

Review on Restorative Justice Approach in The Settlement of Sexual Violence Cases

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Abstract

According to the 2018-2020 Annual Record (CATAHU) of Komnas Perempuan, sexual violence against women, such as incest, cyber sexual violence, marital rape, fornication, and rape, happens often in personal/private and community settings. Sexual violence causes in material, physical, and psychological damages for the victim. However, when solving it, many people remain to consider it trivial. When restorative justice used to resolve the case, often, the solutions to resolve cases of sexual violence pay less attention to the condition of the victim. This paper analyzes whether the pursuit of restorative justice is an appropriate response for victims of sexual violence. The pursuit of restorative justice is one of many ambitious strategies to reform criminal justice mechanisms. This becomes increasingly problematic when the indicator of restorative justice is unclear. The method used in this study is a qualitative approach, namely the normative method, through library research. The primary purpose of the restorative justice approach is to reduce the jail population. Therefore, it is resolved as peacefully as possible (via mediation) with the aim of restoring the situation to its original state and reestablishing the pattern of good relations in society. In cases of sexual violence, the victim suffers not only physical and material losses, but also psychological and social ones. Whether then this Restorative Justice can protect victims and ensure their rights is still a questionable. Physical and monetary losses may be recoverable in a short period of time, but psychological trauma might last a lifetime. In addition, there is no assurance that the offender will not threaten the victim or even repeat his crimes once the Restorative Justice process has been concluded.

Keywords: restorative justice, sexual violence, gender-based violence

I. INTRODUCTION

Sexual violence is one of many forms of gender-based violence. Gender-based violence itself is a form of violence occurred due to the gender inequality which encourage someone to believe that violence is acceptable.

The 2019 KOMNAS Perempuan (The National Commission on Violence against Women) Yearly Notes stated that from 2011 to 2019, a total of 46,698 cases of sexual violence were reported. These cases included rape, sexual assault, sexual harassment, incest, adultery, sexual exploitation, and forced abortion (Komnas, 2019).

Meanwhile, according to the 2021 KOMNAS Perempuan Yearly Notes (CATAHU – Catatan Tahunan), the number of violent acts against women has decreased by approximately 31.5% annually. Notably, the decreased number in 2020 did not indicate that the number of actual cases has decreased. This is similar to the findings of (Tia Palermo et al, 2014) study on gender-based violence in developing countries, the reports of sexual violence in Indonesia replicates an iceberg. It is believed that the actual cases vastly outnumber the reported cases.

The high number of unreported cases is frequently ascribed to victims' lack of confidence in the Indonesian criminal justice system; and that the protection offered to victims of sexual abuse by Indonesia's legal system was inadequate. The 2021 KOMNAS Perempuan Yearly Notes identified several cause for the decreased number in reported sexual violence cases during the pandemic, such as 1) the relationship between the victims and the perpetrator during the restriction of movement in the time of Covid-19 pandemic; 2) there is an inclination that victim only dare to tell her family or keep silent; 3) technological/digital illiteracy; 4) a complaint handling model that is not ready for pandemic conditions (not yet converting the model to online scheme) (Kimnas, 2021).

Sexual violence causes in material, physical, and psychological damages for the victim. The psychological damages vary, ranging from deep trauma, fear, shame to changes in behaviour due to sexual violence experienced. While the physical damages range from bruises, and wounds in sexual organs to severe injuries such as fractures and damage to the reproductive organs.

However, often, when solving it, many people remain to consider it trivial. The solutions to resolve cases of sexual violence usually pay less attention to the condition of the victim. There are those who settle it by the perpetrators paying financial compensation, there are those who marry the victim to the perpetrator, and there are those who settle it by the perpetrators paying a fine to the community environment, such as building the paving roads. It is impossible to return the victim to his or her original condition. Extremely traumatized victims take a very long time to recover, especially if they marry their abusers; they will live with the perpetrator for the rest of their lives, and there is still the risk that the abuser will commit other acts of violence against them. The government have enacted and revised several laws and legislation to provide better protection for victims of sexual violence. Some of the most notable include: Law No. 23/2004 on Anti-Domestic Violence that specifically regulates domestic violence; Law No. 13/2006, as amended by Law No. 31/2014, on Witness and Victim Protection, involving the protection of child victims of sexual violence; Law No. 21/2007 on Anti-Trafficking in Persons (TIP) that criminalizes TIP offenders and regulates the protection of women and child victims of sexual exploitation; and Law No. 23/2002, as amended by Law No. 35/2014, on Child Protection that regulates the prohibition on sexual violence against children.

The roadmap for criminal justice reform in Indonesia was influenced by restorative approaches to justice, as opposed to the conventional ideas of retributive punishment that dominate the majority of criminal law (BPHN, 2015). In compliance with Supreme Court Decree No.

1691/DJU/SK/ PS.00/12/2020 Concerning Application of Restorative Justice Guidelines Enforcement. The restorative justice approach is an alternative method for resolving criminal cases through mediation that brings together victims, perpetrators, and their families with an emphasis on restoring victims and perpetrators to their original state of well-being.

Restorative justice has attracted attention and is considered as a crucial method to reduce the amount of prisoners in Indonesia. However, it is questionable whether the practices align with the purpose of victim redress. Institutionalization of restorative justice practices tends to prioritize offender rehabilitation over grievance redressal. As a result of the lack of assistance provided to victims, they are often unprepared to participate in restorative justice practices, which benefits the perpetrator more. It demonstrates that not all 'restorative' activities are aligned with the concepts of restorative justice; some approaches hijack the concept of restorative justice in favour of the offender rather than the victim.

This paper examines whether restorative justice is an appropriate approach for cases of sexual violence and how its implementation in Indonesia's criminal justice system might be effectively navigated. Importantly, it explores whether the concept of restorative justice may be aligned with the victim's interests rather than encouraging impunity for perpetrators, arguing that restorative justice practices must be driven by victim-centered approaches, especially in cases of sexual violence.

II. LITERATURE REVIEW

Restorative Justice Defined

Restorative justice is a structured, collaborative decision-making process that usually involves victims, perpetrators, and sometimes other member of the community. The goal is for participant to share their experiences of, incidents; understand the damage caused; and reach an agreement on how to repair the damage, prevent it from happening again and/or ensure safe communities. The basic principles of restorative justice are as follows (Karp, 2016):

- 1) Focusing on the damages of violations, not on the violated rules;
- 2) Showing equal care and commitment to victims and
- 3) perpetrators by involving both in the judicial process;
- 4) Working to restore, empower and
- 5) meet the needs of affected parties;
- 6) Support people who have caused harm, encouraging them to understand, accept and fulfil their responsibilities;
- 7) Note that although obligations may be difficult for those who have caused harm,
- 8) they must not be seen as a disadvantage and must be achievable;
- 9) Provide opportunities for dialogue - directly (face to face) or indirectly -
- 10) between the victim and the people who caused the injury, as needed;

- 11) Community involvement and empowerment through the legal process;
- 12) Encourage cooperation and, if necessary, reintegration instead of coercion and isolation;
- 13) Giving attention to the unintended consequences of our actions and programs; and • Demonstrating respect to all parties, including harmed parties, people who caused harm, and impacted community members.

The Basic Concept of Restorative Law

In the practice of criminal law enforcement, we often hear the term restorative justice or restorative law, which is called restorative law in the Indonesian translation. The meaning of restorative law is namely: "restoration of relationships and compensation of the criminal (his family) to the victims of the crime (his family) outside the court with the intention of disobedience (peaceful efforts) and with the aim that the crime be properly resolved by agreements between the parties (Morris, 2002). Restorative justice is essentially a philosophy (guideline) of a peace process outside the judicial system through mediation or deliberation, to achieve justice expected by the parties involved in criminal law, ie. the perpetrators (their families) (Payne & Kelly, 2015). crime victims (families) to find the best solution agreed upon and agreed upon by, parties. Restorative justice is said to be a philosophy (guideline) in the delivery of justice, carried out by parties outside the justice system, because it supports the peace process between offenders (their families) and victims (their families). to the occurrence of victims/losses of these crimes (Sekhroni, 2016).

Thus, it can be argued that the right to restore a just situation includes basic principles, including:

- 1) Strive for peace outside the court of the criminals (their families) against the victims (their families)
- 2) The perpetrators of the crime (his family) are responsible for compensation by compensating the damage caused by the crime he committed; and
- 3) Resolving criminal legal matters between the perpetrator and the victim of the crime when an agreement is reached between the parties.

III. METHODOLOGY

This research implements qualitative approach with secondary data analysis/indexation (IOM, 2020). The secondary data in this research are the literatures on restorative justice, relevant legal documents established by institutions of law enforcement, such as the penal code law and the existence of the Anti-Sexual Violence Law, and Indonesia online newspaper articles on sexual violence in Indonesia as reference cases

IV. RESULT AND DISCUSSION

Sexual Violence

According to World Health Organization (WHO), sexual violence is interpreted as any sexual act, attempt to obtain a sexual act, undesirable comment, or action, toward one's sexuality with an element of coercion by anyone (regardless of the relationship with the victim) and in any situation (not limited to domestic or work settings) (Kruh, 2002). The coercion mentioned in the definition can be in the form of physical or psychological violence, for example, psychological threat, threat of layoffs, or physical threats. The presence of the element of coercion is intended to force the victim to submit to the perpetrator's will. Apart from exercising the element of coercion, this crime may also occur when an individual does not have the ability to give full consent to participate in the sexual act that the perpetrator is about to perform, for example: due to being under the influence, asleep or unconscious, or having a mental disability. Moreover, United Nations (UN) has defined sexual violence as an aggressive and cruel conduct with different varieties and consequences, ranging from unwanted touch to forced sexual intercourse and rape (UN Reports, 2015).

Besides the act of rape, the other types of sexual violence identified by the WHO include sexual slavery, sexual harassment, trafficking for the purpose of forced prostitution, forced exposure to pornography, forced pregnancy, forced sterilization, forced abortion, forced marriage, and female genital mutilation (WHO, 2003). Acts of rape and other sexual violence acts are deemed to breach human rights and if these acts are performed in war and political conflicts, they are regarded as crimes against humanity. Therefore, the state has the responsibility to protect women from all types of sexual violence and provide appropriate medical and psychosocial assistance (International Criminal Record, 1998).

The Law No. 12/2022 on Sexual Violence Crimes (*Undang-Undang No 12 Tahun 2022 tentang Tindak Pidana Kekerasan Sexual*, abbreviated as UU TPKS) Article 1 number 1 defines Sexual Violence Crimes as all acts that fulfill the elements of a criminal act as regulated in this law and other acts of sexual violence as regulated in the law as long as it is determined in this law. Based on these provisions, the types of crimes of sexual violence are as follows:

- a) Non-physical sexual harassment;
- b) Physical sexual harassment;
- c) Coercion of contraception;
- d) Forced sterilization;
- e) Forced marriage;
- f) Sexual abuse;
- g) Sexual exploitation;
- h) Sexual slavery; and
- i) Electronic based sexual violence.

Other types of sexual violence crimes also explained in The Law No. 12/2022 on Sexual Violence Crimes Article 4 number 2, as follows:

- a) Rape;
- b) Obscene acts;
- c) Sexual intercourse with children, obscene acts against children, and/or sexual exploitation of children;
- d) Acts of violating decency that are contrary to the will of the Victim;
- e) Pornography involving children or pornography that explicitly contains violence and sexual exploitation;
- f) Forced prostitution;
- g) Criminal acts of trafficking in persons aimed at sexual exploitation;
- h) Sexual violence within the household;
- i) Money laundering crime whose predicate crime is a Sexual Violence Crime; and
- j) Other criminal acts that are expressly stated as Crimes of Sexual Violence as stipulated in the provisions of the legislation.

Victims of sexual violence usually experience physical, psychological, and even social suffering caused by the act. Law No. 13 of 2006 about the Protection of Witnesses and Victims defines a victim as 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 about Protection of Witnesses and Victims states that victims have the rights to:

- a) 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
- b) Participate in the process of selecting and determining forms of security protection and support
- c) Give information without pressure
- d) Get a translator
- e) Free from ensnared questions
- f) Obtain information regarding the progress of the case
- g) Obtain information regarding court decisions
- h) Knowing in terms of the convict being released
- i) Got a new identity
- j) Getting a new residence
- k) Obtain reimbursement of transportation costs as needed
- l) Obtain legal advice and/or
- m) Obtain temporary living expenses assistance until the protection deadline expires

Although Law No. 13 of 2006 about Witness Protection and Victims have guaranteed a sense of security in giving information during the examination process. The embodiment of a sense of security that often does not work according to the objectives of the regulations these laws make victims tend to prefer to remain silent. Women often experience unfair treatment and received the

act of discrimination whilst undergo the process of law (Apriyani, 2021). Women often blamed by law enforcer as the reason of domestic violence conducted by her spouse, mostly wives were deemed not devoted enough in taking care of their husbands, disloyal, as well as lacking of parenting skill (Ashila, 2019). In other situation, many law enforcer suggest that the women who invite the act of raping because of their choice of clothing, wandering at night, and engage themselves to a free-spirited crowd. Moreover, women-victim mostly received questions, or remarks that put them in precarious position, and harassing statement from law enforcer are drawing fear and leads to a sense of trauma (Ashila, 2019). When the court manages the case, judges often ask about sexual history of the victim and tends to ignore the victim's needs for proper assistance and recovery. These situations put more challenge on women in contact with the law and in accessing their rights, especially the rights to receive a fair trial (Komnas Perempuan, 2017). Therefore, in most cases of sexual violence, the victim prefers to remain silent.

Restorative Justice

Restorative Justice or often translated as restoration justice, is an approach model that emerged in the 1960s in efforts to resolve criminal cases. This method emphasizes the direct participation of perpetrators, victims, and the community in the process of resolving criminal cases, as opposed to the standard criminal justice system (Amdani, 2016).

Restorative Justice, also known as restoration justice, is a model approach that arose in the 1960s in an effort to resolve criminal cases. This method emphasizes the direct participation of perpetrators, victims, and the community in the process of resolving criminal cases, as opposed to the standard criminal justice system.

Restorative Justice is an alternative settlement of criminal cases in which punishment 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 their relationships. The fundamental premise of restorative justice is the rehabilitation of victims who have suffered as a result of a crime by the provision of restitution, peace, community service, or other arrangements. A fair law in restorative justice is not one-sided, unbiased, or arbitrary; it only takes the side of the truth in line with applicable rules and regulations; and it considers the equality of rights, compensation, and balance in all aspects of life. Offenders have the opportunity to participate in restoration, the community is responsible for maintaining peace, and the court is responsible for maintaining public order (SK Mahkamah Agung, 2022).

Liebmann defines restorative justice as a legal system that tries to repair the well-being of victims, offenders, and communities harmed by crime, as well as to prevent future violations or criminal acts. Liebman also presents a statement of the essential ideas of restorative justice as follows (Liebmann, 2007):

- a. Prioritize victim assistance and recovery.
- b. Offenders are accountable for their actions.

- c. Dialogue between the victim and the perpetrator to develop an understanding.
- d. There is an attempt to accurately classify the incurred losses.
- g. Offenders must be aware of how to avoid crime in the future.
- f. The community facilitates the integration of both victims and abusers.

Restorative Justice Approach in Protecting Victims of Sexual Violence

Restorative justice has been practiced as a method of rehabilitation for victims of crime in different countries. They have replaced the victim as the central focus on the current criminal justice system; they serve as law enforcers and the victim's spokesman. The victim's compensation was traded for other forms of punishment. Additionally, victim rehabilitation has shifted towards offender rehabilitation.

Wood and Suzuki address the risk that restorative justice may be distorted to the point that it becomes 'non-restorative' by acknowledging the many practices and variations of restorative justice. Although their approach does not particularly address sexual assault, they offer persistent ideas that can be applied to the subject. It is a concern when programs are labelled 'restorative' but prioritize the rehabilitation of the offender over the victim. Restorative justice may have specific objectives, such as negotiating an agreement between victims and criminals. In these circumstances, success is evaluated by the achievement of such agreements; victims may be coerced into behaving a certain manner in order to ensure 'successes. This may involve accepting an apology or an offer of restitution from offender (Wood & Suzuki, 2016).

In Indonesia, restorative justice is not a new thing in the criminal court system. The Law on the Juvenile Criminal Justice Method recognizes this system, most often known as "diversion." In theory, it is identical to restorative justice. However, this diversion is required or essential when dealing with matters involving juveniles and the law. In contrast, in some instances, such as those involving sexual violence, the character is more of a recommendation. Since the release of the Supreme Court's Decision Letter 1691/DJU/SK/PS.00/12/2020 on the Implementation of Restorative Justice Implementation Guidelines, the guidelines have been enforced. This strategy is enforced by taking the guidelines' significant considerations into account.

In the Supreme Court Decree Number 1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for the Implementation of Restorative Justice, it is stated that in adjudicating cases of women facing the law, consideration must be given to the history of violence perpetrated by the perpetrators against the victims, the power relations that have rendered the victims powerless, the psychological and physical powerlessness of the victims, and the psychological impact suffered by the victims. litigants.

The Law No. 12/2022 on Sexual Violence Crimes also regulates a restitution for victims. The law focuses on meeting the needs and defending the interests of victims, particularly with regard to their right to privacy, protection from the threat posed by the perpetrator and their family or peers, and protection from further victimization. The measure appears to seek a 'friendlier' process,

regulating comprehensive services such as medical care, economic aid, and psychological assistance to accompany the victim throughout the case proceedings, from the initial report to the publication of the verdict.

The Law No 12/2022 on Sexual Violence is strictly and clearly regulated with the aim of:

- a) to prevent all forms of sexual violence;
- b) to treat, protect and recover victims;
- c) to carry out law enforcement and rehabilitate perpetrators;
- d) to create an environment without sexual violence; and
- e) to ensure the non-repetition of sexual violence.

Unfortunately, the implementation of restorative justice is often seen as deviating from its original purpose. For example, in 2019 a young girl (16 years old) was gang-raped by 6 people in Central Java. The age range of the perpetrators was between 39 and 60 years old. The occurrence of rape was discovered when the woman was six months pregnant. The matter was resolved through mediation, with each perpetrator paying as much as 7.5 million IDR in restitution (equal to 700 USD). The mediation was facilitated by village officers. Still in 2019, a woman was gang-raped by her colleagues in Cooperatives and SMEs Ministry (Okezone, 2019). The matter was resolved through mediation. The victim was forced to be married with one of the perpetrators, while the other perpetrators were walking away – even one of them received a scholarship to study abroad. The mediation was facilitated by the police officer.

These cases raise the question of how these laws accommodate non-justice or alternative mechanisms. This question is crucial due to its connections to 'restorative justice' efforts intended to resolve incidents of sexual violence outside of the criminal court system. In these cases, mediation was utilized as part of a process of restorative justice. The officer cites Circulation Decree of the Police Chief (SE/8/VII/2018) (2018 Decree) about the implementation of restorative justice in criminal cases. The Decree authorized investigators to adopt restorative justice procedures under the following conditions: the victim consents to the mediation, the case is not classified as a major crime, and the criminal case is closed. The Decree is broadly implemented, and police personnel have also mediated a significant number of cases involving serious sexual violence.

In response to the many approaches to restorative justice, Indonesian women's movements have determined several choices for its implementation in cases of sexual violence. The first believes that restorative justice, as an alternative approach, is inappropriate for serious sexual violence offenses. The second evaluates the victim's decision on whether or not to utilize the alternate method.

Related to the impact of restorative justice practices on the victim is the fact that mediation processes frequently provide automatic impunity to the offender instead of focusing on fulfilling or addressing the victim's reparation, thereby undermining the fundamental principle of restorative

justice. The agreement of the victim to participate in mediation with the criminal has become the rationale used by law enforcement and other parties to settle mediation (Nurherwati, 2020).

According to the experts, situations of sexual violence should not be resolved by mediation, primarily because mediation is distinct from restorative justice. Mediation is intended for use in civil issues, such as marital disputes over alimony or property, in accordance with the continental law tradition, which is distinct from the common law system. In addition, they emphasize General Recommendation CEDAW 33/2015, which specifies the limitations of alternative mechanisms for domestic and sexual abuse against women.

This approach to restorative justice can only be utilized to solve incidents of violence if the perpetrator is a child, because children as perpetrators are actually victims of their environment, which shapes their conduct. Aside from that, youngsters are unable of deciding what to do and what not to do. This conforms to the requirements of the special statute on juvenile justice.

In February 2021, Komnas Perempuan issued the following excerpt from its position statement in response to the Coordinating Ministry of Political, Legal, and Security Affairs addressing restorative justice in resolving cases of violence: *“Komnas Perempuan invites the Coordinating Ministry for Political, Legal, and Security Affairs and all parties to continue supervising the implementation of Restorative Justice, whether through law enforcement institutions or in the community. In addition, to conduct a comprehensive study of Restorative Justice, including attempts to address previous human rights breaches, in order to strengthen its concepts, policies, and implementation guidelines. This strengthening is required so that within the framework of Restorative Justice, in addition to promoting harmony among people, the rights of victims, particularly female victims of abuse, to truth, justice, and restoration are prioritized.”* (Komnas Ham, 2021)

The concept of restorative justice should Continue to strengthen the notion of restorative justice so that it prioritizes the fulfilment of the rights of victims of violence and their right to recover from trauma and their social condition. The victim's interests should take precedence above all other considerations. Even if this restorative justice strategy is utilized, it must be founded on the victim's permission; nevertheless, this does not imply that it is the only viable answer.

V. CONCLUSION

Sexual violence is a crime with numerous harmful repercussions for its victims. In addition to physical, financial, and social suffering and losses, victims frequently endure psychological suffering, from which recovery can take years or even a lifetime. Victims must also carry the weight of the bad stigma that society attaches to them.

Restorative justice focuses its efforts on the victim. Based on international legal frameworks and the scholarly literature on restorative justice and sexual violence, the authors conclude that the protections offered by alternative approaches labelled 'restorative justice' to victims of sexual abuse are questionable. Not only do they violate Indonesia's criminal justice system, but it is also

impossible to observe how the practice benefits victim protection and justice. As patriarchal culture is deeply rooted in Indonesian society, such informal practices can easily reinforce existing gender biases, inequality, and power imbalances, so undermining their intended deterrent effect.

The restorative justice approach cannot be used as a means of resolving sexual violence cases because, in addition to its inability to protect victims, it would lead to the emergence of thoughts or assumptions that the perpetrator's actions can be resolved with only restitution and that the perpetrators are free to roam the streets once more. In addition, there is no assurance that the victim will be secure if the criminal poses a threat.

The Law No. 12/2022 on Sexual Violence makes it quite clear that the alternative restorative justice mechanism is not intended to replace the existing criminal justice mechanism, but rather to supplement it. Therefore, the concept of restorative justice should continue to be strengthened so that it promotes the rights of victims of violence and their ability to recover from trauma and social situations.

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