

GENDER-BASED RESTORATIVE JUSTICE FOR VICTIMS OF VIOLENCE AGAINST WOMEN

Cahya Wulandari and Indung Wijayanto
Faculty of Law, Semarang State University
E-mail: cahyawulandari@yahoo.com

Abstract

Positive law is less oriented towards the protection of victims, especially women. Restorative justice appears to protect and resolve problems with the interests of the victim-oriented. This article discusses the form of legal protection for victims of violence against women, gender-based and describes the form of restorative justice for victims of gender-based violence against women. Positive criminal law does not accommodate both the interests of the victim to determine the crime against himself and to restore his suffering. This is caused due to the dominance of retributive justice in the settlement mind set crime through the criminal law. The restorative justice allows for an active role in the completion of a crime victim who happens also allows the imposition of sanctions that are beneficial to the recovery of the suffering of the victims.

Keywords: victims; violence against women; restorative justice

Abstrak

Hukum positif kurang berorientasi pada perlindungan terhadap korban terutama perempuan. *Restorative justice* muncul untuk melindungi dan menyelesaikan masalah dengan berorientasi pada kepentingan korban. Artikel ini mengkaji bentuk perlindungan hukum bagi korban kekerasan terhadap perempuan yang berbasis gender dan mendeskripsikan bentuk *restorative justice* berbasis gender bagi korban kekerasan terhadap perempuan. Penegakan hukum pidana positif tidak mengakomodasi kepentingan korban untuk menentukan penyelesaian kejahatan yang menimpanya maupun untuk memulihkan penderitaannya. Hal tersebut diakibatkan masih dominannya paradigma keadilan retributive dalam penyelesaian kejahatan melalui hukum pidana. *Restorative justice* memungkinkan peran aktif korban dalam penyelesaian kejahatan dan pemulihan penderitaan korban.

Kata kunci: korban; kekerasan perempuan; restorative justice

Preface

Gender difference actually is not a problem as long as it does not create gender inequality. Gender differences in fact has created a variety of injustice. Real form of injustice that is created are gender-based violence in the form of domestic violence, sexual abuse, rape, sexual objectification, trafficking, forced prostitution, and actions that are harmful to women.

Assumptions about gender implicitly saying that the most violent offenders are men.¹ Men have greater opportunity to commit violence against women. Based on research con-

ducted by the Legal Resource Center for Gender Justice and Human Rights (LRC KJHAM) obtained the result that the amount of violence against women increasingly year by year. Victims of this violence is not limited to women but also happen to children (girl).

Positive criminal enforcement against perpetrators of violence against women does not accommodate the interests of victims both to determine completely the crime against them and to restore their suffering. This is caused due to the dominance of retributive justice paradigm in solving a case through the criminal law. Hence comes the restorative justice that allows victims to have an active role in solving crime and also allows the imposition of sanctions that are beneficial to the recovery of suf-

¹ J. B. Worthen & P. V Sullivan, "Gender Bias in Attributions of Responsibility for Abuse", *Journal of Family Violenc*, Vol. 20 2005, page 305-311.

fering victims. Based on this background it is interesting to study the role of restorative justice of gender based on the legal protection for victims of violence against women.

This paper will examine issues related to the law, especially criminal procedural law relating to the legal protection for victims of women violence, through a gender-based restorative justice. Anxiety of the criminal justice system that has not been in favor of the victims, especially women and children victims who incidentally is a vulnerable group that should be protected. This makes the researchers moved to see restorative justice as a form of gender-based legal protections. The criminal justice system that includes the level of investigation, prosecution until the trial as a single integrated entity of criminal justice system that cannot be separated from one another in the operation in the field of law enforcement need to consider the interests of the victim in this case needs to be fought for women's rights related as victim. Victims of violence against women in settling disputes are over priority in accordance with what is needed and not merely look at the rules of the existing legislation, but rather upholding fairness and benefits to women victims. This paper examines the legal system in the handling of cases of violence against women, either on the form of legal protection for victims of gender-based violence against women and gender-based forms of restorative justice for victims of violence against women.

Discussion

Legal System in Handling Cases of Violence against Women

The existence of the law if it is explored further is inseparable with the legal system that includes substance (legislation, including customary law), structure (institutional and law enforcement), and the legal culture (people's behavior). Based on this research, the effect of variable competence and commitment is significant to the variable settlement of complaints.² When an investigator has the competen-

ce and commitment that both the settlement of the complaint given to the public will also be good. Commitment both from the investigator/ investigator assistance gives meaning that the investigator/investigator assistance who has a good commitment will be able to give a good settlement of complaint also on the community (family/victim).

The criminal justice system is expected to realize the needs of people to obtain justice. But in fact many people are disappointed with the results of the workings of the criminal justice system. It has to do with too dependency of court system to power and authority, so as if the law belongs only to the ruler and does not belong to the community, with such conditions, it justify weakness of people by the presence of the ruler so that the criminal justice system in favor of the ruling government.³

There are both substantive and formal rules that are likely difficult for women to achieve justice in the legal substance. Material regulations stipulated in the Criminal Code are not familiar with gender-based violence. Formal regulations include settings that govern how the offense is applied through the judicial process.

Regarding the criminal justice system, in the Criminal Procedure Code only a few articles that specifically regulates the rights of victims, while the rights of suspects and defendants much more secured in the Criminal Code. By implementing the Criminal Code deemed to have committed the rule of law, regardless of whether the interests of the injured party has been fulfilled.

The substance of the law that is still gender bias will provide constraints on the level of the legal structure that law enforcement officers and law enforcement agencies, among others: a matter of interpretation of the substance of the criminal procedure law is motivated

² Agus Wantoro, "Pengaruh Kompetensi dan Komitmen Penyidik Terhadap Penyelesaian Komplain Keluarga/Kor-

ban dalam Penanganan Perkara oleh Anggota Reskrim Polres Lampung Utara", *Jurnal Yustisia*, 2011, Surakarta: Law Faculty of Universitas Sebelas Maret, page 40.

³ Rena Yulia, "Penerapan Keadilan Restoratif dalam Putusan Hakim: Upaya Penyelesaian Konflik melalui Sistem Peradilan Pidana", *Jurnal Yudisial*, Vol. 5 No. 2 August 2012, page 234.

by the view that still gender bias, the attitude of some of the law enforcement against the victim which is influenced by the culture of discrediting the victim.

The substance of the law and legal structure is also closely related to the legal culture. If the legal culture that formed in the community still gender bias, the way people view the issue of violence against women are still drowning interests above the interests of the victims of violence are considered to be larger, such as the family name and the public especially when it comes to the domestic sphere.

Unrest toward substantive law, legal culture and structural confirmed by Tri Sulistiyono that the need for the demolition of the substance of the law is still a lot to save injustice against women, particularly which puts women in the domestic sphere and are in an unequal power with men both in households and in the wider community. The substance of the law and the policies that favor women, which is already owned at this time should be followed by the empowerment of the apparatus in law enforcement institutions (prosecutors, judges, police, and lawyers).⁴

Reality shows that the legal community in Indonesia has not provide optimal protection of the rights of women. Some laws actually provide opportunities for violations of women's rights and gender-based inequality. Various forms of discrimination and violence against women worsening the living conditions of women and impede women's equal rights. It is appropriate that women are treated fairly and do not accept discrimination and violence.⁵

Forms of Legal Protection for Victims of Gender-Based Violence against Women

Legal protection for the victims can be seen from the two meanings, namely: the protection of the law not to be victims of crime and protection to obtain insurance/legal compensation for the suffering or loss of people who have become victims of crime. Legal protection can be abstract (indirectly) as a preventive measure to prevent becoming a victim and legal protection in concrete (directly) as a repressive, with convict the perpetrators. Preventive efforts is done partly by issuing legislation and repressive efforts to crack down on offenders.

In connection with the victims, who seek justice, then they have the right to get protection and restoration of the legal interest in the criminal justice process as set forth in Act No. 8 of 1981 on the Criminal Procedure Code and morally formulated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁶ Assistance should have been given to the victim as a form of legal protection for the victims in this case related to the victims of violence against women. Victims will receive assistance in the form of material, health care, psychological and social, through the state and community volunteers. The fourth thing that is expected to be manifested in the formulation of criminal laws explicitly and clearly is the protection and restoration of the legal interests of victims of criminal acts.⁷

According to Holmes, the law is not there to confirm the existence of the law itself, but the law is there to order, tranquility, peace and justice. So if by without presenting the law, the conditions can be created, why not⁸. Therefore it is quite appropriate in case of the settlement cases of violence against women used the concept of restorative justice. As an alternative, the restorative justice process must necessarily be better than the processes and patterns of

⁴ Tri Sulistiyono, "Pluralisme Hukum; Menggapai Hukum Adat Gaya Baru yang Berperspektif Keadilan Jender", *Jurnal Konstitusi*, Vol. 1 No. 1 November 2008, Semarang: Law Faculty of Universitas Negeri Semarang, page 98.

⁵ Maria Goretti Etik Prawahyanti, "Perlindungan Hukum Bagi Perempuan dalam Sistem Peradilan Pidana Terpadu Penanganan Kasus Kekerasan Terhadap Perempuan di Indonesia", *Jurnal Pembaharuan Hukum, Law Reform*, Vol. 3 No. 2 October 2007, page 33.

⁶ Sri Wahyuni, "Kebijakan Hukum Pidana dalam Memberikan Perlindungan Hukum Terhadap Korban Tindak Pidana Kejahatan dalam Sistem Peradilan Pidana di Indonesia", *Jurnal Law Reform*, 2008, page 86.

⁷ *Ibid*; page 87.

⁸ Antonius Sudirman dalam Bambang Sukoco, "Prospek dan Dilema Penerapan Restoratif Justice System dalam Kasus Pidana Anak", *Jurnal Ilmu Hukum*, Vol. 14 No. 2 September 2001, page 343.

treatment can apply today. Therefore, it becomes important to find and identify a framework approach to restorative treatment. *First*, the involvement of the parties to the fullest and meaningful. In addition to the perpetrator and the victim, the perpetrator and the victim's family and the community are those who have been harmed by the victim. *Secondly*, there is the opportunity for the offender to prove the capacity and quality in addition to overcoming guilt constructively. The *third* focuses on the losses, recovering losses suffered by victims and reduce future losses by preventing crime. And fourth, the agreed penalty for perpetrators should take into account the welfare and equivalence.⁹

Forms of Restorative Justice for Victims of Gender-Based Violence against Women

Some of the obstacles that hinder the commitment to gender equality are grouped into five factors, namely: *first*, the influence of socio-cultural values are still adopts patriarchy, i.e. excessive partiality to men than women; *second*, many of the laws and regulations applicable to both formal and informal (customary law) that is gender bias; *third*, policies and programs are still gender bias; *fourth*, the interpretation of the actualization of religious teachings that are less precise because it is too heavy on the textual approach and partial rather than contextual and holistic; and *fifth*, sense of lack of confidence and inconsistency and lack of determination of women in fighting for women's fate.¹⁰

Based on several factors such constraint, of course, the basic principles of restorative justice can be an appropriate choice for justice for the victims of violence against women. The basic principles of restorative justice: *first*, the crime was placed as the symptoms that are part of social action and not just a violation of

criminal law; *second*, restorative justice is a theory of criminal justice that focuses view to see that crime is an act by a perpetrator against another person or the community rather than to the state. So, it emphasizes more on how the relationship/responsibility of actors (people) in resolving the problem with the victim or the community; *third*, crime is seen as actions that harm people and damaging social relationships.¹¹

Restorative justice approach is a model that appeared in the era of the 1960s in solving criminal cases. In contrast to the approach used in conventional criminal justice system, this approach emphasizes the direct participation of the offender, the victim and the community in the process of settlement of the criminal case. Restorative justice is another form of dispute resolution either formal or semi-formal, which reflects today's trend of individualism and reduce the function of the state.¹²

Restorative justice is a model that puts the completion of the criminal case the recovery of victims, offenders and the community. The main principles of restorative justice is the participation of victims and perpetrators, citizen participation as a volunteer mediator or facilitator for resolving cases.¹³

The concept of restorative justice is basically contains the size of justice which no longer refers to the theory of retaliation in kind from the victim to the perpetrator (whether physical, psychological or punishment), but the painful act cured by providing support to victims and requires offenders to take responsibility, with the help of families and communities when needed.¹⁴

In more detail Muladi stated that restorative justice has several characteristics: (1) crime is defined as a violation to the others and

⁹ Nur Hidayati, "Peradilan Pidana Anak dengan Pendekatan Keadilan Restoratif dan Kepentingan Terbaik Bagi Anak", *Jurnal Pengembangan Humaniora*, Vol. 13 No. 2 August 2013, page 147.

¹⁰ Ristina Yudhanti, "Paradigma Keadilan Gender dalam Pembangunan Hukum", *Jurnal Konstitusi*, Vol. 2 No. 2 November 2010, Semarang: Law Faculty of Universitas Negeri Semarang, page 69-70.

¹¹ Kuart Puji Prayitno, "Restorative Justice untuk Peradilan di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto)", *Jurnal Dinamika Hukum*, Vol. 12 No. 3 September 2012, Purwokerto: Law Faculty of Universitas Jenderal Soedirman, page 411.

¹² Sahuri Lasmadi, "Mediasi Penal dalam Sistem Peradilan Pidana Indonesia", *Jurnal Ilmu Hukum Universitas Jambi*, Vol. 02 2010, page 2.

¹³ Buletin Komisi Yudisial, *Hakim dan Penerapan Keadilan Restoratif*, Vol. VI No 4, January-February 2012

¹⁴ *Loc.cit*, page 2.

recognized as a conflict; (2) The focus on solving the problem of accountability and liability in the future; (3) The nature of normative built on the basis of dialogue and negotiation; (4) Restitution as a means of improving the parties, reconciliation and restoration as the primary goal; (5) Justice formulated as relations rights, assessed on the basis of the results; (6) the target of attention to the improvement of social disadvantage; (7) Society is a facilitator in the restorative process; (8) The role of the victim and the perpetrator is recognized, both in the problem as well as the completion of the rights and needs of victims. The perpetrators of criminal acts are encouraged to take responsibility. (9) accountability of the offender is defined as understanding the impact of the action and to help decide the best; (10) the offenses understood within the overall context, moral, social and economic; and (11) Stigma can be removed through a restorative action.¹⁵

Restorative justice puts a higher value in the direct involvement of the parties. The victim was able to restore control elements, while offenders are encouraged to take responsibility as a step in correcting errors caused by crime and in building social value system.

Handling cases of violence against women with based restorative justice aims to eliminate stigma in the community or stereotype view that considers that women who are victims of violence as a trigger itself. To change the stigmatization, the community must be involved in the discussion of the case in order to find out the right of the principal case occurring and can provide the right solution for the victims.

Our national law have not embraced restorative justice, the purpose of punishment which we have adopted is still aiming for revenge or deterrence, even if it has adopted a system of rehabilitation, it only emphasizes the actors alone, yet emphasizing rehabilitation or improvement of relations within the communi-

ty, including the rehabilitation of victims.¹⁶ Whereas in the case of the application of restorative justice, victims are a very important role in the settlement of violence against women which aims to rehabilitate and provide compensation as desired by the victim.

Of course it is also in line with the idea contained in an article: restorative justice is defined as - an ethos with practical goals, among roommates to restore harm by including the affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue. Restorative justice, Gavrielides argues, - adopts a fresh approach to conflicts and their control, retaining at the same time on certain rehabilitative goals". Restorative justice practices consist of: direct and indirect mediation, family group conferences, healing/sentencing circles and community restorative boards".¹⁷

The foregoing can be seen quite right that restorative justice can be applied in cases of violence against women in the hopes of women victims benefit from the completion of their case. The principle of mutual benefit can be realized so that justice for victims or to the community can be achieved and not merely provide legal certainty alone.

Restorative justice puts a higher value associated with the involvement of the parties. Victims can restore control elements, while actors take responsibility in fixing an error caused by a crime they did and in building social value system. So the role of government in criminal cases to monopolize settlement can be reduced. Restorative justice requires the cooperative efforts of the government and the community to create an environment where victims and perpetrators can reconcile their conflicts and repair injuries suffered.¹⁸

¹⁵ Saptadi Agung Priharyanto, 2011, *Peran Aparat Penegak Hukum dan Pendamping Korban dalam Penanganan KDRT (Studi Kasus LBH APIK Jakarta, P2TP2A Provinsi DKI Jakarta dan Unit PPA Bareskrim Polri)*, Tesis, Jakarta: Universitas Indonesia, page 42-43.

¹⁶ Apong Herlina, "Restorative Justice", *Jurnal Kriminologi Indonesia*, Vol. 3 No. 3 September 2004, page 26.

¹⁷ Theo Gavrielides, 2011, *Restorative Practices: from the Early Societies to the 1970's*, www.internetjournalofcriminology.com, Accessed on 10 August 2014, page 2.

¹⁸ Septa Candra, "Restorative Justice: Suatu Tinjauan terhadap Hukum Pidana di Indonesia", *Jurnal Rechst-vinding (Media Pembinaan Hukum Nasional)*, Vol. 2 No. 2 August 2013, page 269.

Mediation process conducted related to the criminal act is commonly known as penal mediation. Philosophically, the penal mediation can be achieved form of justice that is fast, simple and inexpensive because the parties involved are relatively less than through the judicial process by the Criminal Justice System components. Penal mediation can be studied from a sociological perspective, in accordance with the local knowledge of Indonesian society.¹⁹

Closing

Conclusion

Conclusions that can be drawn from the above discussion is handling system of violence against women need to use restorative justice approach in terms of gender-based conflict resolution with regard to the interests and wishes of the victim first women to get fit with what could restore them as usual so that the settlement case is not just a formality but to achieve substantive justice. In the resolution of cases of violence against women were supposed to be women victims find comfort in telling their case without any pressure from any and traumatic for the victim does need to be given psychological assistance.

Suggestion

The government should build synergy among health workers, social workers, volunteer, spiritual director and Legal Assistance. Assistance should continue to be done in order to help the rights of women who experience violence. In addition, it should be in the criminal justice system in Indonesia is based will realize the benefit and fairness of the legal process runs compared to the rule of law alone. The need for a paradigm change in the law enforcement officers in resolving cases of violence against women in particular.

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