

Restorative Justice for Victim's Rights on Sexual Violence: Tension in Law and Policy Reform in Indonesia

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Abstract

Indonesia has experienced very dynamic advocacy for legal reform on the protection of victims of sexual violence. Incidents of sexual violence have increased during the COVID-19 pandemic. This paper considers three major 'initiatives' used to address sexual violence in Indonesia: first, the establishment of alternative policy mechanisms outside the traditional criminal justice system by law enforcement; second, the Criminal Code Bill and Government of Indonesia under the Ministry on Law and Human Rights; and third, the establishment of the anti-sexual violence bill for victim protection initiated by parliament and supported by women's movements. All of these initiatives have claimed to incorporate principles of restorative justice within their approach which the impact of COVID-19 become one of the arguments. 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. This paper finds that both the Criminal Code Bill and the Anti-Sexual Violence Bill have integrated some elements of restorative justice to criminal justice system, with the latter focusing more on the rights of the victims of sexual violence. Prior to the enactment of these Bill's there some existing policies called for restorative justice for victims of sexual violence. Given the lack of clarity surrounding the meaning of restoring the rights of victims of sexual violence or how this could be measured, it was difficult to support victims or assess their restorative progress. This policy tends to neglect victims of sexual violence in favour of the offender's interest. Without a formal definition and appropriate indicators to regulate it (i.e. with no clear aim), new policies seeking to protect victims of sexual violence and move toward restorative justice are unlikely to provide substantive support to those who need it most.

Keywords: sexual violence, restorative justice, victim rights, criminal justice system, Indonesia legal reform.

I. INTRODUCTION

Sexual violence has become increasingly politically salient in Indonesia. The National Commission on Violence against Women (Komnas Perempuan), a specialized national human rights body and mechanism in Indonesia, reported that the number of sexual violence are relatively high. In 2018, 6,903 cases on sexual violence reported

to this institution, of which 3,915 of them were conducted in the public sphere and 2,988 in the domestic sphere or by a personal relation.¹

From 2011 to 2019, there were a total of 46,698 sexual violence cases reported to different victim support institutions in Indonesia.² These cases included rape, sexual assault, sexual harassment, incest, adultery, sexual exploitation, and forced abortion. In 2020, Komnas Perempuan was also informed that there was an increase of sexual cyber cases from 97 to 281 cases.³ Similar to the findings of Tia Palermo et al⁴ in their study of gender-based violence in developing countries, reports of sexual violence in Indonesia replicates an iceberg. In this sense, it is believed that actual cases far outweigh reported cases. The Alliance of Academic for Advocacy on the Anti-Sexual Violence Bill (2020) found that 84.2% out of 2,227 respondents, either themselves or their family members or close friends, have experienced various types of sexual violence, and that they tend not to report these cases. The high numbers of unreported cases is often attributed to victims lack of trust in the Indonesian criminal justice system; 88.4% of respondents reported that the protection offers to victims of sexual violence within Indonesia's legal system was inadequate. In addition, 98.5% of respondents emphasised the urgent need for legal reform to protect victims of sexual violence through a specialized bill.

Legal reform⁵ has become a crucial agenda in Indonesia in new democratic era or reformasi.⁶ To establish criminal justice reform, the government established a Criminal Code Bill to replace the existing Indonesian Criminal Code. Several other laws have established and some existing legislation revised 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.

1 *Catatan Kekerasan terhadap Perempuan Tahun 2018*, by Komnas Perempuan (Jakarta: Komnas Perempuan, 2019).

2 *Naskah Akademis Rancangan Undang-Undang Penghapusan Kekerasan Seksual*, by Komnas Perempuan & Jaringan Masyarakat Sipil (Jakarta: Komnas Perempuan & Jaringan Masyarakat Sipil, 2020).

3 *Catatan Kekerasan terhadap Perempuan Tahun 2019*, by Komnas Perempuan (Jakarta: Komnas Perempuan, 2020).

4 Tia Palermo, Jennifer Bleck & Amber Peterman, "Tip of the Iceberg: Reporting and Gender-Based Violence in Developing Countries" (2014) 179:5 *American Journal of Epidemiology* 602-612.

5 Indah Sri Utari & Ridwan Arifin, "Law Enforcement and Legal Reform in Indonesia and Global Context: How the Law Responds to Community Development?" (2020) 1:1 *Journal of Law and Legal Reform* 1-4.

6 The new democratic era has established in 1998 after the fallen of Soeharto, military and authoritarian regime that has power for about 32 years. In Indonesia context the new democratic era is called as reformasi era.

With these developments, a crucial question arises: can Indonesia's criminal justice system reform improve protection for victims of sexual violence? If so, how? Findings from a number of studies provide strong evidence that the implementation of the law is ineffective in protecting victims of sexual violence.⁷ These studies analyze why the number of cases brought to criminal court is so limited, comprising not more than 5% of all reported cases. Significant factors that influence the ineffectiveness of the protection for sexual violence victims include: limited forms of sexual violence recognized under the existing laws such as rape and sexual assault; the lack of acknowledgment of victims' rights and mechanisms to regulate this; and the prevalent culture of silence to victim due to the lack of support from the family and stigma from community.⁸ Women's rights organizations have pushed for greater focus on the protection of sexual violence victims and in 2016 proposed the Anti-Sexual Violence Bill to the Indonesian parliament.⁹

The blueprint for criminal justice reform in Indonesia was informed by restorative approaches to justice, moving away from traditional principles of retributive punishment that dominates much of criminal law.¹⁰ Restorative justice principles are also adopted in the Anti-Sexual Violence Bill. This restorative approach to justice is relatively new in Indonesia; the existing Criminal Code is inherited from colonial Dutch Law (1918), which has undergone very limited change until recently. Although Indonesia has developed various special criminal laws and procedures, the restorative justice approach has only been accommodated in certain cases, and in a very limited manner.

There are at least four different levels of restorative justice implementation in Indonesia. First, the practice runs through juvenile court.¹¹ Second, it is often used for economic-related crimes such as money laundering or tax crime. These restorative practices have been developed with certain legal grounds based on specific criminal laws. Third, the practice does not rely on any legal basis but it is based on the Memorandum of Understanding (MoU) among legal institutions and legal enforcers (police, prosecutors, and courts).¹² Fourth, the practice is not based on any legal ground or MoU, but manifested through methods such as mediation of domestic and sexual violence.¹³

7 *Catatan Kekerasan terhadap Perempuan Tahun 2017*, by Komnas Perempuan (Jakarta: Komnas Perempuan, 2018); Komnas Perempuan, *supra* note 1; Komnas Perempuan, *supra* note 3.

8 Sri Wiyanti Eddyono, "Dilema Reformasi Hukum Kekerasan Seksual dan Perlindungan Korban", *kompas.id* (2019a).

9 Alya Nurbaiti & Budi Sutrisno, "Public outcry as House plans to delay sexual violence bill – again", *The Jakarta Post* (2 July 2020).

10 BPHN, *Naskah Akademis Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana* (Jakarta: BPHN, 2015).

11 Laura Hardjaloka, "Criminal Justice System of Children: An Overview Restorative Justice Concept in Indonesia and other Countries" (2015) 15:1 *Jurnal Dinamika Hukum* 73–81.

12 Ola Anisa Ayutama, Penerapan Mediasi Penal Pada Tahap Penyidikan (undergraduate, FH UGM, 2015) [unpublished].

13 Eddyono, *supra* note 8; Berita Riau, "Gadis di Riau ini Diperkosa 4 Pemuda, Lewat Mediasi Tokoh Masyarakat, Malah Disuruh Menikah?", *riauaktual* (11 October 2017).

Acknowledging the practices of restorative justice in Common-Anglo law tradition countries, Wood and Suzuki¹⁴ identified several issues to be considered. The first issue is the hybrid and diffusion of the term which lost its original principle, purpose and meaning to redress the victims from the harms caused by crime. Wood and Suzuki¹⁵ also highlight that the basic principles of restorative justice go beyond just the victim, encompassing offenders and communities as well. However, the institutionalization of restorative justice practices tends to focus on offender rehabilitation rather than victim reparations. The lack of assistance provided to victims often leaves them unprepared to participate in restorative justice practices and provides greater benefit to the offender. These findings indicate that not all practices labelled as 'restorative' are aligned with the principles of restorative justice; some practices hijack the notion of restorative justice in the interest of offender rather than the victim.

Restorative justice has become an attractive approach and is viewed as a critical solution to reduce incarceration numbers in Indonesia. However, whether the practices align with the purpose to redress victim is questionable. Several discussions run by women's rights NGOs highlighted the reluctance in providing mediation or alternative mechanisms of restorative justice to settle cases of sexual violence. Criticism suggest that the practice is utilized to facilitate impunity for perpetrators of sexual violence, avoiding processing through the criminal justice system. This may be referred to as a 'peace arrangement' (*perdamaian* or *kesepakatan damai*), conducted by settling a marriage between the victim and perpetrator or providing money for compensation for the family of victims. This can be initiated by the police, family members, or even community leaders.¹⁶ In a rape case that occurred in Central Java, the victim was forced to marry her rapist by her family, resulting in severe psychological illness for the victim.¹⁷

This paper considers whether restorative justice is an appropriate approach for cases of sexual violence and how its implementation can best be navigated in Indonesia's criminal justice system. Crucially, it explores whether the concept of restorative justice can align with the victim's interest rather than facilitating impunity for perpetrators, arguing that restorative justice practices must be guided by victim-centered approaches, particularly in cases of sexual violence.

This research engages with restorative justice literature from different countries, analyzing relevant legal documents established by institution of law enforcers, the bill of penal code and the existence of the bill of Anti-Sexual Violence. The research also includes interviews with key persons involved in advocacy for reform in the legal protections of victim sexual violence. Cases of sexual violence in Indonesia are also analyzed along with online newspaper articles.

14 William Wood & Masahiro Suzuki, "Four Challenges in the Future of Restorative Justice" (2016) 11 *Victims & Offenders* 149–172.

15 *Ibid.*

16 M Syukur, "Korban Pemerkosaan Bergilir Bingung Mau Nikah dengan yang Mana", *Liputan6* (12 October 2017).

17 Patresia Kirandita, "Episode Baru Tragedi Penyintas Perkosaan: Paksaan Menikah", *tirto.id* (13 April 2018).

II. UNDERSTANDING SEXUAL VIOLENCE AND THE DISCOURSE OF SEXUAL VIOLENCE IN INDONESIA

The definition of sexual violence has long been controversial. Recently, it has undergone advanced development in both academic and international legal frameworks to refine and clarify its meaning. In academic terms, Jewkes, Sen, and Garcia-Moreno¹⁸ define sexual violence as:

“any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”

Jewkes, Sen, and Garcia-Moreno¹⁹ reaffirm that coercion has a broader spectrum; from physical coercion to a more subtle manifestations such as psychological intimidation. Psychological coercion can involve creating an excessive the fear in the victim of losing a job, income, or other rights. Jewkes, Sen, and Garcia-Moreno²⁰ also elaborates some conditions where victims may be unable to provide full and informed consent which may include: being under the influence of drugs or alcohol; tiredness or sleep deprivation; mental illness; or other conditions which may inhibit or remove the victims ability to fully understand what is happening to them and provide their consent to these actions. Establishing a definition of sexual violence is no easy task given the complex and controversial nature of the phenomenon.²¹ The process of defining this concept is not only influenced by the changes in its forms but also influenced by various aspects, such as social norms, culture, law, gender roles, and acceptance or recognition of human rights.²²

General Recommendation 19 of the Convention on the Elimination of All Forms of Discrimination against Women (GR CEDAW 19/92) classifies sexual violence as a form of gender-based violence which results from gender discrimination. Sexual violence has a number of manifestations and can be related to traditions, domestic abuse, human trafficking, or pornography. The Vienna Declaration,²³ and the Declaration on Violence against Women²⁴ also provide frameworks that define violence against women which includes sexual violence as a women’s human rights violation.

18 *Sexual Violence. Word Report on Violence and Health*, by R Jewkes, P Sen & C Garcia-Moreno (Geneva: Word Health Organization, 2002).

19 *Ibid.*

20 *Ibid.*

21 *World report on violence and health* (Geneva: World Health Organization, 2002).

22 Elizabeth Dartnall & Rachel Jewkes, “Sexual violence against women: The scope of the problem” (2012) 27:1 *Best practice & research Clinical obstetrics & gynaecology* 3–13.

23 OHCHR, *Vienna Declaration and Programme of Action* (Vienna Declaration and Programme of Action, 1993).

24 *Ibid.*

The forms of violence are diverse and can include rape, sexual assault, sexual harassment, sexual exploitation, sexual slavery, incest, forced sterilisation, pregnancy, abortion, prostitution, or pornography (GR CEDAW 19/92). The Rome Statute, that established the International Criminal Court (ICC, 1998) defines sexual violence as a gross violation of human rights that can be prosecuted in international courts. General Recommendation CEDAW No 35/2017 on Gender Based Violence against Women (GR CEDAW 35/2017) re-emphasizes that sexual violence can happen to anybody, regardless of sex or gender, but because of the asymmetric power relations between men and women, women tend to be more vulnerable to sexual violence. Further, it extends the definition of sexual violence to include online or digital-based sexual violence.

Indonesia ratified CEDAW through Law No. 7/1984 on the Ratification of CEDAW. However, the framework of CEDAW on sexual violence is not automatically interated into all levels of Indonesian society. The primary national institutions that deal with violence against women in Indonesia are the Ministry of Women's Empowerment and Child Protection (KPPA)²⁵ and the national institution Komnas Perempuan²⁶ which focuses on violence against women as a human rights issue.²⁷ These mechanisms have different mandates but both address the issue of violence against women. KPPA is concerned with making policies at the government level regarding to the protection of female victims (e.g. the establishment of local government victim services). Meanwhile Komnas Perempuan focuses on the documentation of violence against women, monitoring the implementation of state policies. Komnas Perempuan²⁸ refers to the definition of sexual violence established by CEDAW and has reported 15 different forms of sexual violence that occurred in Indonesia, namely: rape, sexual intimidation and attempt to rape, sexual harassment, sexual exploitation, trafficking in persons for sexual purposes, forced prostitution, sexual slavery, forced marriage, forced pregnancy, forced abortion, forced contraception and sterilization, sexual torture, sexual punishment, sexual conduct in tradition and practice (including female circumcision), and control of sexuality.²⁹ In its annual report on Violence against Women, Komnas Perempuan³⁰ highlights the categories of sexual violence reported through 239 institutions based on their arena/sphere: personal sphere (domestic/personal relations), community sphere, and sphere of the state. Komnas Perempuan³¹ reported that over the last ten years, there has been an 800% increase in reported cases on sexual violence.

Common understandings of sexual violence refer to the 2017 Anti-Sexual Violence Bill that defines sexual violence as:

25 This national machinery has been changed its scopes several times. In the new order regime it was as the Ministry of the Role of Women to the State Ministry of Women's Empowerment. It was changed into the State Ministry of Women's Empowerment and Child Protection under the second term of the Presidential of Susilo Bambang Yudoyono (2009-2014).

26 See website Komnas Perempuan.go.id (2020).

27 Sri Wiyanti Eddyono, *supra* note 8.

28 *15 Bentuk Kekerasan Seksual: Sebuah Pengenalan*, by Komnas Perempuan (2012).

29 See website Komnas Perempuan.go.id (2012).

30 Komnas Perempuan, *supra* note 3.

31 *Ibid*.

“...any act of degrading, insulting, attacking, and/or other actions against one’s body, sexual desire, and/or reproductive function, forcibly, against the will of a person which cause that person to be unable to give consents in a free state, because of unbalanced power relations, which result suffering in physically, psychologically, sexually, economically, culturally, or politically.”³²

This Bill affirms nine forms of sexual violence that can be charged as crimes, namely: sexual harassment, sexual exploitation, rape, forced marriage, forced contraception and sterilization, forced abortion, forced prostitution, sexual slavery, and sexual torture.³³ These forms of sexual violation were selected from the 15 categories of sexual violation found in the Komnas Perempuan study through several consultations with various stakeholders.

However, this definition raised criticisms due to its use of broad, vague terms, particularly in reference to the definition of ‘criminal’.³⁴ Another criticism addresses the terms ‘sexual desire’ and ‘consent,’ which is viewed as giving a sense of legitimation for consensual sexual conduct to fulfill sexual desire.³⁵ These criticisms were raised by conservative, religious members of parliament and their followers who rejected the bill and its definition of sexual violence. They argue that the definition accommodates ‘free sex and deviant sexual behavior,’ and that the bill does not align with Islamic religious values.³⁶ However, they lack evidence due to the inability to state which article contains such problems. These groups also disapprove of the prohibition of forced marriages, forced abortion, and forced prostitution as part of sexual violence.³⁷

The tensions in defining sexual violence and its forms among parliament members reflects the broader discourse in Indonesian society that is represented in various forms of media including print and social media debates. This discourse is ongoing but has already led to the withdrawal of the bill from parliamentary discussion in March 2020. Fortunately, in November 2020, several parliament members raised the issue to return the bill to the parliamentary agenda; by August 2021 the Legislation Body (Badan Legislasi DPR) under the parliament had launched a new draft. Debates have continued regarding the definition of sexual

32 DPR RI, *Naskah Akademis Rancangan Undang-Undang Penghapusan Kekeraan Seksual*, Jakarta; DPR RI. (Jakarta: DPR RI, 2017).

33 *Ibid.*

34 Tsarina Maharani, “Cultural Norms Stall Deliberations of Indonesia’s Sexual Anti-Violence Bill”, *Kompas* (10 July 2020); Kate Walton, “Indonesia sexual violence bill sparks conservative opposition”, *Al-jazeera* (8 February 2019).

35 Junaedi, “Sanksi Adat untuk Tiga Pemerkosa Remaja di Sulbar Berlangsung Terbuka”, *KOMPAS* (10 February 2020).

36 Balawyn Jones & Max Walden, “Conservative rejection of Indonesia’s anti-sexual violence bill misplaced”, *The Conversation* (26 February 2019), online: <<http://theconversation.com/conservative-rejection-of-indonesias-anti-sexual-violence-bill-misplaced-111683>>; Walton, *supra* note 33.

37 Muhammad Aminudin, “Korban Dugaan Pemerkosaan Aktivistik Antikorupsi Berharap Ada Mediasi Lanjutan”, *detiknews* (30 December 2019).

violence and whether it can be recognized as a form of gender based violence.³⁸ The draft only regulates 5 forms of violence which no longer includes forced marriage, forced abortion, forced prostitution and sexual slavery as part of sexual violation scope. The vice chair of the Legislation Body acknowledged criticisms from women's NGOs that argue it provides lesser protection for women victims.³⁹ This situation shows that legal reform in Indonesia is a complex process, particularly with regard to the Anti-Sexual Violence Bill and perceptions of sexual violence.⁴⁰

III. RESTORATIVE JUSTICE, CRIMINAL JUSTICE SYSTEM, AND SEXUAL VIOLENCE

Restorative justice has been practiced as a method of rehabilitation for victims of crime in different countries.⁴¹ The concept emerged from criticisms of the longstanding retributive practices of the modern criminal justice system that focuses primarily on offenders, to prove their guilt and determine appropriate punishment, often leaving victims behind.⁴² In their 2010 study Van Ness and Strong trace the history of the criminal law tradition, finding evidence that the concept of restorative justice has existed since ancient times in western countries through the payment of reparations provided by the offender to victims and their families.⁴³ There is evidence that similar traditions also existed in Japan, pre-colonial Africa, indigenous communities in North America, New Zealand, Australia, and other countries with traditional criminal mechanisms.⁴⁴ Van Ness & Strong⁴⁵ discuss the shifting paradigm which started in the mid ninth century in the common law system where victims were alienated from the criminal justice system. This was influenced by the shift from a religious to a secular criminal justice system in United Kingdom, where the King became the center of criminal justice mechanism. This included the replacement of the institution of compensation to the victims and their families and to the state, paid by offenders.⁴⁶

States have replaced the victim as the main focus of the modern criminal justice system; they act as law enforcers and representatives of the victim. Victim's compensation was exchanged for different kinds of punishment. Further, victim

38 BBC News Indonesia, "Kisah relawan penyintas kekerasan seksual di tengah pandemi, 'Pelecehan itu kenanya di psikis, lukanya di batin'", *BBC News Indonesia* (16 June 2020).

39 Dio Suhenda, "Activists slam latest draft of sexual violence bill for neglecting victims' rights", *The Jakarta Post* (8 September 2021).

40 *When and Why the State Responds to Women's Demands: Understanding Gender Equality Policy Change in Indonesia*, by Sri Wiyanti Eddyono et al (Geneva: SCN CREST -UNRISD, 2016).

41 Heather Strang & John Braithwaite, *Restorative justice: philosophy to practice* (Hants: Dartmouth Publishing, 2000); Daniel W Van Ness & Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (New Providence: LexisNexis, Andersen Publishing, 2009).

42 Ness & Strong, *supra* note 39.

43 *Ibid.*

44 Carolyn A Conley, *The Unwritten Law: Criminal Justice in Victorian Kent*, 1st edition ed (New York: Oxford University Press, 1991)

45 Ness & Strong, *supra* note 39.

46 *Ibid.*

rehabilitation has also shifted into the rehabilitation of offenders. Van Ness and Strong⁴⁷ criticize this system, arguing that it neglects the harm caused to both victims and offenders. From 1980-2000, restorative approaches began to be reintegrated into many modern criminal justice systems.

Acknowledging various practices of restorative justice and its modifications, Wood and Suzuki⁴⁸ analyze the possibility of the distortion of restorative justice, whereby it becomes 'non-restorative'. Although their analysis does not focus specifically on sexual violence, they raise important points that may be applied to the issue. The first concern is raised when programs are labelled 'restorative' but prioritize the rehabilitation of the offender over the victim. Restorative justice can have a specific goals such as establishing an agreement between victims and offenders. In these situations, success is measured by the achievement of such agreements; victims can be pressured to behave in certain ways to ensure 'success.' This might include accepting an apology or accepting an offer of reparation made by the offender.

There is no guarantee of security for the victim who may feel threatened or intimidated by offenders and their supporters to enter certain agreements they may otherwise not be comfortable making. Wood and Suzuki refer to this as the 'co-optation of restorative justice.' They discuss the displacement of restorative justice, whereby the practice is applied to supplement formal mechanisms rather than acting as an alternative instrument of justice. This is understandable given concerns relating to (the lack of) offender accountability in informal mechanisms.

Further issues relate to whether, and how, restorative justice can address power imbalances between victims and perpetrators in cases involving discrimination. This is an interesting and useful perspective from which to evaluate whether, and how, the restorative justice approach is suitable to address cases of sexual violence in Indonesia, particularly regarding recent developments in criminal law.

Numerous studies have discussed the incapacity of the criminal justice system in handling sexual violence cases.⁴⁹ These studies indicate that the conventional criminal justice system focuses on punishing the offender as the main approach of securing justice. A common feature of modern criminal justice systems is the adoption of due process and fair trial for the defendant with strict evidentiary mechanisms to prove, beyond reasonable doubt, the guilt or innocence of the defendant. This mechanism focuses on processing offenders.⁵⁰ The structure of the criminal justice system is not only preoccupied with offenders, but can also be viewed as a highly masculine

47 *Ibid.*

48 Wood & Suzuki, *supra* note 14.

49 James Pateck, ed, *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press, 2010); Clare McGlynn, "Feminism, Rape and the Search for Justice" (2011) 31 *Oxford Journal of Legal Studies* 825-842; Niamh Joyce-Wojtas & Marie Keenan, "Is restorative justice for sexual crime compatible with various criminal justice systems?" (2016) 19:1 *Contemporary Justice Review* 43-68; Shirley Jülich & Natalie Thorburn, "Sexual Violence and Substantive Equality: Can Restorative Justice Deliver?" (2017) 2:1 *Journal of Human Rights and Social Work* 34-44; Marie Keenan & Ailbhe Griffith, *Two Women's Journeys: Restorative justice after sexual violence* (Eleven Publishing, 2019)

50 Keenan & Griffith, *supra* note 47.

institution; the majority of offenders are male and the system emphasizes crimes that occur in the public sphere. This process is not well equipped to deal with sexual violence, which occurs in the private sphere, or the nuances and needs of women either as victims or offenders. As Shirley Jülich & Natalie Thorburn⁵¹ argue: 'justice means different things to different people, there is an acknowledgement that conventional criminal justice systems typically do not provide victims of sexual violence with an experience of justice.' A singular, punitive approach to justice is independently inadequate to accommodate the perspective and needs of the victim, particularly in cases of sexual violence.

McGlynn⁵² categorizes two key approaches in responding to the ineffectiveness of the conventional criminal justice system in dealing with cases of sexual violence: (1) those who focus on reforming the criminal justice system; and (2) those who focus in establishing a new, alternative mechanism called restorative justice. These two approaches have been competing. The reformist approach focuses on challenging the existing legal system to create a stronger prohibition of sexual violence and more severe punishment for perpetrators who violate this. This aims to provide more regulation to the criminal justice system, recognize different forms of sexual violence as crimes, and provide more severe punishment for offenders.⁵³

In contrast, those who support the idea of restorative justice argue that such changes in the criminal justice system are ineffective. Victims still face barriers to bringing their cases to court; therefore, the number of cases examined by the court does not necessarily reflect the reality or increase despite law reform. The criminal justice system tends to exclude victims from its procedure. While it seems to provide equal access in principle, the system is not equitable.⁵⁴ As such, this approach does not depend on existing mechanisms of justice, but providing an alternative mechanism called the restorative justice approach in response to criminal justice reforms that have continually failed to include victims, demonstrated by the fact that fewer cases that have been brought to the criminal justice system.⁵⁵

Notwithstanding, many have concerns regarding the use of restorative justice, namely the safety of the victim, risks of revictimization, and the existence of unequal power relations.⁵⁶ This argument can encourage scepticism and criticism of restorative justice mechanisms which may be considered a "soft option" or "cheap justice" due to its informal process and outputs.⁵⁷

51 Jülich & Thorburn, *supra* note 47.

52 McGlynn, *supra* note 47.

53 *Ibid*; Joyce-Wojtas & Keenan, *supra* note 47.

54 Jülich & Thorburn, *supra* note 47.

55 McGlynn, *supra* note 47.

56 Sarah Curtis-Fawley & Kathleen Daly, "Gendered violence and restorative justice: the views of victim advocates" (2005) 11:5 *Violence Against Women* 603-638; Ptacek, *supra* note 48; Natacha Bourgon & Kyle Coady, "Restorative Justice and Sexual Violence: An Annotated Bibliography" (2019) Research and Statistics Division Department of Justice Canada 78; Joyce-Wojtas & Keenan, *supra* note 47.

57 Marilyn Fernandez, *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing* (Plymouth: Lexington Books, 2010).

Responding to these criticisms, Niamh J. Wojtas & Marie Keenan⁵⁸ propose establishing restorative justice alongside the existing criminal justice system to compliment it. They analyze the use of restorative justice in cases of sexual violence in different legal systems, finding that the practice is used most often in the common law tradition, with only a few countries appealing to it in civil law systems. Fernandez also views restorative justice not as an alternative, but as a supplement to the handling of victims in common law cases of sexual violence.

Niamh J. Wojtas, & Marie Keenan⁵⁹ suggest the development of a hybrid system which utilizes both of the approaches detailed above. According to this line of thought, it is possible to combine these two approaches in a productive manner rather than viewing them as two contrary or mutually exclusive ideas. They propose two possibilities: first, integrate restorative justice into the existing criminal justice system; second, adopt restorative justice practices alongside or outside the criminal justice system, acting as a complimentary process. Referring to Daly, Niamh J. Wojtas & Keenan⁶⁰ consider that activism for the rights of victims of sexual violence triggered both conventional and innovative legal reform. ‘Conventional reform’ refers to the changes in substantive and procedural laws and policies which emphasize efficiency, efficacy, and fairness in the criminal justice system. ‘Innovative reform’ refers to a broader interpretation of justice, which includes enhancing victim’s access to ‘justice in a broader sense’ which takes their experiences into account. This broader mechanism of justice includes additional non-adversarial instruments such as restorative justice. These categories do not have a strong line one with the other, but are interrelated and complementary. Some issues have been identified as problems that need to be addressed, including:

...participation; voice and an opportunity to tell their story; validation and vindication in private and public; offender accountability; treatment and punishment of the offender; public disapproval of sexual crime; protection for children and vulnerable adults; more information about the criminal process; and a timely response to their complaints.⁶¹

This relates to Daly’s⁶² assertion that victims have different experiences, needs, and interests. As such, one approach to justice cannot satisfy all. The key point is to understand victims interests in justice to develop specific solutions rather than offering a ‘one-size fits-all justice remedy’.⁶³ Armatta⁶⁴ provides further support for this notion, explaining that common justice is often unable to provide opportunities

58 *Ibid*, Joyce-Wojtas & Keenan, *supra* note 47.

59 *Ibid*.

60 Kathleen Daly, Conventional and Innovative Justice Responses to Sexual Violence, No.12/2011 (Australian Institute of Family Studies- Australian Centre for the Study of Sexual Assault, 2011); Keenan & Griffith, *supra* note 47.

61 *Ibid* at 44.

62 Kathleen Daly, “What is Restorative Justice? Fresh Answers to a Vexed Question” (2016) 11:1 Victims & Offenders 9-29.

63 Keenan & Griffith, *supra* note 47.

64 Judith Armatta, “Ending Sexual Violence Through Transformative Justice” (2018) 5:1 Interdisciplinary Journal of Partnership Studies 4-4.

for victims to be heard and hold offenders meaningfully accountable. The underpinning argument is also supported by the concept of equality, as elaborated by Shirley Jülich and Natalie Thorburn⁶⁵:

Legally, there are two approaches to equality. The first is to treat all people the same; the second is to accommodate the differences between people. Those that support the equal or same treatment debate, that is formal or procedural equality, claim that emphasizing the difference between men and women infers that women are deviating from the 'norm'. On the other hand, those that support the different or special treatment debate argue that true equality is based on the recognition of the differing needs of men and women which arise from their different experiences ... While both the equal or same treatment perspective and the different or special treatment perspective emphasize gender difference, these can be applied also to differences between groups of people, that is the differences between abled and differently abled groups, the differences between middle class, predominantly white groups and those with different racial or ethnic backgrounds the differences between adults and children or the differences between powerful groups and those who are powerless...

To conclude, the hybrid system emphasizes victim's concerns, their distinct interests and needs. Restorative justice becomes a complement of justice mechanisms whether integrated into the criminal justice system or remaining outside and independent of it.⁶⁶ The critical point of this view is framing restorative justice system as a complementary, rather than opposing, component of criminal justice reform. Since the approach focuses on the voice of the victim, it is implied that the victim has the right to choose which mechanism suits their interest and needs, whether it is the formal justice mechanism or the restorative justice mechanism.

A further question relates to whether it is possible to avoid or dismiss the criminal justice system in the name of restorative justice. Daly⁶⁷ emphasizes an innovative approach by integrating restorative justice into criminal justice or acting as an alternative approach to justice. Meanwhile Niatmh J. Wojtas & Marie Keenan⁶⁸ propose that restorative justice can be pursued alongside the existing system. These proposals need to be elaborated further, considering what Wood and Suzuki⁶⁹ refer to as the 'hijacking' of restorative justice, particularly when restorative justice is used to replace existing justice mechanism. Hybrid approaches to justice may indeed represent an innovative approach that accommodates victims of sexual violence, but needs to be further elaborated.

65 Jülich & Thorburn, *supra* note 47.

66 *Ibid.*

67 Daly, *supra* note 58.

68 *Ibid.*; Joyce-Wojtas & Keenan, *supra* note 47.

69 Wood & Suzuki, *supra* note 14.

IV. RESTORATIVE JUSTICE, SEXUAL VIOLENCE AND LEGAL REFORM IN INDONESIA

As mentioned in the introduction, there are two important bills relating to sexual violence that have recently been discussed in Indonesia's parliament: the Criminal Code Bill and the Anti-Sexual Violence Bill. While the Criminal Code Bill was the subject of intense discussion in the parliament, the Anti-Sexual Violence Bill was withdrawn from the priority bills to be discussed in 2020 due to conflicting views of parliamentary representatives from different political parties.⁷⁰ The political parties that support the bill are the Democratic National (Nasdem), The Indonesian Democratic Party of Struggle (PDI-P), and The National Awakening Party (PKB) while The Prosperius Party (PKS) oppose it. Other parties do not have clear positions relating to their stance on the bill. In November 2020, the Anti-Sexual Violence Bill was put back on the parliamentary agenda after receiving mass criticism by various groups in Indonesia. In August 2021, Badan Legislasi (Badan Legislasi or Baleg DPR) shared the new draft of the Anti-Sexual Violence Bill 2021.

While the Criminal Code Bill regulates certain forms of sexual violence, which are rape and sexual assault, while the Anti-Sexual Violence Bill, established in 2021, reduces the recognized forms of sexual violence from nine to five forms, namely: sexual harassment, sexual exploitation, forced contraception, rape, and sexual torture.⁷¹ The Criminal Code Bill is as a general criminal law which only regulates prohibitions and sanctions, while the Anti-Sexual Violence Bill is as a specific criminal law which regulates prohibitions, sanctions, and procedures including the rules of evidence and rights of the victim.

The background paper (Naskah Akademis) of the Criminal Code Bill states that:

“...to respond to the significant development with regard to the demand for serious/heavier punishment for certain crimes of extraordinary crimes, while other party demands to have a restorative approach and to avoid retributive justice, the new formulation of criminal code and criminal procedural code need to incorporate restorative justice”⁷²

The background paper highlights the tensions in criminal policy reform: first, the demand for heavier punishment; and second, the demand for restorative justice. Those who support the idea of heavier punishments, particularly for crimes involving narcotics or corruption which attract high attention from the public. Tensions continued as discussions and consultations of the bill moved forward and parliament claimed a more restorative approach to justice. At the same time, capital punishment was also regulated in the bill as well as the expansion of criminalisation for adultery,

70 R Valentina Sagala, “‘Difficulties’ surrounding sexual violence eradication bill”, *The Jakarta Post* (4 July 2020).

71 The forms the Anti-Sexual Violence Bill 2017 has introduced nine forms of sexual violence which four of its was no longer exist in 2021: Forced marriage, force abortion, force prostitution, and sexual slavery.

72 BPHN, *supra* note 10.B

which supposes to be not as criminal conduct.⁷³ According to Braithwaite⁷⁴ restorative justice is about 'healing rather than hurting, moral learning, community participation and community caring, respectful dialogue, forgiveness, responsibility, apology, and making amend.' It is necessary to have different processes for 'granting justice, closure, restoration of dignity, transcendence of shame, and healing for victim.' In line with this, Wood and Suzuki⁷⁵ appeal to the restorative justice framework to draw attention to both the victim and the offender. Notwithstanding, the background paper of Criminal Code Bill does not refer to the victim's interests and needs. The concept of restorative justice in this document is concerned with the interest of the offenders only.⁷⁶ This focus on offenders and the exclusion of victims points to a distortion of the very concept of restorative justice.

The Criminal Code Bill also implies the integration of a particular perspective of restorative justice, as stated in Article 51 (version Sept 2019), relating to the purpose and objectives of punishment:

- a. to prevent the crime by upholding norms for the protection of the society;
- b. to correct the offender by educating and guiding them to become a good and useful person;
- c. to settle conflict as the impact of the crime, to restore balance, and to create security and peace in the society;
- d. to encourage the regret and to guilt free of the offenders.

Points a and c are critical in highlighting the broad purposes of punishment in preventing crimes, protecting society, and addressing conflict. However, this article still emphasizes offender's interests rather than the victim's. It presents the objective of punishment as the education and rehabilitation of the offender. The purpose of punishment, as set out in this article, makes no reference to redress for victims, which is a very important element of restorative justice.⁷⁷

Interestingly, the Criminal Code Bill indicates different ways of integrating restorative justice into the law. The first relates to restitution as an additional punishment. Other indications, as stated in Article 54 paragraph (1) of the Criminal Code Bill, consider the use of sanctions against offenders, the impact of crimes on victims and their families, forgiveness, and the value of justice in society. These considerations demonstrate how the Bill has integrated restorative justice into the criminal justice system. Notwithstanding, in previous research I found a contradiction between the concept of restorative justice – where rehabilitation, restitution, or reconciliation can be used as an alternative to imposing punishment in the form of imprisonment to the offender – and its use in practice. I argue that restorative justice can be used as a legitimization device for lesser punishment for offenders in the name of reconciliation.

73 Sri Wiyanti Eddyono, *Women's empowerment in Indonesia: a poor community in Jakarta*, first edition ed, ASAA women in Asia series (London and New York: Routledge, 2019b).

74 Strang & Braithwaite, *supra* note 40.

75 Wood & Suzuki, *supra* note 14.

76 Eddyono, *supra* note 8.

77 Daly, *supra* note 60 ; Keenan & Griffith, *supra* note 47.

The Anti-Sexual Violence Bill, proposed by women's rights NGOs and Komnas Perempuan and adopted by parliament on September 30th 2020, has adopted restorative justice principles which are set out in the background paper of the bill:

“the purpose of the bill is to restore justice for the public, especially victims, as found in the theory of restorative justice with restitution and reparation approach...Restorative justice is a case solving approach that involves the offender, victim, victim's family, or other parties, with an emphasis on the recovery of the victim.”⁷⁸

The background paper highlights that the Anti-Sexual Violence Bill refers to restorative justice integrated in the criminal justice system that accentuates restitution and reparation for victims. The integrated restorative justice approach is set out in the general requirement in Article 1 which explicitly regulates the rights of victim to services, protection, and remedy. The purpose of this approach is to redress the harm experienced by victims.

The Anti-Sexual Violence Bill 2021 emphasizes various sanctions where the main forms of punishment are imprisonment and fine with additional punishments including revoking the guardian right of a child, the announcement of the offenders identity, asset recovery, restitution, and special coaching. Restitution for victims is one of the most important issues regulated in the bill. In addition, special rehabilitation can also be provided along with other sanctions imposed by judges. Special rehabilitation aims to change the attitude of the offender so that they can manage their behaviors in the future.

This raises the question: does providing sanctions and imposing special rehabilitation align with the principles of restorative justice? As Wood and Suzuki⁷⁹ note, restorative justice is a more informal mechanism; it is based on a voluntary rather than obligatory process for both victim and offender. Including special rehabilitation as a sanction while dismissing its voluntary nature does not reflect the fundamental principle of restorative justice where the offender is conscious of their desire to change their behavior and that they experience regret for their actions.

The other indication that the Anti-Sexual Violence Bill utilizes restorative justice relates to the mechanism of handling victims. The bill focuses on serving the victims' needs and interests, while protecting them from the impact of the case, particularly regarding their rights of privacy and protection from the threat from the offender and their family or peers, and further victimization. The bill seems to pursue 'friendlier' mechanism, regulating comprehensive services such as medical care, economic aid, and psychological assistance to support the victim during the case proceedings from the initial reporting, until the decision of the case is published.

However, there is a strong debate regarding whether the bill can accommodate alternative mechanisms in place of the existing criminal justice mechanism. The Anti-Sexual Violence Bill is a specific piece of criminal law which adopts the principle of

78 DPR RI, *supra* note 30.

79 Wood & Suzuki, *supra* note 14.

Premium Remidium which places punishment as the primary response.⁸⁰ Theoretically, such a principle becomes a limitation to have a mediation penal, especially because most crimes are categorized as delik biasa (ordinary offense), not delik aduan (complaint offense). For ordinary crimes, law enforcers can continue processing the case even if the victim wishes to withdraw it. Conversely, complaint crimes can only proceed based on the victim's wishes. If the victim does not want to continue the criminal case and prefers to settle through an alternative mechanism, the law enforcer must withdraw the case, unless it has already been brought to the court.

The 2021 Anti-Sexual Violence Bill only classifies one form of sexual violence as a complaint offense: sexual harassment, both verbal and physical. The impact of classifying the majority of crimes related to sexual violence as ordinary offenses is that cases can proceed without taking the victim's consent (or lack thereof) into consideration. Yet, both the Bill of Penal Code and the Anti-Sexual Violence Bill have established mechanisms that take the victims interest into consideration when the judge administers sanctions to the offender. It is clear that both bills have potential to integrate restorative justice into criminal law and its justice system.

V. LEGITIMATION OF 'RESTORATIVE JUSTICE' FOR SEXUAL VIOLENCE: DEPRAVED POLICIES

This prompts the question: to what extent do these bills provide space for non-justice or alternative mechanisms? This question is significant largely due to its connections to initiatives used to settle cases of sexual violence outside of the criminal court labelled as 'restorative justice.' Examples of these initiatives are highlighted in Table 1.

80 DPR RI, *supra* note 30.

Table 1; Sexual violence cases through non-criminal justice mechanism

Year	Case
2020	A woman experienced sexual violence where her breast was squeezed in public in Jakarta. According to Article 281 of Indonesian Criminal Code, it is an ordinary crime under crimes against decency with the maximum punishment of 2 years 8 month or fine. The case was settled using mediation facilitated by lawyer of the offender, and the criminal charge was withdrawn. ⁸¹
2020	The victim experienced sexual harassment by an offender in Yogyakarta. This case was settled through a mediation process and was is not brought into criminal proceeding. ⁸²
2020	A young youtube influencer, a university student, has conducted sexual assault to his fellow student. The case was settled through mediation process by an organisation in which the offender is involved as a member. The offender acknowledged his attitude and accepted the punishment given by the organisation, which is to be dismissed from the organisation. The offender also had to apologize to the victim through social media. ⁸³
2020	A 15-year-old girl was raped by her father, brother and cousin in West Sulawesi. A customary court of the region was conducted, in which the offenders were punished through a symbolic way of killing a buffalo. This was viewed as a serious crime in the community. This punishment was not an excuse for ceasing their criminal case. ⁸⁴
2019	A young girl (16 years old) experienced a gang rape committed by 6 people in Central Java. The offenders were 39-60 years old. The commission of rape came to surface when the victim was 6-months pregnancy. The case was settled through a mediation, with compensation paid by each of the offenders as much 7,5 million IDR (equal to 700 USD). The mediation was facilitated by village officers. ⁸⁵
2019	An anti-corruption activist raped to two students in East Java. One of the victims has serious psychological problem due to the impact of the case. The mediation is processing for the offender's confession, compensation for victim, and to dismiss the offender from the organisation, and the offender confessed. ⁸⁶
2017	An 18-year-old woman experienced gang rape by 4 men. The families of the offenders and the victim and the community recommended to conduct mediation without the existence of the victim. The mediation reached the agreement that the victim has to marry the offenders, but the disagreement came among the offenders on who will get to be married with the victim. ⁸⁷

Table 1 demonstrates that various sexual violence cases - including sexual harassment, sexual assault, and gang rape - are settled outside of the formal criminal justice system. In these cases, mediation was used as part of a restorative justice process. According to Indonesian law, sexual assault and rape committed against a child are considered serious crimes and not suitable for alternative, informal mechanisms of justice. These practices do not comply with the Indonesian criminal justice system that is rooted in continental or civil law tradition.

81 Berita Hukum, "Kasus 'Begal Payudara', Kuasa Hukum Berhasil Mediasi Pihak Pelaku dan Korban", (29 January 2020).

82 BBC News Indonesia, *supra* note 37.

83 Galih Priatmojo & Mutiara Rizka Maulina, "YouTuber Turah Tersandung Kasus Pelecehan Seksual, Ini Kronologinya", *Suara Jogja* (6 August 2020).

84 Junaedi, *supra* note 34.

85 Okezone, "Gadis Belia Diperkosa 6 Orang, Pelaku Beri Rp7,5 Juta agar Tak Dihukum : Okezone News", (8 November 2019).

86 Aminudin, *supra* note 36.d

87 Berita Riau, *supra* note 13.

Notwithstanding, these practices continued with some cases allegedly being facilitated by legal officers (police officers).⁸⁸ The police officer refers to the Circulation Decree of the Police Head (SE/8/VII/2018) (2018 Decree) on the implementation of restorative justice in criminal cases. The Decree provided an authority for investigators implement restorative justice practices under certain conditions: the victim agrees to settle the mediation, the case is not categorized as a serious crime, and it discontinues the criminal case. The implementation of the Decree is very broad, and many serious sexual violence cases have also been brought to mediation by the police officers.⁸⁹ Niatmh J. Wojtas & Marie Keenan⁹⁰ note that the Decree does not define restorative justice as a complementary mechanism, but as the replacement to the criminal justice mechanism. Mediation is only able to achieve specific types of agreement and compensation. However, the fourth condition of the Decree states that victims who agree to mediation will lose their right to have their case being brought before the criminal court.

The 2018 Decree also strengthened two other policies: The Police Regulation 6/2019 on Police Investigation and The Attorney General Regulation 15/2020 on Restorative Justice. These two policies, established by two different law enforcement institutions, also use mediation as a replacement for handling cases through formal criminal proceedings. The 2018 Decree has since been revised with The Police Regulation No 8/2021. This regulation grants investigators the authority to pursue restorative justice under certain circumstances, namely: the case is not one of public interest, it does not create conflict in society, and the crime is not repeated. The other parameter is the peace agreement between victim and offender which includes the rights of the victims and the responsibility of the offender. The regulation refers to the victim's rights to reparation, asset recovery, and compensation. The changing of the regulation has not impacted the restorative justice approach. Sexual violence cases continue to be settled through processes of restorative justice, including cases of online sexual violence which are linked to the crime of transaction of electronic.

VI. THE CRITICISM AND ITS DEBATES ON MEDIATION AS RESTORATIVE JUSTICE

Responding to the various approaches to restorative justice, women's movements in Indonesia have deduced several options for its implementation in cases of sexual violence. The first views restorative justice, as an alternative mechanism, as unsuitable for serious crimes of sexual violence. The second considers the possibility victim's deciding whether to engage with the alternative mechanism or not.

Both approaches raise different discussions relating to the Anti-Sexual Violence Bill. The form of sexual violence agreed to be addressed with the alternative mechanism is verbal sexual harassment. The agreement is based on the argument that verbal sexual violence is classified as a light offense, and there is a regulation of

88 Online discussion in Workshop on Indonesian CEDAW report discussion on Violence Against Women, GPPI, 21 Nov 2020

89 *Ibid.*

90 *Ibid.*; Joyce-Wojtas & Keenan, *supra* note 47.

Indonesia's Ministry of Labour that put this form as a subject to labour settlement.⁹¹ Furthermore, this approach does not permit mediation for serious crimes such as sexual assault, rape, sexual slavery, and sexual torture. Their argument is based on the condemnation of recent mediation practices have been deemed uncontrollable and dilemmatic. They criticise the Decree and its widening of police authority in investigation process, appointing them as mediators in cases of sexual violence, violating the criminal procedural law.⁹² In the investigation process, police officers ill-equipped to conduct thorough, unbiased investigations in sexual violence cases because of gender stereotypes and the strong culture of victim blaming.⁹³ Promoting police officers to the position of mediators fails to benefit the victim whose position becomes worse than it would otherwise have been.

Another issue is related to the impact of restorative justice practices on the victim is that mediation processes often provide automatic impunity to the offender rather than focusing on fulfilling or addressing the victim's reparation, undermining the basic principle of restorative justice.⁹⁴ The victim's agreement to follow the proposal for having mediation with offender has become the argument of law enforcer or other parties to settle mediation. However, in accordance with the opinion of one expert, this kind of agreement needs to be evaluated. One of the respondents to this research also stated:

“If the victim said they do not want to bring the case to criminal court, we need to discuss with the victim why they are reluctant to continue their case; because in many situations, they are influenced by many factors: the family, the community that did not support them and even asked them to no longer continue the cases, or they may experience intimidation, they may lack resources, so they think it is more difficult for them to settle the case in the criminal justice system. If the factors are identified, this needs to be discussed, and to support them so they have enough resources and bravery to access their rights. The key issue here is assistance for the victim.”

Experts have recommended the establishment of a clear line to distinguish which cases can and cannot be processed through mediation, particularly when they are regulated through the Anti-Sexual Violence Bill.⁹⁵ According to these experts, sexual violence cases are not supposed to be settled through mediation, largely because mediation is different from restorative justice. Mediation is intended to be used for civil cases such as marital conflict relating to alimony or property, referring to the continental law tradition, which differs from the common law system. Further, they

91 See Circulation Degree of The Ministry of Labour and Transmigration No. SE.03/MEN/IV/2011.

92 Online discussion in Workshop on Indonesian CEDAW report discussion on Violence Against Women, GPPI, 21 Nov 2020

93 Komnas Perempuan, *supra* note 3; Komnas Perempuan, *supra* note 1; Komnas Perempuan, *supra* note 7.

94 Sri Nurherwati, *Online interview with feminist lawyer* (2020).

95 Online discussion in Workshop on Indonesian CEDAW report discussion on Violence Against Women, GPPI, 21 Nov 2020; Online workshop on the the role of National Commission in Mediation, 23 September 2020.

highlight General Recommendation CEDAW 33/2015 which mentions the limits to conduct alternative mechanism for domestic violence and sexual violence to women.⁹⁶

The second approach focuses on the right of victim to choose which mechanism they wish to pursue. It refers to the experiences of handling sexual violence cases, where victims decided not to charge the offender and bring it as a criminal case. This is based on the principle that victim is a subject, not an object. As such, the victim should have the authority to decide whether the case should be pursued through criminal justice system or not. One of the respondents of this research noted:⁹⁷

“From the victim’s perspective, there is a question of whether the criminal procedure can provide substantive justice for them, particularly from using triangular analysis on substantive of the law, structure of the law, and the culture of the law. Restorative justice for sexual violence is then possible to be utilized, particularly where the victim’s rights are not accommodated by law. The law works by itself, it does not really care whether the victim gets a reparation... I am aware of criticisms that some practices of *restorative justice* as mediation or *conferecing* do not see the unequal power relations between the victim and the offender, so it makes it difficult to have a fair process, even in the restorative justice mechanism. However, this supposes to be a part of plurality in laws. Therefore, I argue that restorative justice can be one of the mechanisms situationally. In Eastern Indonesia, customary laws are so rooted in society that the enforcement of law becomes ineffective. In this situation, the mechanism outside criminal law can be one alternative only... but this alternative mechanism needs to be carefully implemented so that it will not strengthen the stigma against victims, *e.g.* there is an insinuation “You were raped and you agreed to be paid by only 15 million (equal to 1,200 USD) why?”... In many cases women cannot negotiate with their own family and community, victims are left behind and excluded from mediation processes... The compensation is not for the victim but for the community, such as the payment of buffalos which will be consumed by the community members... the victim does not get anything... this is also incorrect and very dangerous. The victims need to decide which mechanism suits them. The victim needs to be empowered through the restorative justice approach.”

Debates in Indonesian contexts reflect the global discourse. Both approaches indicate the importance of legal empowerment for victims as part of the process of handling sexual violence cases. The first approach argues that, if the victim is empowered by knowing their rights, receiving appropriate assistance, and there are proper mechanisms integrated in criminal justice system, including compensation,

96 Online workshop on the the role of National Commission in Mediation, 23 September 2020.

97 Fathur Rozi, *Online interview with the member representative of NGO in formulating the Anti-Sexual Violence Bill (2020)*.

they are able to access justice.⁹⁸ Both Indonesia's criminal legal system and alternative mechanisms disempower women.⁹⁹ The alternative mechanism is very difficult to monitor since Indonesia has a very diverse customary law, therefore using legal reforms in criminal justice system is one of the solutions. The second approach also agrees to have legal empowerment for the victim, since they are aware of the dangerous situation of the alternative mechanism provided through customary law, which is rooted in patriarchal culture. This approach considers the need to standardize the kind of restorative justice practice that suits different victims in different situations. They also agree that the process needs to protect the victim not only from short-term harm, but also in their longer term context.¹⁰⁰

The points of agreement between the first and second approach are reflected in the substance of the Anti-Sexual Violence Bill, drafted by women's rights NGOs and Komnas Perempuan in 30 September 2020. This draft was submitted to the parliament for consideration of its integration into the Anti-Sexual Violence Bill drafted by the parliament. First, the draft bill submitted by women's movements proposed that only verbal and physical sexual harassment should be categorized as complaint offenses, while other forms of sexual violence should be considered ordinary offenses. This limits the forms of sexual violence that can be dismissed from the criminal justice system. Second, the draft bill does not limit the process to criminal justice processes, but creates the possibility for victim and offender to participate in mediation regarding the payment of compensation. This does not eliminate the responsibility of offender to endure their criminal punishment.

Both approaches agree that integrating restorative justice into the Anti-Sexual Violence Bill would help limit the harmful practices imposed by law enforcers in failing to bring sexual violence cases to criminal proceeding in the name of restorative justice.¹⁰¹ However, the integration of restorative justice through criminal justice mechanism has very ideal if all sexual violence cases are reported to police so that it became criminal cases. A major problem is that only an estimated 20% of sexual violence cases are reported (BPS, 2021). Most go unreported meaning that they are not linked to the criminal justice system in any way.

Eddyono et al¹⁰² studies 48 verdicts relating to application of underage marriage dispensation which found that the dispensations were utilized to legitimize sexual exploitation between female children and male adults. There is strong indication that dispensation applies where young girls become pregnant because of sexual assault of adult men. In Indonesian criminal law, adults who engage in sexual intercourse with children is classified as a criminal act under the Penal Law and the Law on the Protection of the Child. In addition, the Badan Peradilan Agama (Badilag), the special body of Religious Court under the Supreme Court reported that most applications of divorce by women were based on domestic violence claims which included sexual violence (Badilag, 2021). This presents evidence that alternative

98 Nurherwati, *supra* note 94.

99 Sri Wiyanti Eddyono, *Does National Commission on VAW can run mediation for gender-based violence?* (2020).

100 Rozi, *supra* note 97.

101 Nurherwati, *supra* note 94.

102 Sri Wiyanti Eddyono, *supra* note 38.

mechanism practices can be utilized by various actors in ways that are not always beneficial to the victim.

Some of the situations above are not clearly addressed by the Penal Code or the Anti Sexual Violence Bill 2021, creating some uncertainty regarding whether future bills will be passed. There is no guarantee that the further exploitation of victims, labelled as 'restorative justice,' will end.

VII. CONCLUSION

Although there are alternative mechanisms, such as mediation, that can be used to settle cases of sexual violence in Indonesia, these practices cannot be directly associated with restorative justice. Restorative justice places the victim at the core of its work. Based on international legal frameworks and the scholarly literature on RS and sexual violence, this research finds that alternative mechanisms used to deal with cases of sexual violence, labelled as 'restorative justice' are questionable in the protections they offer victims. Not only do they not adhere to Indonesia's criminal justice system, but it is also difficult to monitor how the practice improves protection and justice for victims. As patriarchal culture is strongly rooted in Indonesian society, such informal practices can easily reinforce existing gender biases, inequality, and power asymmetries, undermining their proposed purpose of deterrence.

The reform of Indonesia's legal criminal justice system has been based on restorative justice. However, the narrow approach to restorative justice taken in the Criminal Code Bill demonstrates the fact that the Bill does not prioritize victims needs and interests as the objectives of criminal law. This informed the Anti-Sexual Violence Bill which forwards a new form of integration for restorative justice and the criminal justice system. Although there are strong debates relating to *how* restorative justice is integrated, it is agreed that there are various ways to implement this approach. In reality, both the criminal justice system and alternative mechanisms present specific dilemmas for women. Criminal justice reforms need to focus on the regulation of victim's rights through criminal justice processes; the legal empowerment of women to enable them to purposefully engage with alternative mechanism is equally important. Hence, the Anti-Sexual Violence Bill clearly states that the alternative restorative justice mechanism is not a replacement for the existing criminal justice mechanism, but rather should be used to complement this process.

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