends. The purpose of the corporation, according to him, is only to generate economic benefits for its shareholders. If the corporation provides some of its profits for society and the environment, then the corporation has violated its nature, because whatever means the corporation will use to seek the highest profit.[13].

The company actually does not only have economic responsibilities to stake holders, such as how to gain profits and increase share prices, or legal responsibilities to the government, such as paying taxes, fulfilling Environmental Impact Analysis (AMDAL) requirements, and other provisions. However, if a company wants to exist and be acceptable, social responsibility must also be included[14].

Starting from the thoughts contained in the background of the problems mentioned above, and in order to facilitate research writing, from this background the writing will specify by identifying problems which will then be used as problems in this research, namely as follows:

1. What are the forms of impact of mining activities in the area of the province of East Java?

2. What are the causes of the impact of mining activities in the areas of the province of East Java?

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[11]H. Salim HS, *Hukum Pertambangan di Indonesia,* Mataram, PT Raja Grafindo Persada, Mold. 1, 2004, p. 55.

[12]Boudieu, Piere. *The Forms of Capital*. Westport CN: Greenwood Press, 1986. p. 45
[13]Maemunah, Siti. *Banjir Dan Keselamatan Warga*. http://indoprogress.com , April, 21, 2013
[14]Wibisono, Yusuf. *Membedah Konsep dan Aplikasi CSR*. Gresik: Fascho Publishing, 2007.p. 40

3. How model of legal protection for the community from the impact of mining activities in the areas of the province of East Java?

II. METHODOLOGY

This research is legal research (legal research) which is normative juridical, namely by conducting studies and processing of research data based on legal aspects accompanied by legal theoretical studies supported by empirical facts in the field.PenThis research is oriented towards dogmatic and theoretical content, with a normative juridical research type that refers to the interpretation of anticipation, namely research tomeanswering a legal issue based on a rule and equipped with empirical research for normative analysis.

An in-depth review was carried out on the laws and regulations related to investment. The data obtained is complemented by research on library materials called library research. Furthermore, after conducting library research, field research is carried out to conclude secondary data obtained previously so that a legal research will be achieved based on existing legal material in reality.

An approach used in a normative study allows a researcher to utilize the findings of empirical legal science and different sciences for the purposes of legal analysis and explanation without changing the character of legal science as a normative science.[15]

Penapproach to the law (statute approach), namely an approach by examining all applicable laws and regulations related to matters that are at issue.[16] InterruptFurthermore, the conceptual approach is an approach that is carried out by referring to legal principles that can be found in the views of scholars or legal doctrines.

With this approach, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issue at hand. The results of this research are expected to be used as a contribution to ideas for parties related to mining, such as: mining business actors, local government and law enforcement officials in Indonesia, especially the province of East Java.

III. IMPACT OF MINING ACTIVITIES IN THE REGION OF EAST JAVA PROVINCE

The Province of East Java is located between 5°37' - 8°48' south latitude and 110°54' - 115°57' east longitude, is an area on the island of Java, which is bordered to the north by the Java Sea, in to the east by the Bali Strait and the Bali Sea, to the south by the Indonesian Ocean and to the west by the First Level Region of Central Java. The province of East Java covers an area of 47,922.45 square kilometers. In 1990 the land use in the Province of East Java included, among other things, a forest area of 5,409 square kilometers or 11.3 percent, an area of 623 shrubs covering an area of

[15] Johnny Ibrahim. *Teori dan Metode Penelitian Hukum Normatif*. Malang. Bayumedia, 2005,p.246
[16]Johnny Ibrahim. *Ibid*, p. 302

.658 square kilometers or 7.6 percent, a grassland area of 376 square kilometers or 0. 8 percent, a field area of 368 square kilometers or 0.8 percent, an upland area of 8,466 square kilometers or 17.7 percent,

East Java Province is an area with a variety of topography in the form of mountains, hills and islands, most of which are located at an altitude of between 0-400 meters above sea level. This area has public waters in the form of lakes, rivers and reservoirs. The climate of the East Java region is humid tropical with an average rainfall of 2,100 millimeters per year. The air temperature varies between 18°Celsius - 35°Celsius. The East Java region has several areas that are prone to disasters, such as earthquakes, volcanic eruptions, and floods.

Data from the East Java Energy and Mineral Resources Agency (ESDM) stated that only 15-20 percent of natural resources in East Java have been explored by mining activities. Setiajit, Head of the East Java EMR Service, said that there is still a lot of mining potential stretching from Banyuwangi, Lumajang, Malang, Blitar, Tulungagung, Pacitan, to Ponorogo. According to him, the mineral, metal, copper, silver and even gold resources in East Java have not been properly explored. "Especially oil and gas, extraordinary in East Java,"

Mining Business is part or all of the stages of activities in the context of research, management and exploitation of minerals and coal which includes general investigation, exploration, feasibility studies, construction, processing and refining mining, transportation and sales as well as post-mining activities. Mining has several characteristics, namely non-renewable (non-renewable), has a relatively higher risk and its exploitation has a relatively higher physical and environmental impact than the exploitation of other commodities in general.[17]

Basically, because of its non-renewable nature, mining entrepreneurs are always looking for new proven reserves. Proven reserves decrease with production and increase with discoveries. There are several types of risks in the mining sector, namely geological risks (exploration) related to uncertainty about the discovery of reserves (production), technological risks related to cost uncertainties, market risks related to price changes and government policy risks related to changes in taxes and domestic prices. .

These risks relate to the magnitudes that affect business profits, namely production, prices, costs and taxes. Businesses that have a higher risk demand a higher rate of return.

1. Mining Potential In East Java

Java Island is the island with the highest population density. One of them is in the province where I live, East Java, the province with the second largest population density in Indonesia, 782 people per km2. At first glance, there are not many mining companies operating here. It is understandable that with a large population density, of course, the land is used more as a residence than mining land. Maybe all this time we think that the Kings of Mining in Indonesia are Papua,

[17]Adrian Sutedi, *Hukum Pertambangan*, Sinar Grafika, Jakarta, 2011, p.43.

Sumatra, Kalimantan, Sulawesi, or etc., not Java. Through this article I try to uncover the great potential of minerals in East Java along with the realities in the field, of course with valid sources of information, namely: direct interviews with the Office of Energy and Mineral Resources of East Java Province.[18]

2. Juridical Implications of Local Government Authorities in Granting Mining Business License After The Application of Law Number 23 of 2014

Based on national data, out of a total of 10,776 issued IUPs, 8,000 mining company permits were issued by district/city governments. The Mining Business Permit is based on the Regional Government Lawespecially in article 8 paragraph (1) and article 37 (a). Not so with the Regional Government Lawthose who have changed the authority of the district/city government relating to mining business permits have shifted to the authority of the province or the authority of the Governor.

So there is an inconsistency between Minerba Act. Inconsistency between Minerba Law and Regional Government Lawis a conflict between laws and regulations that are equal in the hierarchy. Conflicting provisions in the Regional Government Lawwith the Minerba Law is inconsistent in terms of regulatory substance, namely regulations that are hierarchically equal but the substance of one regulation is more general than the substance of other regulations.[19]

If there is an inconsistency of norms, according to the science of law, between laws and regulations like this, then the provisions used are the principle of lex specialis derogat legi generali, meaning that specific legal rules will override general legal rules. Synchronization of laws and regulations with the principle of lex specialis derogat legi generali refers to two laws and regulations that hierarchically have the same position, but the scope of content material between the laws and regulations is not the same, that is, one is a special arrangement of the other. other.[20]

Legal rules that contain the principle of lex specialis derogate legi generali are seen according to Hart's legal system theory, including the category of rule of recognition, which regulates which legal rules are recognized as valid as an

[18]Jafar, East Java Provincial Government Printbook "*Pertambangan Mineral dan Batubara Provinsi Jawa Timur".*

[19]Hantoro, Novianto M, *Synchronization and Harmonization of Arrangements Regarding Regional Regulations, As well as Material Review of Bali Province Regional Regulation Number 16 of 200 Central government and the people's representative council* (DPR), *Concerning the Bali Provincial Spatial Plan for 2009-2029, Data Processing Study Center and Information* (P3DI) Secretariat General of the DPR RI, Jakarta. 2012, p. 11.

[20]Marzuki, Peter Mahmud, *Penelitian Hukum*, Revised Edition, Jakarta: Prenada Media Group, 2016, p. 139

applicable rule. The principle of lex specialis derogat legi generali is the legal principle that determines in application (application policy),[21]so that it is said to be the principle that determines which legal rules apply. Bagir Manan stated that there are several principles conveyed by Bagir Manan that must be considered in the lex specialis derogat legi generali principle, namely:[22]

(a) The provisions found in the general legal rules apply, except for those specifically regulated in the special legal rules

(b) The provisions of the lex specialis must be equal to the provisions of the lex generali

(c) The provisions of the lex specialis must be in the same legal environment as the lex generali.

Legal inconsistency between local government lawsUnlike the Minerba Law regarding the issuance of mining business permits, the Minerba Law regulates more specific and specific substance regarding the issuance of Mining Business Permits when compared to the Regional Government Law.. Based on its substance, the Minerba Law is a special legal regulation, while the Regional Government Lawis a general rule of law.

Provisions in the Minerba Law with the Regional Government Lawis also in the arrangement regarding the same provisions, namely the authority to issue mining business permits. However, the provisions in the Minerba Law are more specific than the Regional Government Law, besides that the position of the Minerba Law with the Regional Government Laweven equal, because both are equally formed in the law. Should the three principles of using the lex specialis derogat legi generali principle be fulfilled, this means that lex specialis derogat legi generali can be applied to resolve legal conflicts that occur between regional government laws.with the Minerba Law regarding the authority to issue IUP.

But if the government wants to further optimize the authority of the Governor in granting Mining Business Permits as stipulated in the Law on Regional Governmentthen the principle used is the principle of lex posteriori derogat lex priori. That is, if there is a legal conflict between the new laws and regulations and the old laws and regulations, the old laws and regulations are set aside (not enforced). Regarding mining business permits that have been issued by the Regency/Municipal government prior to the issuance of the Regional Government Lawremains valid until the expiry of the permit, as long as it is not returned or revoked due to the reasons stipulated in Article 117 of the Minerba Law as stipulated in the Regional Government Lawhas been stated regarding the provisions on the validity of permits that have been issued prior to their

[21]Raspati, Lucky. "*Tinjauan Yuridis Penerapan Asas Lex Specialis Derogat Legi Generali Menurut Doktrin Kekhususan Yang Sistemati* http://raspati.blogspot.co.id/2008/03/review-juridical-implementation-asas-lex.html, accessed on April 21 2016 at 18.30 WIB in Rika Indra Dewi Hananto Widodo *op cit*, p. 7.
[22]Manan, Bagir, *Hukum Positif Indonesia: Suatu Kajian Teoritik*, Yogyakarta, FH UII Press, 2004, p. 56.

promulgation, these provisions lie in the transitional provisions of the Regional Government LawArticle 402 paragraph (1). Article 402 paragraph (1) Regional Government Lawit states that "permits that have been issued before the enactment of this law remain valid until the expiry of the permit".

This article mandates that permits have been issued prior to the enactment of the Regional Government Lawwill remain in effect until the expiry of the permit period. Besides that, by continuing to apply the Law on Regional Governmentwhich stipulates the division of authority for licensing in the mining sector as above, for district/city regional governments, the development and increase in the benefits of mining business activities cannot be carried out optimally.

The loss of supervisory activities in the mining sector as a control over problems in exercising regional authority regarding production (regional revenue), in protecting the workforce and preserving the environment and overcoming social problems. Then there is no Mining and Energy Office in the Regency/City, due to the abolition no later than October 2, 2016, and the formation of Provincial UPTs in the Regency/City and central vertical institutions in the regions for mineral resource affairs.

3. Impact of Mining on Environmental Conditions

A mining activity in the form of extracting resources directly from nature certainly has an impact on the environmental conditions around the mining site. 61.8% of the community stated that the presence of mining slightly disturbed the surrounding environment.

The results of the interview were 36.4% of the people said that the existence of coal mining made the environment dusty and as many as 18.2% of the people thought that mining activities caused pollution to the environment.

Air pollution that occurs causing dust due to coal transportation. Transportation of coal through unpaved dirt roads makes the air dusty. The dusty air affects the people who are close to the mine site and the people who are in the area through which coal is transported. The water pollution occurred as a result of mining activities carried out. As many as 20 people, namely 36.4% of the people, stated that the river water was cloudy.

Mining activities also have an impact on road conditions. As many as 89.1% of the community stated that mining activities disrupted road conditions. 47.3% of the people stated that the roads in the village had potholes. The potholes in the road conditions are caused by the transportation of coal from the pit where it is taken to the consumer. Transportation using large trucks with large mass loads causes potholes in the road.

IV. CAUSES OF THE IMPACT OF MINING ACTIVITIES IN THE REGION OF EAST JAVA PROVINCE

Mining business activity is essentially a basic industrial activity, where its function is to provide raw materials for other industrial needs. Bearing in mind that the occurrence of a mineral deposit requires a very long time (in geological time), then in its utilization and management it must really be optimal. Therefore, the presentation of data information, such as topographical maps, geological maps, exploration investigations and feasibility studies and AMDAL for a mining business activity has a very large role in supporting the success of the activity.

Mine minerals are mostly found in remote areas with dense forests, in the form of hilly or mountainous areas and plains with undisturbed environmental conditions; maybe even social life in the area is still not touched by the development of technological advances. So initially the interaction between the environmental components in the areas mentioned above is in balance, then the natural balance will be disrupted and cause fundamental changes or what is commonly called an impact. The impact of mining activities on the environment can be seen from several aspects, namely:

1. Physical Aspect

Land clearing/land preparation activities will result in the loss of cover crops, both trees and cover crops. The loss of this cover crop causes the soil surface to become vulnerable to erosion by water and wind. Loss of vegetation in the area, changes in soil nutrients due to the influence of heat, erosion by surface water and a decrease in soil quality.

2. Chemical Aspect

Decline in the chemical quality of surface water, groundwater, air and soil due to the entry of chemical elements originating from mining activities that exceed established quality standards. Activities of supporting facilities also have the potential for pollution, for example activities of heavy equipment workshops, power plants, material storage warehouses, hospitals/polyclinics, fuel depots, etc. These activities have the potential to release liquid, solid or gas waste into the environment with different physical and chemical characteristics.

3. Biological Aspect

Land clearing on a large scale will reduce the number and types of local plants, which can lead to extinction, especially of species/species that are endemic to the area. In general, endemic flora and fauna species are very vulnerable to environmental changes, so efforts to restore these species to an engineered condition will be difficult to succeed.

4. Social, Economic and Cultural Aspects

Mining activities, which are both technology-intensive and capital-intensive, are a source of foreign exchange for the country. The economic cycle when the project is underway will certainly stimulate the growth of the related economic sector.

Availability and opening of employment opportunities for the local community even though the presence of immigrant communities to compete is unavoidable. With the inclusion of various cultures and lifestyles of everyone involved in this mining project, it will gradually influence the social and cultural life patterns of the local community.

5. Health and Safety Aspects

With the diversity of lifestyles and social status of the community, coupled with mining activities that have the potential to impact on the environment, it will result in the emergence of various types of diseases in the community that may not have existed or rarely occurred before. There are changes in social life, so it is not uncommon for problems to arise due to differences that may not be accepted by the local community. It is very possible for security vulnerabilities to arise which can disrupt the smooth running of the mining itself.

6. Mine Reclamation

Reclamation is a planned effort to restore the function and carrying capacity of the environment on ex-mining land to be better than before. So a good and correct mine plan from the start includes reclamation efforts on ex-mining land, even where field conditions allow reclamation to also be carried out while the mine is still running.

7. Supervision

The basic definition of supervision is the activity of collecting, researching, comparing and assessing measurable evidence in order to consider and report the degree of conformity of the measurable evidence with predetermined criteria and is carried out by someone who is competent and independent.

V. MODEL OF LEGAL PROTECTION FOR THE COMMUNITY FROM THE IMPACT OF MINING ACTIVITIES IN THE REGIONS OF EAST JAVA PROVINCE

1. Penal Policy Model for Mining Crimes With Permits

According to Law Number 4 of 2009, criminal sanctions have indeed been placed as Ultimum Remidium (last resort) which were previously preceded by administrative sanctions. Of course, this is in accordance with the purpose of sentencing, namely placing a penal policy as a last resort that can be taken.

As an effort to facilitate criminal law enforcement schemes against mining crimes, the researcher provides an overview of the penal policy model for mining crimes.

a. Penal Policy for Licensors

It is jointly known that the criminalization of licensors is regulated in Article 165 of the Minerba Law. As previously stated, Law Number 11 of 1967 concerning Basic Mining Provisions does not contain a penal policy against licensers. Of

course this needs to be appreciated, however, a more comprehensive regulatory direction must be carried out and keep abreast of the times. After regional autonomy, regional and central officials often lavishly used their authority to issue so many permits without considering environmental risks and conflicts over natural resources. The provisions in Article 165 of Law Number 4 of 2009 state that everyone who issues an IUP, IPR, or an IUPK that contravenes this law and abuses its authority shall be subject to criminal sanctions for a maximum of 2 (two) years in prison and a maximum fine of Rp. 200,000,000.00 (two hundred million rupiahs). When viewed from its scope, the direction of the penal policy for licensors is of course not only on technical matters related to the issuance of permits based on the Minerba Law. The scope of the penal policy for licensors can be expanded to other aspects, such as criminal acts of corruption, environmental crimes, and other related criminal acts. One that is often mentioned, for example, under the pretext of wanting to increase Regional Original Revenue (PAD), regional heads often easily issue permits for mining businesses. Mining permits that are issued are often considered not to have gone through the proper procedures. The potential for collusion in the issuance of permits by local governments is also very wide open when it is associated with the reality of the high political costs for regional heads during campaigns. Even though currently, after the enactment of Law Number 2 of 2015, the authority to issue mining permits is in the hands of the central government and governors, nevertheless, there is still a need for supervision as part of the policy of penalizing licensees so that this authority is not misused.

b. Penal Policy for Mining Business Actors

Law Number 4 of 2009 stipulates that Mining Business Permits (IUP), Special Mining Business Permits (IUPK), and People's Mining Permits (IPR) can be granted to parties including business entities, both State-Owned Enterprises (BUMN), Regional Owned Enterprises (BUMD), as well as private business entities. Cooperatives and individuals listed in several articles of the law can also obtain mining business permits for people's mining permits. All mining business actors are required to meet administrative requirements, technical requirements, environmental requirements, and financial requirements.

Other provisions are further regulated in implementing regulations. From the facts that the researchers found, several forms of violation of existing provisions often occur. One example, namely violations of post-mining activities. Some ex-mining lands are left untouched so that they have an impact on environmental damage. Therefore, extensive discussion is needed regarding the penal policy for each business actor when committing a violation. Several criminal sanctions for business actors have already been stipulated in Law Number 4 of 2009. For individual perpetrators, various forms of violations are regulated starting from Article 158 to Article 162. However, the penal policy that places more emphasis on parties who do not have a mining permit or in other words illegal. On the other hand, mining business actors who already have permits or in other words have government permits do not seem to have many aspects that can be subject to sanctions. In fact, based on tracing several aspects such as environmental damage due to post-mining activities that are not carried out, it is also often carried out by business actors who already have mining permits. For business actors in the form

of legal entities, the Minerba Law determines this in several articles. Article 163 paragraph (1) states that in the event that the criminal act referred to in this case is committed by a legal entity, in addition to imprisonment and fines against its management, the punishment that can be imposed on said legal entity is in the form of a fine with an weight plus 1/3 (one third) times the maximum fine imposed. In paragraph (2) it is stated that in addition to the fine as referred to in paragraph (1), legal entities can be subject to additional punishment in the form of revocation of business licenses and/or revocation of legal entity status. If you look at the provisions, the penal policy for mining business actors in the form of legal entities has been accommodated. The Minerba Law already reflects a penal policy against mining crimes committed by corporations. Regarding the technical law enforcement that has existed so far, the Supreme Court issued Perma Number 13 of 2016 as a form of reference for law enforcers who have so far found it difficult to prosecute criminal acts committed by corporations. However, it is necessary to expand the scope and potential of mining crimes committed by corporations as a form of penal policy model. Corporations have the potential to commit violations in various fields, such as corruption, the environment, tax evasion, and human rights. Several alternative sanctions for corporations which according to the author can be used as a reference as described by Jonathan Clough. First, orders to publish (adverse publicity orders), in which corporations publish at their own expense the crimes they have committed, the punishments, and the steps to prevent the recurrence of these crimes. Second, probation (corporate probation), in which a corporation must do something within a certain period of time and its implementation will be monitored. Third, the provision of fines (fines). Fourth, dissolving and stopping corporate activities (incapacitation and re-straint). Fifth, reparation which is believed to improve the victim's condition. However, we would like to pay attention to the impact of having to harmonize regulations in various fields. For this reason, steps that also need to be taken are harmonization and unification of regulations in the field of mining crime in a comprehensive manner and arranged in a regulatory format, starting from administrative to criminal aspects. In addition, it is necessary to carry out a more in-depth analysis of the potential for discussion of Human Rights Due Diligence as a form of penal policy model for mining crimes in the human rights aspect. ranging from administrative to criminal aspects. In addition, it is necessary to carry out a more in-depth analysis of the potential for discussion of Human Rights Due Diligence as a form of penal policy model for mining crimes in the human rights aspect. ranging from administrative to criminal aspects. In addition, it is necessary to carry out a more in-depth analysis of the potential for discussion of Human Rights Due Diligence as a form of penal policy model for mining crimes in the human rights aspect.

c. Penal Policy Model Against Mining Crimes

The penal policy model for mining crimes must be directed at two general forms. Penal policies must immediately provide repressive efforts by enforcing existing laws (ius constitutum), but still have to find an ideal format as a form of improvement in the future (ius constituendum). As an example of sand mining in Lumajang Regency, several repressive efforts have been made by the local

government against mining that does not have a permit (illegal). Based on Lumajang Regent Circular Number: 180/327/427.12/2015 concerning the cessation of Illegal Mining of Non-Metal and Rock Minerals in Lumajang Regency.

Against business actors who hold permits and commit violations, repressive measures are also handled by the East Java Regional Police. In addition, in order to harmonize policies within the Lumajang Regency administration with higher regulations, the government and the Lumajang Regency DPRD established the Lumajang Regency Regional Regulation Number 8 of 2017 concerning Revocation of 4 (four) Regional Regulations, one of which is Regional Regulation Number 18 2006 concerning Regional Mining Permits. The technique for granting mining business permits is currently carried out through East Java Governor Regulation Number 49 of 2016. Given the mining aspect which has its own complexities, the penal policy against mining crimes must also be a special discussion. The penal policy model for mining crimes must be oriented towards two things. First, regarding the responsible parties. Second, related to the material law imposed. Parties that can be held accountable for mining crimes caused by government policies, namely licensers, business actors who are legal entities, both corporations, cooperatives, community groups, and individuals. Regarding the material, law enforcement against mining crimes targets corruption, environmental crimes, human rights crimes, and even taxation crimes. Parties that can be held accountable for mining crimes caused by government policies, namely licensers, business actors who are legal entities, both corporations, cooperatives, community groups, and individuals. Regarding the material, law enforcement against mining crimes targets corruption, environmental crimes, human rights crimes, and even taxation crimes. Parties that can be held accountable for mining crimes caused by government policies, namely licensers, business actors who are legal entities, both corporations, cooperatives, community groups, and individuals. Regarding the material, law enforcement against mining crimes targets corruption, environmental crimes, human rights crimes, and even taxation crimes.

2. Supervision as an Instrument for Law Enforcement in *Minerba* Mining Business Management to Realize a Form of Protection for the Community

Environmental problems in mining are in fact in Indonesia, much questioned. The cause is the emergence of negative impacts in the exploitation of minerals as a result of the mining business in the form of forest destruction, sea contamination, disease outbreaks, and community conflicts around the mining area. The direct impact is ecological damage and the possibility of flooding and landslides. The tailings of gold miners contain toxic materials which cause the community's inability to obtain a healthy environment.[23]

Mining agreements on protected forests have a negative impact on the forestry sector in Indonesia. Mining conflicts are considered more as administrative issues,

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[23]Yusni Yetti, " *Analisis Kebijakan AMDAL Dalam Mencegah Kerusakan* ", Lemigas Publication Sheet, Vol. 41, No. 3, December 2007, p. 24.

because of the weak supervision of mining inspectors, so that resolution through the courts is avoided.[24]Therefore it is relevant if in order to make administrative law enforcement effective, it should start with efforts that are preventive in nature, namely through the implementation of supervision. Through preventive efforts, it is hoped that repressive settlement through the courts can be minimized.

As a consequence of the issuance of a Mining Business Permit (IUP), the next step is to carry out supervision. Supervision is one element in management activities. In principle, supervision is carried out as a preventive measure whether activities are carried out according to existing regulations.[25]

In principle, supervision of the management of the mining business aims to make the IUP holders more focused in carrying out activities related to the mining business, so that they do not deviate from the orders and prohibitions set out in the permit. In theory George R. Terry argues that supervision is intended to determine what has been achieved, evaluate and apply corrective action if necessary, to be able to ensure the results are in accordance with the plan.[26]

Relevant to this opinion, supervision is absolutely necessary in the context of mining business management in accordance with the principle of the purpose of supervision, namely not to deviate from the orders and prohibitions that have been stipulated in the permit. Therefore, as part of the management function, planning becomes increasingly important for the effectiveness of supervisory duties, and as the realization of law enforcement duties as mandated by laws and regulations. The success or failure of a series of supervisory tasks is determined by the initial planning of the supervisory activities themselves.

Although it is not regulated in a limitative manner regarding planning activities on supervision in PP 55 of 2010 concerning P4UPMB and Minister of Mining and Energy Decree Number 2555.K of 1993 concerning Executing Mining Inspections (PIT) in General Mining Businesses, in reality these stages should be carried out in the framework of the effectiveness of the task supervision. If this is not regulated in a limiting manner, of course it will have an impact on the implementation of the rules at the empirical level. Therefore, normatively it still needs improvement.

Planning is absolutely necessary to start the implementation of supervision to realize the legal will that contains orders and prohibitions in the mining sector. In addition to the planning made by the mining entrepreneur, the task of supervising mining activities that has been carried out by the PIT so far is carried out through the planning stages. Before the supervision was carried out, in accordance with

[24]Supriatna Suhala, 2009, " *Penyelesaian Konflik Pertambangan Butuh Lembaga Khusus* ", available on the websitewww.majalahtambang.com,accessed December 2, 2020.
[25]Fenty Puluhulawa, " *Substansi Hukum Tentang Pengawasan Izin Pada Usaha Pertambangan* ", Journal of Pelangi Ilmu, Vol 3 Number 4, 4 September 2010, p. 148.
[26]George R. Terry (in Jazim Hamidi and Mustafa Lutfi), " *Eksistensi Komisi Ombudsman Nasional dalam Mewujudkan Good Governance* ", Varia Perjudi Law Magazine, April 2009 Edition, p. 47.

the planning several things that had been done were as follows. First, providing guidelines and standards for implementing mining business management; second, providing guidance, supervision and consultation; and third, education and training. Furthermore, supervision is carried out through evaluation of work plans and implementation of mining business activities and direct inspections to mining business locations.

The facts above show that in sectoral agencies the planning strategy related to supervision regarding environmental management as the realization of the issuance of Mining Business Permits (IUP) has been carried out, although in reality it has not been carried out in an integrated manner between sectoral agencies. The above facts also prove that the planning for supervision is carried out separately by each sectoral agency, namely between the Department of Energy and Mineral Resources and the BLHD. Ideally, planning carried out in an integrated manner essentially plays an important role and determines whether or not the implementation of supervision is optimal. Therefore, through integrated planning, joint commitment, shared perceptions, so that it is hoped that the entire series of supervisory implementation can be carried out according to the targets set in an integrated manner through planning, so that administrative law enforcement efforts can be carried out. Through integrated supervision, it is hoped that its implementation will not deviate from the nature and essence of the supervision objectives. Likewise with changes in legislation that are not necessarily followed by system changes, because they are related to the absence of implementing regulations. For example, currently the Mineral and Coal Mining Law (UUPMB) is in effect which has not been able to apply effectively in the field. In theory, according to Ridwan, one of the motives for conducting supervision is coordination. so that administrative law enforcement efforts can be carried out. Through integrated supervision, it is hoped that its implementation will not deviate from the nature and essence of the supervision objectives. Likewise with changes in legislation that are not necessarily followed by system changes, because they are related to the absence of implementing regulations. For example, currently the Mineral and Coal Mining Law (UUPMB) is in effect which has not been able to apply effectively in the field. In theory, according to Ridwan, one of the motives for conducting supervision is coordination. so that administrative law enforcement efforts can be carried out. Through integrated supervision, it is hoped that its implementation will not deviate from the nature and essence of the supervision objectives. Likewise with changes in legislation that are not necessarily followed by system changes, because they are related to the absence of implementing regulations. For example, currently the Mineral and Coal Mining Law (UUPMB) is in effect which has not been able to apply effectively in the field. In theory, according to Ridwan, one of the motives for conducting supervision is coordination. due to the absence of implementing regulations. For example, currently the Mineral and Coal Mining Law (UUPMB) is in effect which has not been able to apply effectively in the field. In theory, according to Ridwan, one of the motives for conducting supervision is coordination. due to the absence of implementing regulations. For example, currently the Mineral and Coal Mining Law (UUPMB) is in effect which has not been able to apply effectively in the field.

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Coordination should have started at the planning stage, so that in practice it is expected to support the implementation of administrative law enforcement. Through supervision, it is hoped that a balance will be established between mining management and the preservation of environmental functions, so that it is expected to realize environmentally sound mining management. The implementation of environmentally sound mining will support the implementation of the concept of development for the present and the future as expected through international conferences which have resulted in various international declarations.

Mining business in the form of technical implementation cannot be separated from other government agencies/agencies on a cross-sectoral basis. This implies that overall the implementation of a mining business should always involve cross-sectoral government agencies/agencies for the continuity of these activities, particularly with regard to performance related to environmental management supervision. The expectation of this agency's involvement is intended as a realization of the issuance of IUP, both Exploration IUP and Production Operation IUP which are instruments of law enforcement in mining areas. Therefore, ideally mining management with an environmental perspective is expected to materialize if there is a synergistic working relationship between agencies in the form of coordination.

Coordination is essentially an act of mutually supporting cooperation to achieve harmony which will ultimately result in good cooperation between all parties. Coordination is very necessary in relation to the mining business, because in practice it is related to the requirements for various forms of licensing which are not only the authority of technical agencies, in this case the Department of Energy and Mineral Resources, but also related to other sectoral agencies. This connection can be seen in several matters regarding licensing. For example, with regard to Amdal and environmental permits involving Bapedalda agencies, permits regarding B3 waste consisting of permits for transporting, producing, collecting, processing, and storage permits, some of which are the authority of the central government and some of which are the authority of the regions, and if the mining area is in a district/city area, then the IUP is issued by the ESDM Office. This is where coordination is needed before issuing these various permits, as well as in carrying out supervision as a consequence of the issuance of an IUP. Therefore we need legal norms that strictly regulate. At the operational stage, the same understanding is needed from various parties, especially law enforcement in the field related to the matter in question. Coordination is absolutely necessary to establish synergy and especially in addressing issues related to the environment. Therefore we need legal norms that strictly regulate. At the operational stage, the same understanding is needed from various parties, especially law enforcement

[27]P. de Haan and Versteden (in Ridwan), Administrative Law in the Regions, Bandung: PT Raja Grafindo Persada, 2006, p. 126.

in the field related to the matter in question. Coordination is absolutely necessary to establish synergy and especially in addressing issues related to the environment. Therefore we need legal norms that strictly regulate. At the operational stage, the same understanding is needed from various parties, especially law enforcement in the field related to the matter in question. Coordination is absolutely necessary to establish synergy and especially in addressing issues related to the environment.

The variety of laws and regulations that govern and the institutions responsible for their respective fields require these agencies to carry out coordination. Based on the table, if it is related to mining, the involvement of the institutions as described in the table is required in the following matters.

Table. Legislation and Responsible Institutions

No	Legislation	Responsible Institution
1.	Law Number 32 of 2009 concerning Protection and Management of the environment	Ministry of Environment (KLH)
2.	Law Number 23 of 2014 concerning Governance Area	Ministry of Home Affairs & Local Government
3.	Law Number 4 of 2009 concerning Mining Minerals and Coal	ESDM Department
4.	Law Number 5 of 1990 concerning Natural Resources Conservation	KLH, Department Forestry, Department Maritime Affairs, Department of Fisheries
5.	Law Number 41 of 1999 which was amended by Law Number 19 of 2004 concerning Amendments to Law Number 41 of 1999 concerning Forestry	Ministry of Forestry
6.	Law Number 26 of 2007 concerning Spatial Planning	PU
7.	Law Number 5 of 1960 concerning Provisions Basic Agrarian Provisions	National Land Agency (BPN)
8.	Law Number 25 of 2007 concerning Capital investment	Investment Coordinating Board (BKPM).
9.	*Hinder Ordonantie*(HO)	Local Government

Weak coordination can be seen from the fact that some of the granting of mining permits were not reported to Bapedalda, so that Bapedalda himself did not know

for sure the whereabouts of mining businesses, as well as mining businesses that had completed carrying out mining operations were never notified, so that when Bapedalda carried out supervision in the field turned out that the company had closed (not conducting mining business activities). Realities like these are obstacles in making supervision an instrument of law enforcement, because it does not yet reflect integration and is still sectoral in nature and there is no coordination between agencies with each other.

Supervision is carried out by the respective technical agencies, so that there is no integration yet. For example, the field supervision schedule is carried out individually by each technical agency. If analyzed, there are several factors causing the lack of coordination. First, each technical agency has its own program, so they don't feel the need to coordinate; second, the emergence of sectoral egoism because they feel they have more authority for that; third, technical obstacles that hinder the implementation of coordination, such as, lack of supporting facilities, time, and costs, so that coordination cannot be carried out.

In addition to the factors mentioned above, conflicting policies of government agencies are still considered as factors that have an impact on law enforcement.[28]This of course has an impact on decision making and slow action on resolution of any problems that arise. The application of the principle of coordination in supervision is one of the early prevention efforts and in order to anticipate the emergence of various possibilities for environmental pollution/destruction in the mining business.

In addition to supervision as described above, supervision can be carried out by involving the community as an external supervisor as regulated in Article 70 UUPPLH. Community supervision in question is social supervision which is of course different from supervision carried out by officials who are directly responsible for the implementation of the mining business. Community oversight is essentially functioning for control. Through community supervision, it is hoped that it can become a control as well as raise awareness in everyone about the importance of protecting and managing the environment. Therefore, ideally,

According to Siti Sundari Rangkuti, environmental management can only succeed in supporting sustainable development if the government functions effectively and is integrated.[29] Relevant to the opinion expressed by Siti Sundari Rangkuti, it is necessary to have the same policies and standards in supervision, so as to prove that internally the principle of coordination has been implemented through a policy of establishing an integrated licensing system. Externally, the role of the community as referred to in Article 70 of the UUPLH is needed to support an integrated system. This is accompanied by the hope that it can support optimal principles for the purpose of implementing supervision, namely, as a preventive

[28]Maharani Siti Sophia, " *Catatan Ketidakadilan Hukum Atas Lingkungan* ", Jentera Law Journal, 18th Edition, Year IV, 2008, p. 33.

[29] Siti Sundari Rangkuti, *Hukum Lingkungan dan Kebijakan Lingkungan Nasional*, Third Edition, Surabaya: Airlangga University Press, 2006, p. 126.

effort in realizing law enforcement.[30] According to Nabiel Makarim, environmental law enforcement includes the development of a one-stop system.[31]Models like this can be applied in Indonesia, to minimize environmental pollution/damage, especially in East Java Province

Based on the description above, in order to optimize the supervisory duties and as an alternative solution to anticipate environmental pollution/damage in the mining business, various efforts are needed. Through these efforts, it is hoped that good mining practices will be realized. There are two efforts that need to be done. First, the need to establish an integrated environmental licensing system like in the Netherlands to facilitate the implementation of coordination, as well as optimal supervision, so that cooperative actions mutually support each other to achieve harmony in the end will result in good cooperation between all parties, according to the principle of coordination. An integrated environmental licensing system is expected to increase efficiency in terms of time and cost; and second,

VI. CONCLUSION

From the results of the research and discussion as well as the descriptions as presented in the previous chapters, the conclusions that can be conveyed by the researcher are:

1. The impacts of mining activities in the province of East Java include causing conflicts that arise in the midst of society between the community and mining entrepreneurs. Ecologically, the impact of mining also causes pollution, both water and air pollution, as well as environmental damage in the form of road damage.

2. The causes of the impact of mining activities in the province of East Java, among others, due to weak supervision of the mining business, the AMDAL system that has not been maximized and also the lack of a technological system that can overcome problems in the field.

3. The model of legal protection for the community from the impact of mining activities in East Java Province can be carried out by implementing a "penal" policy (criminal law means) and also implementing a "non-penal" policy (means outside of criminal law), namely by using administrative and civil law settlements. . Besides that, protection can also be given by emphasizing the form of inherent supervision of the mining business. This supervision can be carried out optimally by preceded by a good planning and coordination process between related agencies and carried out through a one-stop system.

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[30] Fenty Puluhulawa, " *Kewenangan Perizinan Dalam Pengelolaan Lingkungan Pada Usaha Pertambangan Mineral dan Batubara*", Journal of Legality Law, Vol 3, Number 2, 2 August 2010, p. 7.

[31] Absori, " *Penegakan Hukum Lingkungan Pada Era Reformasi* ", Journal of Legal Studies, No. 2, Vol 8, Muhammadiyah University of Surakarta, 2005, p. 221.

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Protection of the Civil Rights Covid-19 Patients Against the Opening of Medical Records in a Pandemic Situation

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ABSTACT: Hospitals need a method to identify a person's disease, namely by using medical records. Medical record documents containing patient identity and medical information, including medical secrets that doctors, hospitals and other medical personnel must keep confidential. However, the confidentiality of medical records is not absolute as mandated in Article 5 paragraph (1) of the Minister of Health concerning Medical Confidentiality, medical record information can be disclosed for certain purposes in accordance with laws and regulations. One of them is for the public interest, namely extraordinary events/outbreaks of infectious diseases. The disclosure of the confidentiality of the medical records of COVID-19 patients by the government in the first press conference regarding COVID-19 patients in Indonesia, made the personal information and identities of COVID-19 patients known to the public, resulting in a violation of patient civil rights. This is because the *Permenkes* does not stipulate criteria or limits on disclosing medical records for the benefit of infectious disease outbreaks, which has led to a blurring of norms that have an impact on the civil rights of COVID-19 patients. To identify and analyze these problems, researchers used normative legal research methods with a conceptual approach, to analyze the protection of the civil rights of COVID-19 patients to the confidentiality of medical records. The results of this study are that patients have civil rights related to personal confidential medical records contained in the Medical Secrets of the Minister of Health, opening medical records in a pandemic situation only discloses patient medical information and does not explain patient personal secrets, so this information is only disclosed to authorized officials. In obtaining these civil rights, COVID-19 patients should be able to use a restorative justice approach by educating the public, providing counseling on how to fight COVID-19.

Keywords: Protection, Covid-19, Pandemic, Medical Record.

I. INTRODUCTION

The identification of a new variant virus called COVID-19 (Corona Virus Desease 2019) officially designate by WHO (World Health Organization) to be an infectious disease outbreak. The COVID-19 virus is a new variant virus in 2019 that attacks acute breathing, which in a short period of time is able to spread rapidly almost all over the world. Indonesia, which ranks fourth in the list of the most populous countries, namely 276 million people, has the highest number of COVID-19 sufferers also with the addition of positive cases that continue to increase rapidly every day. So from the statu the level of COVID-19 rose which was originally a disease outbreak to a global pandemic. Based on data on the increasing spread of the virus in Indonesia, it is necessary for COVID-19 patients to get legal protection related to civil rights they have regarding medical records in a pandemic situation.

Each person can be referred to as a patient if suffering from a disease or disorder bodily/spiritual which requires and get the services of a doctor in the healing of the disease he suffered. As has been normalized in Article 1 Paragraph (4) of the hospital law on the definition of patients, namely "patient is any person who consults his health problems to obtain the necessary health services either directly or indirectly to a doctor or dentist".

Understanding the patient can be concluded As someone who has a disease and is entitled to receive health services from doctors, hospitals, or other health workers directly or indirectly with the aim of recovering from the disease.

Based on the Ministry of health of the Republic of Indonesia (Moh) guidelines for the implementation and procedure of medical records in hospitals, patients in hospitals are divided and categorized into outpatients (Polyclinic patients and emergency patients) and inpatients. Types of patients when viewed based on their medical records in accordance with the Permenkes medical records, namely: 1). Outpatient; 2). Inpatient; 3). Emergency patient; and 4). Catastrophic state patients

In terms of hospital services, then a patient can be categorized into: 1). Patients who can wait, namely outpatient patients who come by appointment and patients who do not come in a state of emergency; 2). Patients who are immediately helped (emergency patients); 3). New patients, the first time to get medical services from the hospital; 4). Old patients, namely patients who have previously come for the purposes of obtaining health services

In Article 1 of Law No. 9 of 1960 on the principles of Health normalized that:

> "Every citizen has the right to the highest degree of Health and needs to be included in government health efforts"

Health workers who are obliged to provide health services need to attach importance to the rights and obligations of patients in order to create a good health service so that the quality of health can improve. Patient rights are individual human or fundamental rights inherent in each person in his legal relations in the field of Health. There are several categories of rights owned by patients such as rights in general, the rights of patients in their position as consumers, the rights of patients to the practice of Medicine and the rights of patients to hospitals.

According to Bahder Johan Nasution, the rights of patients in general can be detailed as follows : 1). Patient's right to care; 2). The right to refuse certain means of treatment; 3). The right to choose health workers and hospitals that will terminate the treatment agreement; 4). Right to information; 5). The right to refuse treatment without permission; 6). The right to a sense of security; 7). Right to restrictions on the regulation of freedom of care; 8). The right to terminate the treatment agreement; 9). Twenty-for-a-day visitor rights; 10). The patient's right to sue or; 11). Patient's rights regarding legal aid; and 12). The right of the patient to be advised about the experiment by health workers or experts.

Rights in general, patients who receive services from the hospital still have a role and rights as consumers. According to Munir Fuady doctors and hospitals rarely consider patients as consumers so that the guidelines in the service of patients as consumers in providing services are little applied. These guidelines are contained in Law No. 8 of 1999 on Consumer Protection. The rights of patients in their position as consumers are as follows: 1). The right to health, safety and comfort; 2). The right to choose the service; 3). The right to True, clear and honest information; 4). The right to be heard; 5). The right to protection, advocacy, and dispute resolution efforts; 6). The right to education and consumer guidance related to health; 7). The right to get the service right; 8). Right to compensation for damages; and 8). other rights

The rights of patients in obtaining health services are also spelled out in Article 4 to Article 8 of Law No. 36 of 2009 on Health stated that : 1). Everyone has the right to health; 2). Everyone has the same right to access and resources in the field of Health; 3). Everyone deserves a healthy environment for the achievement of health status; 4). Everyone has the right to information and education about balanced and responsible health; 5). Everyone has the right to obtain information about his / her health data including actions and treatments that have been or will be received from health workers.

Of the various types of patient rights mentioned above, when it comes to civil rights, they are very relevant to those owned by all patients, especially COVID-19 patients, regarding the right to confidentiality and privacy of their illness and medical record data, which can be seen in Article 32 letter J of the law on hospitals.

The patient's obligations have been normalized in Article 8 of the Minister of Health Regulation Number 69 of 2014 concerning Hospital obligations and patient obligations, namely: 1). Use hospital facilities responsibly; 2). Follow the rules of the hospital; 3). Respect the rights of patients, visitors, and the rights of health workers and other personnel working in the hospital; 4). Provide honest, complete information, in accordance with their abilities and knowledge about the patient's health problems; 5). Accept all the consequences of his personal decision to refuse the therapy plan recommended by health workers in order to cure the patient's illness or health problems.

Patients as recipients of hospital health services are obliged to carry out all obligations imposed. On the other hand, patients have various rights that are the obligations of hospitals and health workers to fulfill and not violate any rights that have been given to patients. The rights and obligations of patients and hospitals as described above become a balanced unity as an effort to improve the quality of health services and also as one of the efforts to support the recovery of patients

On March 2, 2020, President Joko Widodo revealed that Indonesia had its first COVID-19 patient. The patient was identified as a 31-year-old woman along with her 64-year-old mother. The two patients were then given nicknames as patient 01 (the first patient affected by COVID-19 in Indonesia) and patient 02 (the second patient affected by COVID-19 in Indonesia). The author is committed to protecting the rights of patients in confidentiality of identity so that the name of patient 01 and patient 02 will be disguised using the initials ST and MD

Since the press conference, the media and the public began to dig up information related to the identity, background, and personal secrets of COVID-19 patients which were finally known by almost all Indonesian people.Several media such as CNN Indonesia, Tribunnews, and Merdekanews reported at the same time covering photos of ST and MD houses installed police lines included the name of the housing where the patient lived. Someone also had time to write on the Disway page and then forwarded in the Merdekanews media with the title “first two” which clearly states the full name, home address and professional background of MD (patient 02 COVID-19).

The actions of the media and public officials who reveal the identity of ST and MD patients so that they are known to the public cause patients to feel fear, shame, and even shunned by the community

On the other hand, the rapid development of covid-19 virus transmission, handling and treatment that have not been clearly found, cause concern for the community. Coupled with the knowledge of personal information including the identity of ST and MD patients, it has resulted in frightened people starting to stay away from and blaspheme COVID-19 patients. As a result, the patient's recovery

is hampered and his social life decreases due to personal secrets that have been known by the public.

Hospitals and doctors in dealing with COVID-19 patients need a method to identify someone as a COVID-19 patient. To ensure that the patient is a suspect, medical measures that can be taken by the hospital are needed. Medical actions by the hospital in terms of diagnosing patients can be done through the means of medical record documents, which have been regulated in the regulation of the Minister of Health No. 269 of 2008 on medical records (hereinafter briefly Permenkes medical records).

Medical records have an important position for patient health services because in the medical record there is a personal data such as identity, patient background, health condition, and history of illness which is a privacy or personal secret for the patient himself.

Seeing the importance of medical records, in Article 48 of Law Number 29 of 2004 concerning medical practice (hereinafter briefly as the medical practice law), it is regulated that every doctor or dentist in carrying out medical practice is obliged to keep medical secrets that is contained in medical records.

The confidentiality of medical records is one of the most important elements in the world of medicine that can be opened, as confirmed in Article 5 of Permenkes number 36 of 2012 concerning medical secrets (hereinafter briefly Permenkes medical secrets) that medical records are medical secrets that can be shown or opened only to a few parties in accordance with the interests needed, namely by reason of certain interests or public interests that can be done without patient consent.

The civil law relationship that exists between the patient and the hospital certainly carries rights (bevoegdheid) in the form of power or authority, and obligations (plicht) which are the responsibility of the parties to fulfill them. This legal relationship between the patient and the hospital has occurred since there was an agreement to carry out medical action. The agreement is established through informed consent made prior to carrying out a medical action. COVID-19 patients have civil rights that must be protected by society and the state. A violation of a person's civil rights can not only be prosecuted civilly with compensation, but can also be restored with restorative justice which is expected to be beneficial not only to the injured parties, but also to the state and society.

II. METHODOLOGY

Normative legal research type, a scientific research procedure to find the truth based on the scientific logic of the normative side, which fully uses secondary legal material (literature material). Preparation of conceptual framework using the

formulation contained in the legislation that became the basis of research. In conducting a legal research it is necessary to take an approach-an approach to examine each existing problem. The types of approaches are : 1). Statutory approach; and 2). Conceptual approach.

III. FORM OF PROTECTION OF CIVIL RIGHTS OF COVID-19 PATIENTS AGAINST OPENING MEDICAL RECORDS IN A PANDEMIC SITUATION WITH A RESTORATIVE JUSTICE APPROACH

In reality man has carried with him various types of rights and obligations protected by the state since birth. The word "right" has a meaning as the authority or power that someone has to do something as stipulated in the rules. According to Van Apeldorn power arises due to rights which are laws which are given by humans as subjects of law. The power of a person in question here is the power to do something and also the power or the right not to do something. Rudolf Von Ihering also explained the notion of Rights is an important need that is protected by law so that the law is the giver of authority or power to someone.

As the definition can be drawn conclusions related to the understanding of rights. Rights are normative elements in the form of power or authority that every human being has inherent since birth. The authority is in the area of equal rights and freedoms related to interaction between individuals and involves elements of rights. For example, the right to life, the right to get health services, and so forth. The right is the authority for a person to act or not act as stipulated by law. While civil law is a law that normalizes the rules of rights between citizens in a society that specifically emphasizes the interests of individuals or individuals (personal).

Civil Rights which is a combination of the word" rights " and " civil" is a right that is born due to the existence of legal relations, namely civil relations between legal subjects that can give rise to rights or eliminate rights, both material rights and individual rights (Persoonlijk Recht). Civil rights in their application are divided into several kinds of forms. Form of civil rights, namely:

1. Absolute Right (Absolute)

Absolute rights (absolutes) are also called onpersoonlijk rights that have the understanding that rights contain the power to act for everyone. On the other hand, to keep these rights fulfilled there is an obligation that must be fulfilled by each subject of law not to violate rights. Some of the rights included in this absolute right or onpersoonlijk right are:

a. All public rights, that is, rights that have meaning in an objective sense. The 1945 Constitution is one of the rules of the application of public rights in it.
b. Part of civil rights, based on civil law in an objective sense. That right is: 1). The right of personality, namely the rights of man over himself, including to

The right to claim compensation for losses suffered by one's own family and The right to claim compensation for injuries suffered (disability)

c. Family Rights, namely rights arising from the legal relationship of the family
d. Some of the rights to property, namely rights that have financial value. This right consists of: property rights, the right of power over an object. An example is the ownership of land and the right to intangible objects, in contrast to tangible objects. The right or power over intangible objects is obtained from the results of the human mind. An example is copyright.

2. Relative Rights

Relative rights are the granting of authority to a person or several people to make someone able to do something or not do something. This relative right is exercised as a result of an agreement through an agreement made by the subject of law. Thus, this relative right does not apply to everyone but can only apply to certain subjects of law.

Relative rights arise from the agreement of the parties concerned. The interest used in the agreement can be in the form of objects or achievements. Thus, it can be said that relative rights are individual rights which are addressed to a certain person or in some cases can concern a certain object.

The civil law relationship that exists between the patient and the hospital certainly brings rights (bevoegdheid) in the form of power or authority, and obligations (plicht) which are the responsibility of the parties to fulfill them. This legal relationship between the patient and the hospital occurs since there is an agreement to carry out medical actions. The agreement is established through the approval of medical actions (Informed Consent) made before performing a medical act. Informed Consent is a form of communication both orally and in writing between the hospital and the patient, regarding the agreement of medical actions to be performed by the doctor. and the hospital to the patient. The written agreement can be in the form of signing a consent form as a form of formality and legality of confirmation of what has been agreed previously.

The existence of Informed Consent is also the implementation of the obligations of hospitals and medical personnel to fulfill the rights of patients in obtaining information related to medical actions to be performed. Thus, in response to this information, the patient has the right to refuse, accept, and ask for the opinion of other doctors regarding the medical actions to be performed. The signing of Informed Consent is a legal act carried out by the patient, where the parties, namely the doctor, the patient, and the hospital agree to bind themselves to an agreement to perform medical services at the hospital. As a result, there is a legal relationship between the patient and the hospital, which causes legal consequences in the form of mutual engagement between the parties.

Since the signing of the patient registration approval sheet, then between the patient and the hospital that issued the approval is established an engagement. As normalized in Article 1234 of the Civil Code that every engagement is to give something, do something, or not to do something. Engagements that exist, resulting in the emergence of achievements in the form of rights and obligations to be fulfilled by the hospital to patients and vice versa. The civil code as the basic material of civil law does not explicitly explain the definition of the right itself, but looking at the forms of rights in the Civil Code such as property rights, rights of Use, and rights of objects can be concluded that the definition of rights in the Civil Code is a power or authority given to subjects of law to a particular object.

In relation to the legal relationship between patients and hospitals in terms of medical care, there is a principle of medical law that rests on two basic rights of patients, namely the right to healthcare and the right to self-determination. The basic rights of the patient are the human rights of the patient as a subject of human law, the normalization of which has been regulated internationally in Article 55 of the United Nations Charter on the right to self-determination and the right to health, which is nationally regulated in Article 28 letter H of the 1945 Constitution. In addition to these basic rights, the patient as a user of medical services also has the right as a security normalized in Article 4 of the Health Law, Article 32 of the hospital Law, Article 52 Permenkes Medical Practice and the right as a consumer of medical services regulated in Article 4 of the consumer protection law. Various rights stipulated in the legislation are civil rights owned by patients in relation to medical records.

The civil rights of patients as users of medical services and consumers of services as normalized in Article 4 of the Health Law, Article 32 of the law on hospitals, Article 52 of the law on medical practice, Article 4 of the law on consumer protection, namely: 1). Equal rights in obtaining access to resources in the field of Health; 2). The right to determine their own health services necessary for him; 3). Obtain quality health services in accordance with professional standards and standard operating procedures; 4). Obtain effective and efficient services so that patients avoid physical and material losses; 5). Ask for consultation about his illness to other doctors who have a license to practice (SIP) both inside and outside the hospital; 6). Get privacy and confidentiality of the disease suffered including medical data; 7). Give consent or refuse the action to be taken by health workers against the disease suffered; 8). Obtain security and safety during treatment in the hospital; 9). Sue and / or sue the hospital if the hospital is suspected of providing services that are not in accordance with the standards of both civil and criminal; 10). The right to consumer protection advocacy, protection, and dispute resolution efforts; 11). The right to be treated or served properly and honestly and non-discriminatory; and 12). The right to obtain compensation, compensation, and or

reimbursement if the person and services received are not in accordance with the agreement.

A civil right born as a result of a civil relationship between the patient and the hospital gives rise to a legal consequence in the form of a binding engagement of the parties. Thus, the rights of these patients must be fulfilled considering that patient satisfaction is one of the barometers of the quality of hospital services.

Various rules regarding medical records above, is one of the government's efforts in providing protection to patients. The element of protection can be said to be legal protection consisting of government protection, legal certainty, citizen rights, and the application of sanctions have been listed in the laws and regulations governing medical record secrets. There are many types of legal protection that have been put forward by experts including internal legal protection and external legal protection.

Forms of legal protection based on their sources are divided by M.Isnaeni into two forms, namely external legal protection and internal legal protection. Internal legal protection is basically a legal protection that comes from the parties themselves in making a deal, where the parties get protection since it was decided that the word 'agreed' regarding the agreement and the engagement made. The agreement that gives rise to the engagement is the basis for legal protection, where all the risks that can be caused can be counteracted through clauses that are packaged on the basis of agreement as well..

Regarding internal legal protection, the parties can realize it if their legal position is relatively equal, in the sense that the parties have a relatively balanced bargaining power (capacity). The balanced position of the parties makes the legal protection contained in the agreement easier to achieve. This is in accordance with the principle of freedom of contract which is a foundation for the parties when assembling the clauses of the agreement, so that the balanced legal protection of each party can be realized directly on their initiative. . In short, internal legal protection is a form of legal protection that comes from the parties themselves in conducting a legal relationship.

External legal protection is a form of legal protection that is sourced or made by the authorities through regulation for the benefit of weak parties. The regulations made are not allowed to be biased and biased in favor of one party, then proportionally it is also mandatory to provide balanced legal protection as early as possible to the other party. With regard to the relationship between hospitals and COVID-19 patients, internal legal protection has been established since the agreement in the form of approval of medical actions agreed by patients and hospitals. In contrast to the internal legal protection that the parties tend to have the same legal standing, in this case the external legal protection is present as an

effort of the government to provide rights to its people, that is, the same legal protection of the interests of parties who have a weak position compared to other parties.

Here are some other arrangements that become legal protection and legal guarantees for patients against confidential medical records, namely:

1. Article 29 paragraph (2) of the hospital Law, explains that the hospital is obliged to respect and protect the rights of patients. Hospitals that are found to be in violation may be subject to administrative sanctions in the form of reprimand, and revocation of licenses.

2. Article 17 letter H number 2 of the Public Information Disclosure Law, where a person's history, condition and treatment, physical and psychological health treatment are classified as information that is excluded from being disseminated into public information

3. Article 57 paragraph (1) of the health law, regulates the right of every person to the secret of his personal health condition that has been submitted to the health service provider.

Based on the above arrangements regarding confidential medical records, patients in obtaining civil rights guarantees need legal protection. Legal protection used for patients against confidential medical records in Indonesia tend to be sourced to the form of external legal protection in the form of regulations from the government through legislation, which is prepared by the authorities through regulations for the interests of weak parties, according to the nature of the rules of law that should not be burdensome to one party and is impartial to one party.

External legal protection protects the interests of a person by allocating power to him, to act in the framework of interests, which interests are the object of a right. The external legal protection pursued through a legislation has a purpose, the scope of which is then planned through strategies and policies. All of these things, found in every major legal arrangement are held with the common goal of legal protection.

Civil rights owned by COVID-19 patients are very suitable for obtaining external legal protection where the government regulates them through statutory regulations. When there are adequate arrangements regarding the legal protection of the civil rights of COVID-19 patients against the disclosure of medical records, then when a person's civil rights are violated, in this case the COVID-19 patient, they can file a lawsuit for compensation to obtain their rights through compensation in the form of money. However, for the restoration of civil rights,

another way that can be used is restorative justice which is not only useful for the aggrieved party but also can be useful for society and country.

IV. PERMISSIBLE TO OPEN MEDICAL RECORDS OF COVID-19 PATIENTS IN A PANDEMIC SITUATION

Based on Article 5 Paragraph (1) Permenkes medical secrets there are several interests that allow medical records to be opened, namely; First, the interests of the patient's Health, which aims for administrative purposes, insurance payments, and the interests of maintaining the patient's Health; second, the interests of fulfilling the request of law enforcement officials, which is useful in the investigation, prosecution and court; Fourth, based on the provisions of legislation. The interests under the provisions of the legislation in question are the interests of ethical or disciplinary enforcement and / or public interest. Public interest is the interest of the nation, state, and society that must be realized by the government for the welfare of the people. Article 9 paragraph (4) Permenkes medical secrets, confirms that the public interest referred to in the opening of medical records include the interests of : 1). Medical audit; 2). threat of extraordinary events / outbreaks of infectious diseases; 3). health research for the benefit of the state; 4). education or use of information that will be useful in the future; and 5). threats to the safety of others individually or in society.

In connection with the COVID-19 pandemic as an infectious disease outbreak in Indonesia, the interests that form the basis for opening medical records belonging to COVID-19 patients are of public interest, namely the threat of extraordinary events/infectious disease outbreaks. The opening of medical record data on the threat of extraordinary events/outbreaks of infectious diseases allows to reveal the identity of patients to institutions and authorities. The disclosure of patient identities in medical records containing health information and personal data, can be useful for medical personnel and the government in carrying out observations and determining policies as an effort to combat the COVID-19 virus in Indonesia.

In Article 1 Number 1 Permenkes Infectious Disease Prevention. Transmission of the disease can be through direct physical contact with people who are sick or who have been infected, in the form of touch or spread of droplets from parts of the body (droplets). . Disease outbreaks that have been regulated in Article 1 Number 5 of the regulation on Infectious Disease Management can be interpreted as an increase in the number of diseases above normal that usually occur and suddenly attack the population of a certain geographic area. The study of patterns of disease spread and health status, applied to the control of health problems is referred to as Epidemiology.

Disease outbreaks are divided into three different status levels, namely endemic, epidemic and pandemic, which are based on the ability to spread the disease in an

area. The first Status is endemic, where infectious diseases begin to appear and become characteristic in a particular region. When a disease has spread rapidly to another region or country and begins to affect the population of that region or country, then the level of the outbreak of this disease rises to the second level, which is called an epidemic. The spread of the virus quickly rose to a pandemic level which made the outbreak of the disease occur simultaneously everywhere, covering large geographical areas (entire countries.continent) and has become a common problem for all citizens. The pandemic level is different from endemic which is used to indicate the high level of cases of a disease. Pandemics only show the level of disease spread in an area.

The term phase passed by an infectious disease such as endemic and pandemic, is useful as a warning for the government and the public to be prepared and alert so that they can immediately implement health protocols. There are several criteria for a disease to be said to be in the pandemic phase. These criteria include: 1). Outbreaks that broke out in unison occurred everywhere covering a wide geographical area; 2). It spreads globally or internationally and is unpredictable so it is difficult to control.

The rate of spread of an infectious disease can be a dangerous threat if a cure or vaccine is not found, resulting in an increase in the number of infected people. The rapid spread of infectious diseases can become dangerous if people are unable to cooperate with the government in suppressing the spread of outbreaks. Efforts to combat the outbreak as affirmed in Article 10 of Government Regulation No. 40 of 1991 on the management of infectious disease outbreaks one of which is an epidemiological investigation aimed at finding out the cause of the outbreak, knowing the community groups threatened by the outbreak, and determining how to overcome it. In conducting epidemiological investigations, data and information from patients are needed, one of which is located in the medical record.

Confidential medical records can only be opened for certain interests, one of which is the public interest. Extraordinary events/outbreaks of infectious diseases are one of the public interests that have an impact on the social life of the community, economy, and government, so that the response must be prioritized. Medical record data opened to institutions or authorities in a pandemic situation is useful as a basis for government epidemiological investigations either in order to make vaccines and drugs against infectious diseases or to be able to make observations in areas affected by the virus. Medical records are also useful in the application of epidemiology that studies the pattern of disease spread or health-related events, so that based on research on patient medical record data can produce prevention programs, clinical interventions and Public Health control measures against infectious diseases. Therefore, the opening of medical records can be one of the efforts to overcome infectious disease outbreaks in Indonesia

The opening of medical record data in pandemic situations is for the public interest, in contrast to the opening of medical records in ordinary situations for the sake of Health and the request of law enforcement officials. The difference lies in the consent of the patient, where in ordinary situations medical records can only be opened on the basis of the consent of the patient and the patient's family. Meanwhile, as normalized in Article 9 paragraph (1) of the Permenkes Medical secret that in a pandemic situation that belongs to the category of public interest, the opening of medical records is carried out without the consent of the patient.

The pandemic situation, which has a complex impact on people's welfare in the social and economic fields in a country, requires the government to act quickly and determine policies in an effort to prevent many people from contracting infectious diseases. Thus, the opening of medical records without the consent of patients in a pandemic situation can be considered as an efficient and effective step to study and find drugs, vaccines and ways to suppress the spread of infectious diseases.

Confidentiality of medical records based on Article 5 Paragraph (1) Permenkes medical secrets can be opened for the benefit of the patient's health, the request of law enforcement officials, the patient's own request, the interests of discipline ethics, and the public interest. Opening of medical records in situations of infectious disease outbreaks, namely for the public interest as normalized in Article 9 paragraph (1) Permenkes medical secrets can be done without the consent of the patient

In the regulation of the Minister of Health No. 82 of 2014 on the management of Infectious Diseases that institutes and officials authorized to follow up and have the right to know the identity of patients, including public health officials, the Central Government, the President, local governments (governors, regents and mayors), the Minister of Health.

This medical record opening criterion refers to the important information section to enforce the principle of benefience (bringing benefits) and nonmelafience (not harm) to the community.Information in medical records that are used for efforts to combat the COVID-19 virus such as personal data (identity) and personal secrets (background, relationship status, patient work, patient disease history) does not need to be disclosed because it is outside the necessary public interest. Meanwhile, general information such as the number of residents confirmed positive for COVID-19 and the affected areas is information that brings benefits and needs to be known by the public as public awareness and tracing carried out by the government to determine actions to prevent the spread of COVID-19

V. LEGAL MEASURES CAN BE TAKEN BY COVID-19 PATIENTS WHOSE MEDICAL RECORD IDENTITY IS DISCLOSED TO THE PUBLIC WITH RESTORATIVE JUSTICE APPROACH

The patient personal data information issued by the government gives the public and the media space to find out who is the first COVID-19 patient in Indonesia. The Media even covers the patient's home address, and provides private confidential information regarding the patient's work background, up to the patient's domestic life, which belongs to the realm of privacy and is not for public consumption.. As a result, COVID-19 patients also feel embarrassed to get treatment and often get blasphemy from the public through social media. The excitement of the community and the news worsened the patient's condition so that the patient did not recover as a result of receiving blasphemy from people who already knew his identity. .

Based on the principle of public interest above personal interest, the opening of patient medical record data in a pandemic situation for the public interest is used as an effort to overcome infectious disease outbreaks based on medical secrets regulation. Indonesia itself in practice enforces the principles of proportionality, nesesitas (necessity) and purposive limitation (other purposes) in the handling of COVID-19 patient data regulation confirmed positive, which means that there is a limit provisions in the retrieval and access of medical record data by not excluding the effects of justice for patients.

Medical records as part of patient privacy require permission from the owner to be opened. This is due to the inclusion of patient personal information in medical records that are not related to general information such as health promotion, disease transmission, and others. On the other hand, the COVID-19 pandemic has actually encouraged the government to be transparent about all medical information related to the COVID-19 virus in an effort to reduce the transmission rate. However, it must still be distinguished regarding information that is mandatory for the public to know and information that is excluded from being opened to the public because as stated in Article 17 letter h of the Public Information Disclosure Law Public Information that if opened can reveal personal secrets such as the history and condition of family members, history of treatment conditions, and physical health of a person can cause harm and violate the civil rights of COVID-19 patients. The government's action in opening medical record data for COVID-19 patients has an impact on the knowledge of personal secrets and identities of COVID-19 patients by the public. This, of course, violates the patient's civil rights to be protected privacy, and violates the patient's right to be healthy and recover from the disease. As a result, COVID-19 patients not only suffer losses because they are blasphemed but also suffer losses because they do not recover and experience a decrease in health (drop).

Looking at the social facts that occur, it is necessary to identify whether the government's actions can be classified as unlawful. An act can be said to be unlawful (onrechtmatige daad) if it is contrary to the law and causes harm to others which is not a default. As normalized in Article 1365 of the Civil Code there are 4 (four) elements of the fulfillment of unlawful acts, namely the existence of unlawful acts, errors, losses, and the causal relationship between acts and losses. The first element of the unlawful acts, acts that dimkasud is the act of legal subjects who are considered to violate the rules of written or unwritten law that applies in public life. In relation to the opening of medical record data for COVID-19 patients, it has been stipulated in Article 9 paragraph (5) of the medical secrets regulation that the patient's identity can only be opened to authorized institutions and officials, so that government actions that mention the patient's identity and personal secrets include violating the law and harming the patient.

The second element is the error, the loss as a cause in the act of breaking the law arises due to an error. An action can be said to be a mistake when it meets one of the elements of intentionality or negligence. Mistakes caused by deliberate (opzet) done by someone with the intention and the consequences are realized, while negligence (nalatigheid) is an act that is less cautious either due to not think about the emergence of a risk that when it should be thought of. Thus, any act caused by intent or negligence can be categorized as an unlawful act as long as the Act violates the rule of law. The government's actions in order to answer public questions about COVID-19 patients by providing information about initials, affected areas, professions, and home addresses have resulted in the identity of COVID-19 patients being easily known by the public. Information about the patient's personal secret should be a mandatory privacy to be maintained and not to be known to the public as stated in Article 17 letter h of the Public Information Disclosure Law regarding excluded public information. Thus, government actions can be classified as negligence that causes harm to COVID-19 patients

The third element of an act can be said as an unlawful act is the loss. According To M.Tjoanda, loss has a relative sense, which rests on a comparison between two circumstances in which there is a difference (adverse) between the circumstances that arise as a result of violation of the norm, and the situation that should arise anadaikata violation of the norm does not occur. .Losses can be divided into material losses and immaterial losses. Material losses are real losses can be assessed by nominal in the form of money or goods, otherwise immaterial losses are not real can be known the amount nilainyaa. Immaterial losses are losses suffered as a result of the loss of potential profits in the future. Immaterial loss can be a link, trauma, disappointment, pain, and so forth. The provisions in Article 1372 of the Civil Code are the basis for immaterial damages. Immaterial damages cannot be calculated mathematically how much money is given to compensate for

the losses suffered but requires the discretion of the judge in applying the condition that the amount of compensation must be reasonable. If it is associated with the knowledge of the identity of COVID-19 patients, then patients who receive blasphemy from the public, thereby making patients feel traumatized, even scared and making their health condition deteriorate have experienced immaterial losses that cannot be calculated in real terms.

The fourth element, as the last element of an act can be said to be an unlawful act, namely the causality (causal relationship) between unlawful acts and losses. As explained above, that the government's negligence in disclosing medical records of COVID-19 patients by providing information about the patient's personal secrets is an act that violates the law and results in patients experiencing immaterial losses in the form of insults, blasphemy, and worsening health conditions.

In an effort to reduce the number of COVID-19 infections, the government should not need to provide information to the public about the initials of the names and addresses of patients, but only need to provide general information about the number of positive confirmed patients and areas affected by COVID-19, so that the surrounding community can be more vigilant and know the general information needed to prevent the increase in transmission rates. The hospital should also conduct searches and safeguards the patient's medical record files that have been opened, as stipulated in Article 46 of the hospital law that the hospital is responsible for the patient's medical record. For this reason, if there are COVID-19 patients who have suffered losses due to unlawful acts related to the opening of the medical record, COVID-19 patients can file legal proceedings against the hospital.

Legal remedies are a way or effort for patients who feel aggrieved, to claim the rights that have been violated and obtain the protection of rights granted by the court. The legal protection provided to COVID-19 patients in filing legal remedies can be sourced from external or internal sources. Internal legal protection formed since the agreement in the form of approval of medical actions agreed by the patient and the hospital gives rise to the right for patients to be able to file a default legal remedy if in the approval of the medical action there is a statement about the mandatory confidentiality of personal secrets and patient identity.

In addition to filing a lawsuit for compensation to the court, COVID-19 patients whose civil rights have been damaged due to the disclosure of medical records can also submit efforts to resolve using restorative justice. Restorative Justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation. Restorative justice

efforts are very appropriate in this case, where the recovery of the civil rights of COVID-19 patients whose personal information and data has been disseminated to the public can be restored with the consent of the injured patient. Knowing all the identities of the first COVID-19 patients made the government seek restorative justice by providing opportunities and facilitating the patients concerned to hold press conferences.

The press conference here is a form of restorative justice sought by the government. In this press conference, COVID-19 patients provide education to the public about COVID-19 symptoms, treatment and stories while being treated in hospital. Having this press conference also makes COVID-19 patients no longer feel the bad effects of knowing their identities in society, meaning that these COVID-19 patients no longer feel ostracized or terrorized about their illness but are instead given awards and welcomed for their enthusiasm in providing education to the public. Thus, the restorative justice efforts that can be carried out can directly restore the civil rights of COVID-19 patients who have been violated without having to file a lawsuit in a court.

VI. CONCLUSION

1. The patient has a civil right to privacy of confidentiality of the disease and to sue the hospital. The legal protection of patients is regulated in several laws that state that hospitals have an obligation to protect the rights and privacy of patients

2. The opening of medical records can only be done by the doctor as the person in charge of patient care and the head of the hospital as the leader of the health care facility, and the identity of the patient can only be opened to the institution and the authorities to follow up, namely the head of the Health Office, Local Government (governor, mayor, or regent), Minister of Health, and the Central Government, namely the president of the Republic of Indonesia.

3. The fulfillment of elements of unlawful acts, including elements of errors, immaterial losses, and causality relationships between acts and losses, gives rise to the right for COVID-19 patients to be able to file legal remedies as normalized in Article 57 paragraph (1) of the health law in the form of claims for compensation on the basis of unlawful acts against the leaders of Health

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