



Misperception of the Implementation of the Principle of Restorative Justice to the Crime of Rape

Nur Akifah Janur¹, Abdul Rahman², Ardiansyah³

¹Jurusan Syariah dan Ekonomi Bisnis Islam, STAIN Majene, Indonesia

²Jurusan Syariah dan Ekonomi Bisnis Islam, STAIN Majene, Indonesia

³Jurusan Syariah dan Ekonomi Bisnis Islam, STAIN Majene, Indonesia

Email: nurakifah@stainmajene.ac.id¹, rahman_kanang@stainmajene.ac.id²,
ardi.ansyah@stainmajene.ac.id³

ARTICLE INFO

Article History:

Received: 2023-04-08

Accepted: 2023-05-06

Published: 2023-07-31

Keywords:

*Crime of Rape,
Misperception,
Restorative Justice*

ABSTRACT

The concept of Restorative Justice is an alternative settlement of criminal cases in which, in criminal justice procedures, the focus of punishment is shifted to a mediation or deliberation process involving several parties, including the perpetrator, victim, family of the perpetrator or victim, and other related parties, where the principle of one crime in the Criminal Code (KUHP) is the crime of rape regulated in Article 285 of the Criminal Code which is a form of crime against decency. The purpose of the research is to review the perception errors in the application of the principles of restorative justice to the crime of rape to provide a direction for change regarding the principles of restorative justice in the crime of rape. The study comes to the conclusion that restorative justice must prioritize ensuring the rights of rape victims are upheld rather than being applied in a way that reconciles the victim and the offender. The TPKS Law, which governs rape law enforcement in Indonesia, ensures that victims' rights are protected in terms of handling rights, protection issues, and recovery rights. The punishment meted out to those who commit the crime of rape is a way of holding them accountable for their deeds.

A. Introduction

Sexual harassment (rape) legal protection is a countermeasure against victims by obtaining assistance based on restorative justice.¹ The application of restorative justice to rape victims because women suffer material, physical, and psychological losses. Settlement is still conservative by paying monetary compensation and marrying the victim to the perpetrator. However, the act of rape of the victim takes a very long time, especially by marrying the perpetrator, the victim will live with the perpetrator for life and there is still the potential that the perpetrator will commit violence again against the victim.²

Studies on the criminal offense of rape related to restorative justice show that there are several trends in previous studies. Tanjung, Sulastris & Al Adawiah stated that sanctions against the crime of rape there is a gap between punishment and rape victims.³ Dwiki Apriya showed that in addition to law enforcement, the commission of rape victims can be a consideration to compensate for the losses of rape victims.⁴ While Sinta and Wibowo found that counseling guidance for perpetrators and victims was less than optimal, the crime of rape only focused on criminal factors compared to other factors.⁵ Judging from previous research the research has not explored further restorative justice for rape victims.

Based on the previous study, this research formulates the research objective to explore the criminal offense of rape about the importance of restorative justice involvement. Therefore, this research asks two questions firstly, how is victim recovery

¹ Edy Suwito and Mulyadi Aribowo, "Perlindungan Hukum Terhadap Korban Tindak Pidana Pemerkosaan Dalam Peradilan Pidana," *MIZAN, Jurnal Ilmu Hukum* 8, no. 1 (2019): 27.

² Asit Defi Indriyani, "Pendekatan Restorative Justice Dalam Melindungi Korban Kekerasan Seksual," *IJouGS: Indonesian Journal of Gender Studies* 2, no. 2 (2021): 44–56.

³ Er Tanjung, Lusiana Sulastris, and Rabiah Al Adawiah, "Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Pemerkosaan" *Jurnal Hukum Sasana*. 9.1 (2023): 80–98.

⁴ Dwiki Apriyansa, "Penegakan Hukum Terhadap Tindak Pidana Pemerkosaan Terhadap Anak Dibawah Umur Dan Sanksi Yang Diterapkan" *Jurnal Panorama Hukum*. 4.2 (2019): 135–145.

⁵ Jasuma Bakti Prima Shinta and Padmono Wibowo, "Optimalisasi Bimbingan dan Konseling pada Anak Pelaku Tindak Pidana Pemerkosaan" *Jurnal Intelektualita: Keislaman, Sosial dan Sains*. 11.1 (2022): 1–20.

as the goal or principle of restorative justice? Second, legal protection for Victims of the crime of Rape and Legal Victims?

Based on these issues related to restorative justice, the implications and contributions of this research are conceptual and practical. The conceptual contribution is that restorative justice is an important concept to provide assistance and protection to rape victims rather than getting a position by the law. While the practical implication is that restorative justice plays an important role in criminal acts so restorative justice can be an instrument in rape crimes as a form of protection for victims.

B. Finding and Discussion

1. Victims' Right to Restoration as The Main Objective of Restorative Justice Principles

Regulation of the Attorney General Number 15 of 2020, the requirements of Restorative Justice are a. First-time criminal offense b. Loss under IDR 2.5 million c. Agreement between the perpetrator and the victim d. The criminal offense is only punishable by a fine or imprisonment of not more than 5 (five) years e. The suspect returns goods obtained from the criminal offense to the victim The criminal offense is only punishable by a fine or punishable by imprisonment of not more than 5 (five) years e. The suspect returns the goods obtained from the criminal offense to the victim f. The suspect compensates the victim g. The suspect reimburses the victim. The suspect shall compensate the victim for the loss g. The suspect reimburses the costs incurred as a result of the criminal offense and/or repairs the damage incurred as a result of the criminal offense.⁶

The crime of rape can be seen in the Criminal Code, more specifically in Article 285 of the Criminal Code (KUHP) which reads that anyone who forces a woman or woman to have sex with him or her without the bond of marriage, using violence can

⁶ Beti Eka Wahyuni, "Analisis Penerapan Prinsip Restorative Justice sebagai Alternatif Penyelesaian Perkara Aksi Eksibionisme" *Tesis Program Pascasarjana Ilmu Hukum Fakultas Hukum Universitas Lampung*. 2023, Hal 88.

be sentenced to twelve years imprisonment.⁷ Based on these provisions, it is clear that Restorative Justice is not appropriate if applied to the crime of rape because the crime is not a minor offense where the punishment for the perpetrator is 12 (twelve) years imprisonment.

Based on this, the application of restorative justice in the crime of rape does not mean that it is resolved in a family manner by reconciling the perpetrator with the victim, but rather restorative justice, which should prioritize the recovery of victims based on the principle that responses to crime must restore the rights of victims as much as possible. Some indicators of restoring victims' rights are 1) disclosure of information by the court to victims; 2) the court always considers the opinions, views, and needs of victims; 3) the court accommodates assistance for victims who need it; and 4) informal mechanisms (mediation, arbitration) are used to facilitate conciliation and victim recovery. In addition, technical procedural mechanisms such as restitution, compensation, and victim assistance must always run optimally to restore victims' rights.

Rape is a form of sexual violence where most of the victims are women and children, so rape is also referred to as Gender Based Violence.⁸ Data recorded in the National Commission on Women Annual Records (CATAHU) of Komnas Perempuan in 2020 illustrates that in the 12 years from 2008 to 2019, violence against women increased by 792% (almost 800%), meaning that violence against women in Indonesia for 12 years increased by nearly 8 times. This phenomenon is still like an iceberg, which means that women are far more likely to experience an insecure life in actual situations.

⁷ Teo Dentha Maha Pratama, Anak Agung Sagung Laksmi Dewi, and Ni Made Sukaryati Karma, "Tindak Pidana Pemerkosaan dalam Perspektif Perlindungan Hukum Perempuan" *Jurnal Interpretasi Hukum*. 1.2 (2020): 191–196.

⁸ Asit Defi Indriyani, *Pendekatan Restorative Justice dalam Melindungi Korban Kekerasan Seksual*, Indonesian Journal of Gender Studies, Volume 2 Nomor 2 Tahun 2021, IAIN Ponorogo, Hal 44

The crime of rape causes the victim to suffer material, physical and psychological losses. In resolving rape cases, mainly through the application of the concept of restorative justice, which is translated textually as mediation or peace efforts, namely, law enforcement and the community consider that the case does not need to be processed by law (eliminate punishment). Some solve it by paying compensation with money from the perpetrators, and some marry the victims to the perpetrators, some even by paying fines to the community, such as paving roads and others. Even though it absolutely cannot return the victim to its original state. The trauma experienced takes a very long time, especially by marrying the victim to the perpetrator because the victim will live with the perpetrator for life, and there is still the potential for the perpetrator to commit violence against the victim again.

The concept of restorative justice is indeed a concept that can function as an accelerator of the simple, fast, and low-cost judicial principle to ensure the fulfillment of legal certainty and public justice. However, applying the principle of restorative justice does not mean abolishing imprisonment in certain cases that cause mass losses and are related to the price of a person's life, so confinement can still be used. This practice is suspected to be more to stop the legal process to strengthen the impunity of the perpetrators. In particular, the practice of marrying a victim to a rapist is a forced marriage that has a long-term impact on the victim. Apart from still experiencing trauma that requires a recovery process, this practice also places the victim in a constant vulnerability to violence in their marriage.

Rape cases are not related to property, so it is not easy to apply restorative justice in this case. If the theft case has only material value, then the concept of restorative justice can be used. However, for rape cases, the impact is not only related to material losses but also psychological issues, such as deep trauma and the victim's future. Thus, the practice of marrying victims to rapists contributes to the increasing number of rape cases. Therefore, the application of the concept of Restorative Justice to the crime of rape must pay attention to the condition of the victim and the deterrent

effect on the perpetrator. When the victim does not want peace should not apply this principle.

Furthermore, Komnas Perempuan also has a view regarding restorative justice in handling cases of violence, as in the quote from its statement of attitude in responding to the Coordinating Minister for Political, Legal, and Security Affairs in February 2021, as below:

Considering the various practices in the name of Restorative Justice that can place women, victims of violence, into 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 held through law enforcement institutions or amid society. Also, to jointly conduct a more comprehensive study on the application of Restorative Justice, including regarding efforts to handle past human rights violations, to strengthen concepts, policies, and guidelines for their implementation. This strengthening is needed so that in the framework of Restorative Justice, in addition to building harmony in the community, it also prioritizes the fulfillment of the rights of victims, especially women victims of violence, in the name of truth, justice, and restoration.

The statement of attitude given by the National Commission for Women aims to ensure that the implementation of the concept of Restorative Justice, especially in cases of sexual violence (rape), must pay attention to the condition of the victim in fulfilling their rights.

In the Supreme Court Decree Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Restorative Justice Implementation Guidelines, it is explained that in adjudicating cases of women dealing with the law, they must pay attention to the history of violence from the perpetrator against the victim, the relationship between the perpetrator and the victim. The power that causes the victim to be powerless, the victim's physical and psychological powerlessness, the psychological impact experienced by the victim, discrimination, inequalities in legal

protection that affect access to justice, and inequality in social status between the litigants.⁹

2. Legal Protection for Victims of The Crime of Rape

The crime of rape is one of the forms of sexual violence regulated in Article 11 of Law Number 12 of 2022 concerning the Criminal Acts of Sexual Violence, hereinafter referred to as the TPKS Law. Article 11 of the TPKS Law clearly outlines that sexual violence can take the form of sexual harassment; sexual exploitation; forced contraception; forced abortion; rape; forced marriage; forced prostitution; sexual slavery; and/or sexual torture. In terms of its applicability, the TPKS Law is a more specialized provision (*Lex Specialis*) than the Criminal Code. The TPKS Law contains forms of sexual violence, as well as guarantees of protection for victims of sexual violence, while the Criminal Code only regulates the general criminalization of sexual violence cases. The explanations provided in the TPKS Law are very adequate.

Actions taken by law enforcement are often considered unsatisfactory for victims. In practice, law enforcement seems to be more generous to perpetrators and does not show sympathy for victims of sexual violence. This is what Francis D Boateng and Gassan Abess stated: "All types of criminal activities are constantly ignored and forgotten throughout the entire criminal justice proceedings". This attitude of law enforcement has encouraged the public to demand that the government issue a policy that specifically regulates sexual violence.

Victims of sexual violence must receive protection from the state to be free from every form of sexual violence. The form of guarantees in the form of rights for victims, among others: the right to treatment, the right to protection, and the right to recovery. These rights are an obligation of the state and must be implemented by the needs and conditions of the victim. In handling rights, victims are entitled to legal assistance, psychological strengthening, health services, and special needs of victims.

⁹ Keputusan Direktur Jendral Badan Peradilan Umum Mahkamah Agung Republik Indonesia Nomor 1691/DJU/SK/PS.00/12/2020 tentang Pemberlakuan Pedoman Penerapan Keadilan Restoratif Justice, Desember 2020.

During this time, victims seem to have been ignored by the government. The TPKS Law fills this "space", victims have the right to obtain physical, psychological, and economic guarantees in this case the Ministry of social affairs acts for the implementation and supervision of the TPKS Law.

Table.1 Rights of Victims of Rape Crime in the TPKS Law¹⁰

Handling Rights	Protection Rights	Right of Restoration
<ul style="list-style-type: none"> • The right to information on the entire process and results of handling, protection, and recovery; • Right, to document and obtain treatment results; • Right to legal services; • Right to psychological strengthening • The right to health care includes medical examination, treatment, and care; • The right to services and facilities for the special needs of victims; • The right to the removal of sexually charged content for cases of sexual violence with electronic media. 	<ul style="list-style-type: none"> • Provision of information on protection rights and facilities; • Providing access to information on the implementation of protection; • Protection from the threat or violence of the perpetrator and other parties and the recurrence of violence; • protection of the confidentiality of identity protection from the attitude and behavior of law enforcement officials who humiliate victims • protection from loss of employment, occupation, education, or access to political representation • Protection of victims and/or reporters from criminal prosecution or civil lawsuits for 	<ul style="list-style-type: none"> • Medical Rehabilitation • Mental and social rehabilitation • Social empowerment • Restitution and/or compensation • Social reintegration

¹⁰ Muhammad Hasanuddin, "Implikasi Yuridis Pengaturan Hak Korban Tindak Pidana Kekerasan Seksual Dalam Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual" *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan*. Vol.9.Kekerasan Seksual (2022): 1–15.

	criminal acts of sexual violence that have been reported.	
--	---	--

Attention to the recovery of victims of sexual violence and the punishment of perpetrators needs to be matched with our attention to preventing recurrence. The actions received by the victim can drastically change his life with various impacts, including stress that leads to depression, trauma, and other diseases, so that the victim can end his own life.¹¹

The crime of rape, as regulated in Article 285 of the Criminal Code, is a form of sexual abuse, which is a physical or non-physical sexual act by someone who has power over the victim intending to fulfill the sexual desires of the perpetrator that the victim does not want.¹²

Victims of sexual violence suffer so much loss that it is necessary to receive appropriate protection. The losses suffered by the victims can be said to be consecutive, ranging from physical, psychological, and social losses. In addition, the victim also suffered a lot of losses during the pre-trial, during the trial process until after the trial was over. Therefore, victims of sexual violence need protection to get a sense of security and comfort from all forms of threats, and the potential for repetition of violence and the victim's recovery process is guaranteed.

a. Restitution

According to Article 1 paragraph (5) of the Government Regulation of the Republic of Indonesia Number 44 of 2008 concerning the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims, restitution is compensation given to victims or their families by perpetrators or third parties, can be in the form of

¹¹ Mawati, E., Takariawan, A., & Sulistiani, L, *Kebijakan Hukum Pidana Mengenai Rehabilitasi Psikososial Korban Tindak Pidana Terorisme Dalam Sistem Peradilan Pidana*. Jurnal Belo , 5 (2), Tahun 2020, Hal. 34-56

¹² Hadibah Zachra Wadjo dan Judy Marria Saimima, *Perlindungan Hukum Terhadap Korban Kekerasan Seksual Dalam Rangka Mewujudkan Keadilan Restoratif*, jurnal Belo, Vol. 6, No 1, Januari 2021, hal 49

returning property, payment of compensation for loss or suffering, or reimbursement of costs for certain actions. The claim for restitution can be made by the victim, family, or the victim's attorney in writing in Indonesian on stamped paper, and the application is submitted to the court through the Witness and Victim Protection Agency.

b. Medical Assistance and Psycho-Social Rehabilitation Assistance

The provision of medical assistance and psycho-social rehabilitation assistance is included in the Amendment to the Law on the Protection of Witnesses and Victims, namely Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims, which states that rape victims also have the right receive medical assistance and psycho-social rehabilitation assistance. The aid is a service provided to victims by the Witness and Victim Protection Agency. Applications for medical help and psycho-social rehabilitation assistance can be submitted in writing in Indonesian and on paper stamped to the Witness and Victim Protection Agency.

By taking into account the provisions related to the protection of rape victims, namely the provision of restitution, medical assistance, and psycho-social rehabilitation, which is the responsibility of the Witness and Victim Protection Agency by applying to the court, it is clear that this has provided a solution to the victim in fulfilling their rights even though the concept of restorative justice is not applied in settlement of cases of criminal acts of rape with the argument of peace so that it can eliminate punishment for the perpetrators because the penalty for the perpetrators of the crime of rape is also a form of protection for the victims.

C. Conclusion

The research concludes that Restorative Justice in its application is not interpreted by reconciling the victim with the perpetrator but Restorative Justice must prioritize the fulfillment of the rights of victims of rape. Law Enforcement on the crime of rape in Indonesia through the TPKS Law guarantees the protection of rights for victims in the form of handling rights, protection matters, and recovery rights. The

punishment imposed on the perpetrators of the crime of rape is a form of consequence for their actions.

Reference

- Asit Defi Indapriyansa, Dwiki. "Penegakan Hukum Terhadap Tindak Pidana Pemerkosaan Terhadap Anak Dibawah Umur Dan Sanksi Yang Diterapkan." *Jurnal Panorama Hukum* 4.2 (2019): 135–145.
- Bayusuta, Bratadewa Bima, and Yohanes Suwanto. "Analisis yuridis undang-undang tindak pidana kekerasan seksual dalam penegakan hukum di Indonesia." *Sovereignty : Jurnal Demokrasi dan Ketahanan Nasional* 1.1 (2022): 37–43.
- Beti Eka Wahyuni. "Analisis Penerapan Prinsip Restorative Justice sebagai Alternatif Penyelesaian Perkara Aksi Eksibionisme." *Tesis Program Pascasarjana Ilmu Hukum Fakultas Hukum Universitas Lampung*, 2023.
- Boateng, Francis D., and Gassan Abess. "Victims' role in the criminal justice system: A statutory analysis of victims' rights in U.S." *International Journal of Police Science and Management* 19.4 (2017): 221–228.
- Er Tanjung, Lusla Sulastru, and Rabiah Al Adawiah. "Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Pemerkosaan." *Jurnal Hukum Sasana* 9.1 (2023): 80–98.
- Hasanuddin, Muhammad. "Implikasi Yuridis Pengaturan Hak Korban Tindak Pidana Kekerasan Seksual Dalam Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual." *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan* Vol.9.Kekerasan Seksual (2022): 1–15.
- Indriyani, Asit Defi. "Pendekatan Restorative Justice Dalam Melindungi Korban Kekerasan Seksual." *IJouGS: Indonesian Journal of Gender Studies* 2.2 (2021): 44–56.
- Liebmman, Marian, 2007, *Restorative Justice, How it Work*, London, and Philadelphia: Jessica Kingsley Publishers.
- Mawati, E., Takariawan, A., & Sulistiani, L, 2020, *Kebijakan Hukum Pidana Mengenai Rehabilitasi Psikososial Korban Tindak Pidana Terorisme Dalam Sistem Peradilan Pidana*. Jurnal Belo , 5 (2), Tahun 2020.
- Muladi, 1995, *Kapita Selekta Hukum Pidana*, Penerbit Universitas Diponegoro, Semarang.
- Mulyadi, Lilik, 2019, *Kapita Selekta Hukum Pidana Kriminologi dan Viktimologi*, Jakarta, Djambatan.
- Pratama, Teo Dentha Maha, Anak Agung Sagung Laksmi Dewi, and Ni Made

- Sukaryati Karma. "Tindak Pidana Pemerkosaan dalam Perspektif Perlindungan Hukum Perempuan." *Jurnal Interpretasi Hukum* 1.2 (2020): 191–196.
- Riyani, 2021, *Pendekatan Restorative Justice dalam Melindungi Korban Kekerasan Seksual*, Indonesian Journal of Gender Studies, Volume 2 Nomor 2 Tahun 2021, IAIN Ponorogo.
- Runtu, Johan, *Perlindungan Hukum terhadap Korban Tindak Pidana Perkosaan dalam Peradilan Pidana*, Jurnal Lex Crime, Volume I No.2, April-Juni 2012, Manado.
- Shinta, Jasuma Bakti Prima, and Padmono Wibowo. "Optimalisasi Bimbingan dan Konseling pada Anak Pelaku Tindak Pidana Pemerkosaan." *Jurnal Intelektualita: Keislaman, Sosial dan Sains* 11.1 (2022): 1–20.
- Suwito, Edy, and Mulyadi Aribowo. "Perlindungan Hukum Terhadap Korban Tindak Pidana Pemerkosaan Dalam Peradilan Pidana." *MIZAN, Jurnal Ilmu Hukum* 8.1 (2019): 27.
- Wadjo, Hadibah Zachra dan Judy Marria Saimima, 2021, *Perlindungan Hukum Terhadap Korban Kekerasan Seksual Dalam Rangka Mewujudkan Keadilan Restoratif*, jurnal Belo, Vol. 6, No 1, Januari 2021.
- Yunus, Yutrisa, 2013, *Analisis Konsep Restorative Justice melalui Sistem Diversi dalam Sistem Peradilan Pidana Anak di Indonesia*, Jurnal RechtsVinding, Volume 2 Nomor 2, Agustus 2013, Jakarta.