

The Problem Of Protecting The Rights Of Women Victims Of Sexual Violence: Between Islamic Law And National Law In Indonesia

Atikah Rahmi¹, Asmuni², Nurasiah³
atikahrahmi@umsu.ac.id

¹Faculty of Law, Universitas Muhammadiyah Sumatera Utara, Indonesia

^{2,3}Posgraduate Of Islamic Law, Universitas Islam Negeri Sumatera Utara, Indonesia

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Abstract

The problem of sexual violence against women occurs in all walks of life, while the protection of victims has not been met. The rights of victims of sexual violence as an injured party due to the actions of perpetrators receive less attention and are often neglected. Various efforts to provide justice, protection and recovery to women victims of sexual violence continue to be carried out, but obstacles and challenges make victims marginalized from justice, protection and recovery that should be obtained. The research method used is juridical normative. The results showed that the protection of women victims of sexual violence based on the National Criminal Law includes; physical protection, fulfillment of procedural rights, legal protection, medical, psychological, psychosocial rehabilitation, compensation, compensation and/or restitution seen from the perspective of Islamic law is an urgent matter and a necessity because the actions of perpetrators of sexual violence are contrary to the Constitution and the dignity of humanity which has a tremendous impact on victims.

I. Introduction

Islam opposes sexual violence, because the problem of sexual violence against women is not only an individual problem, but also a social problem related to all forms of torture and cruelty that can degrade the dignity of women. Violence against women is a reflection of male power or a manifestation of women's vulnerability before men or even a picture of injustice against women. A woman is deprived of her dignity and is powerless over her body. Meanwhile, the perpetrator uses the condition of women's helplessness for his benefit and does not care about the impact experienced by the victim in layers and takes a long time to recover himself.¹

Sexual violence is a violation of human rights and includes crimes against human dignity. For this reason, this case should be viewed as a public problem, not just a private matter (individual victims), because this crime is a form of behavior that highlights lust, revenge and superiority, that is, whoever is strong is the one who has the right to sacrifice others. The same opinion was also expressed by Nursyahbani Kantjasungkana, that the problem² of rape which is one form of sexual violence can no longer be viewed as a mere problem between individuals, but is a social problem related to human rights issues, especially those related to the protection against all forms of torture, violence, cruelty and neglect of human dignity.³

The phenomenon of sexual violence is increasingly worrying in almost all lines of Indonesian society; in the public sphere, domestic, even in educational institutions. Based on INFID research in 2020, as many as 66.7% of women have experienced sexual violence, while men are 33.3%. 1 in 3 women aged 15-64 years experienced physical and/or sexual violence by a partner and other than a partner during their lifetime. 2 out of 3 boys and girls aged 13-17 years have experienced one of the violence in their lives, be it physical, sexual or emotional violence.⁴

In 2021, the number of sexual violence during the pandemic soared. Based on the results of Komnas Perempuan's catahu, as many as 299,911 cases of violence against women occurred in 2020. Although the number is reduced from catahu 2020 which was 431,471 cases, the decrease is due to the capacity for documenting not the real conditions of the violence that occurred. Due to the fact that about 34% of the institutions that returned

¹ Kongres Ulama Perempuan Indonesia, *Dokumen Resmi Proses dan Hasil Kongres Ulama Perempuan Indonesia* (Jakarta: KUPI, 2017), h. 60

² Abdul Wahid. Muhammad Irfan. *Perlindungan Terhadap Korban Kekerasan Seksual Advokasi atas Hak Asasi Perempuan*, (Refika Aditama: Bandung, 2001), h. 62

³ Eko Prasetyo Dan Suparman Marzuki, *Perempuan Dalam Wacana Pemerkosaan*, (Yogyakarta: Pkbi- Diy, 1997), h. 178

⁴ <https://nasional.kompas.com/read/2021/02/02/13055491/ijrs-333-persen-pria-alami-kekerasan-seksual-ruu-pks-urgen?page=all>, diakses 20 Juni 2022

the questionnaire stated that there was an increase in complaints of cases during the pandemic.⁵ Still Komnas Perempuan data in 2022, sexual violence is the dominant form of violence against women (KTP), which is 2,228 cases, which is 38.21%; while psychological violence is 2,083 cases or 35.72%.⁶ Violence against women shows increasing numbers every year. In this context, sexual violence in the form of rape ranked the highest at 72% about 2,399 cases, molestation 18%, (601 cases), sexual harassment 5% (166 cases).⁷

Seeing the condition of protection for women victims of sexual violence that is not optimal, it is necessary to add clauses article by article for the sake of perfection by looking at the provisions of Islamic law that accommodate the needs and desires of the local community. This effort needs to be continued So that the legal system in Indonesia becomes a solid and well-established legal entity in handling cases of sexual violence, so that law enforcement for perpetrators of criminal acts is really achieved and gets reasonable justice for victims.

2. Research Method

The research method used is legal research with normative juridical research. Normative juridical is to find the truth of coherence to examine whether the rule of law is in accordance with legal norms and whether norms in the form of orders or prohibitions are in accordance with legal principles, as well as whether someone's actions (acts) are in accordance with legal norms (not just according to legal rules) or legal principles.⁸ The data collection tool used in this study is through the study of documents with a search of the library (library research). Literature study is the sole method used in normative legal research.⁹ The source of data that the authors use in this study is secondary data. Secondary Data that includes abstracts, indexes, bibliographies, government publications, and other reference materials.¹⁰

⁵ Komnas Perempuan, "Perempuan dalam Himpitan Pandemi: Lonjakan Kekerasan Seksual, Kekerasan Siber, Perkawinan Anak dan Keterbatasan Penanganan Di Tengah Covid 19",

⁶ Catatan Tahunan Komnas Perempuan memaparkan datanya bahwa sejak tahun 2010 angka kekerasan terhadap perempuan terus meningkat dari tahun ke tahun. Lihat Komnas Perempuan Catatan Tahunan Edisi Launching 7 Maret 2016, h. 1, melalui: <http://www.komnasperempuan.go.id/wp-content/uploads/2016/03/Komnas-Perempuan-Catatan-Tahunan-2016edisi-Launching-7-Maret-2016.pdf>

⁷ *Ibid*

⁸ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2011).

⁹ Philips Dillah Suratman, *Metode Penelitian Hukum* (Bandung: Alfabeta, 2015).

¹⁰ Soerjono Dan Sri Mamudji Soekanto, *Penelitian Hukum Normatif. Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2003).

3. Results and Discussion

A. Rights Of Victims Of Sexual Violence

Legal reform is realized as a whole, which includes, among others: regulation on the Prevention of sexual violence; forms of sexual violence; victims ' rights, including recovery; criminal justice procedural law on sexual violence, including on evidence; monitoring the elimination of sexual violence; and sentencing. A new system that better protects women in terms of law enforcement and encourages the role of the state to be more responsible for efforts to recover victims and prevent sexual violence in the future. Efforts to overhaul the legal system to address systemic sexual violence against women.¹¹

In the TPKS law, the rights of victims are regulated in Article 70 paragraph (1) UUTPKS: the victim's right to recovery as meant in Article 67 paragraph (1) letter c includes:

- 1) Medical rehabilitation;
- 2) Mental and social rehabilitation;
- 3) social empowerment;
- 4) Restitution and / or compensation; and
- 5) social reintegration.

The purpose of protection against victims of domestic violence is:

- 1) provide information and knowledge of the rights and obligations as a victim as well as the procedures taken in obtaining their rights;
- 2) help relieve / recover the psychological, medical and social burden of the victim/family in building his identity to meet his future;
- 3) Provide a sense of security, comfort and justice for victims and families in the process of handling in the police, hospitals, court proceedings and social environment;
- 4) with a feeling of security and protection, then a good relationship will be created between the victim and the policewoman so that the victim's witnesses will cooperate to disclose the case;
- 5) minimize acts of violence so as not to repeat themselves to victims and people.

Victims as people who experience voices of mistreatment, discrimination and sexual violence from others. The victim is also someone who experiences losses including

¹¹ Ani Purwanti Dan Marzellina Hardiyanti, Strategi Penyelesaian Tindak Kekerasan Seksual Terhadap Perempuan Dan Anak Melalui Ruu Kekerasan Seksual, Masalah - Masalah Hukum, Jilid 47 No. 2, April 2018

physical and mental injuries, emotional misery, economic losses and denial of their human rights. Enforcement of criminal rules is a handling of crimes that need to be eradicated or maintained so that they are in limited circumstances. The implementation of good rule enforcement based on proportional guidelines must strive to create an overall balance value, which includes the balance value by the victim, the criminal perpetrator, and to the people as a whole.¹²

The concept of Victim Protection has been seen as a legal right in essence is part of the problem of human rights protection, so basically the concept of human rights can be viewed as a legal right. The concept of human rights is viewed as a legal right, it has two normative consequences, namely:¹³

1. The obligation for the person responsible (the party burdened with obligations) to respect/not violate rights or meet claims arising from rights.
2. Reparation if the obligation is violated / not fulfilled with reference to the implementation of the protection of the rights of victims of crime as a result of the subscription of the rights in question.

B. The concept of protection of Women Victims of sexual violence: between Islamic law and National Law

The importance of adequate legal protection of victims of crime is not only a national issue, but also an international issue. Therefore, this issue should be given serious attention. This can be seen from the establishment of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by the United Nations (UN), as a result of the Seventh United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, which took place in Milan, Italy, September 1985. "Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of the rights." In the declaration in Milan in 1985, the form of protection provided gets an extension whose purpose is not only aimed at victims of crime (victims of crime), but also protection for victims due to abuse of power (abuse of power).¹⁴

Victims of criminal acts, especially sexual violence, need protection to obtain legal guarantees or compensation for the suffering or losses of victims of sexual violence. The

¹² Nadila Purnama Sari, Anak Agung Sagung Laksmi Dewi Dan Luh Putu Suryani, *Perlindungan Hukum Terhadap Anak Penyandang Disabilitas Sebagai Korban Kekerasan Seksual*, Jurnal Preferensi Hukum, Vol. 2, No. 2, Juli 2021

¹³ Dikdik M Arief Mansur Dan Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan (Antara Norma Dan Realita)*, Jakarta : Pt. Radja Grafindo Persada, 2006, h. 162

¹⁴ Didik M Arif Mansur, Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan Antara Norma Dan Realita*, (Jakarta: Rajawali Pers, 2006), h. 23.

form of compensation can be in the form of restoration of goodwill (rehabilitation), restoration of inner balance, compensation which can be in the form of restitution, compensation and guarantees or social welfare compensation and so on.¹⁵

Protection of victims is one form of legal protection against the community by providing restitution, compensation to victims, medical services, and legal aid. Victims of sexual violence in addition to the right to protection as stipulated in Article 5 paragraph (21) are also entitled to protection in the form of medical assistance, rehabilitation, compensation and restitution. Article 7B of Law No. 31 of 2014 explains that: "further provisions regarding the procedure for applying and granting compensation and restitution as mentioned in Article 7 and Article 7A are regulated by government regulations".¹⁶

Legal reform also needs to be done on formal law. Regulation in formal law is still not able to reach the occurrence of sexual violence in public spaces. Formal law still requires the existence of evidence in the form of witness statements. Sexual violence against women in public spaces is usually carried out through sentences (verbal) or actions that are taken for granted by most citizens. This condition makes it difficult for women to report incidents of sexual violence they have experienced, due to the absence of witnesses. The law in Indonesia also does not provide for the restoration of the condition of women who are victims of sexual violence. There is a need for legal sanctions for perpetrators of violence that are restitutive by restoring the condition of women as victims of sexual violence.¹⁷

In the TPKS Act has accommodated the restitution, several articles in the TPKS law related to restitution as in:

- a. Article 16 Paragraph (1) in addition to imprisonment, fines, or other crimes under the provisions of the law, the judge shall determine the amount of restitution for the crime of sexual violence which is punishable by imprisonment of 4 (four) years or more.
- b. Article 30 paragraph (1) Victims of sexual violence are entitled to restitution and Recovery Services. Article 30 paragraph (2) restitution as meant in Paragraph (1) shall be in the form of: a. compensation for loss of wealth or income; b. indemnity incurred as a result of directly related suffering as a result of the crime of sexual violence; c. reimbursement of medical and/ or psychological care costs; and / or d. compensate for other losses suffered by the victim as a result of the criminal act of sexual violence.
- c. Article 31 paragraph (1) Investigators, public prosecutors, and judges shall notify

¹⁵ Tri Wahyu Widiastuti Dan Endang Yuliana, *Perlindungan Hukum Bagi Anak Korban Kekerasan Seksual*. Eksplorasi, Volume Xxvii No. 1 Agustus Tahun 2014

¹⁶ Mia Hadiati, Moody R. Syailendra, Indah Siti Aprilia, Dan Shrishti Shrishti, *UPaya Pemenuhan Ganti Kerugian Terhadap Perempuan Dan Anak Korban Kekerasan Seksual Di Indonesia*, Serina Iv Untar 2022 *Pemberdayaan Dan Perlindungan Konsumen Di Era Ekonomi Digital*, Jakarta 20 April 2022

¹⁷ Wahyu Krisnanto Dan Martika Dini Syaputri, *Kelemahan Perlindungan Hukum Terhadap Perempuan Dari Kekerasan Seksual Di Ruang Publik*, Jurnal Ilmiah Universitas Batanghari Jambi, 20(2), Juli 2020

- the right to restitution to the victim and LPSK. Article 31 paragraph (2) restitution can be deposited in advance at the Registrar of the District Court where the case is examined. Article 31 paragraph (3) investigators may seize the assets of perpetrators of sexual violence as a guarantee of restitution with the permission of the local district court. Article 31 paragraph (4) foreclosure as meant in paragraph (3) shall be carried out with due regard to the rights of third parties in good faith.
- d. Article 32: restitution as meant in Article 31 paragraph (2) shall be returned to the perpetrator in the case of: a. the case is not prosecuted because there is insufficient evidence or it does not constitute a criminal offense; and f or b. based on a court decision that has acquired permanent legal force, the defendant is decided to be free or free from all lawsuits.
 - e. Article 33 paragraph (1): restitution is given within a period of no later than 30 (thirty) days from the date a copy of the decision or determination of the court is received.
 - f. Article 33 paragraph (3): in the event that the implementation of restitution to the victim is not fulfilled until the time limit as intended in Paragraph (1), the victim or his heirs notify the court.
 - g. Article 33 paragraph (4): the court as referred to in paragraph (3) shall give a warning letter in writing to The Restitution provider to immediately fulfill the obligation to provide restitution to the victim or his heirs.
 - h. Article 33 paragraph (5): the judge in the decision ordered the prosecutor to auction the confiscation of restitution guarantees as long as no restitution payment is made within 30 (thirty) days after the court decision that has obtained permanent legal force.
 - i. Article 33 paragraph (6): in the event that The Restitution deposited as meant in Article 31 paragraph (2) and the assets of the convict auctioned as meant in paragraph (5) exceed the amount of restitution decided or determined by the court, the prosecutor returns the excess to the convict.
 - j. Article 33 paragraph (7): if the assets of the convict seized as meant in paragraph (5) are not sufficient for the restitution fee, the convict shall be subjected to a replacement prison sentence not exceeding the threat of the main crime.

According to Barda Nawawi Arief, the definition of "victim protection" can be seen from two meanings, namely:

- a. can be interpreted as legal protection not to become a victim of criminal acts" (means the protection of human rights or for the legal interests of a person)
- b. it can be interpreted as "protection to obtain legal guarantees/compensation for the suffering/losses of people who have become non-criminal victims" (synonymous with Victim Assistance). The form of compensation can be in the form of restoration of goodwill (rehabilitation), restoration of equanimity (among other things, with forgiveness), compensation (restitution, compensation, Social Welfare guarantees/compensation), and so on.

Giving punishment to the perpetrator is not a good alternative in improving the personality of the perpetrator, while the victim also needs a person who is responsible for his future and life. The apparatus policy Model that submits problem solving to the perpetrator's parents

and the victim's parents is a restorative justice-based solution. Settlement of cases is generally the application of compensation by the perpetrator and his family to the victim or his family to avoid the consequences of revenge. Restorative justice has a new way of thinking and paradigm in looking at a crime committed by a human being without merely providing criminal punishment. According to the concept of restorative justice, the handling of crimes that occur is not only the responsibility of the state but also the responsibility of the community. Therefore, the concept of restorative justice is built on the understanding that crimes that have caused harm must be recovered both the losses suffered by the victim and the losses borne by the community.

Declaration of Basic principles of Justice for Victims of Crime and Abuse of Power approved by the UN General Assembly November 29, 1985 (resolution 40/34) on the recommendation of the 7th Congress, states the protection of victims, among others, in the form of the following:

- a. The victim of a crime should be treated with full respect for his dignity, as well as given the right to immediately demand compensation.
- b. Victims of crime should be informed about their role, timelines, and progress made in handling their cases, the suffering and concerns of victims of crime, should always be displayed and communicated at every level of the process. The victim of a crime must receive compensation from the perpetrator of the crime or his family.

Mernissi held the view that for centuries, Muslims read the text of the Qur'an in a biased manner. Secondary texts such as Hadith compilations and books of fiqh contain many rules that actually contradict the spirit of the Qur'an that liberates people and upholds humanity, including women. If women's rights are an issue for some modern Muslim men, it is not because of the Qur'an or the Prophet, nor because of Islamic tradition, but simply because they are against the interests of the male elite.¹⁸

National legal perspective, referring to the legislation relating to the protection of victims of sexual violence, namely; law of the Republic of Indonesia Law Number no. 32 of 2014 on amendments to law No. 13 of 2006 concerning the protection of witnesses and victims and Law of the Republic of Indonesia number 12 of 2022 concerning the crime of sexual violence. However, it does not override the discussion of other laws and regulations such as; Criminal Code, Criminal Procedure Code, Child Protection Law, PKDRT law and trafficking in Persons Law. While the perspective of Islamic law refers to the Qur'an, Hadith and the results of the views of contemporary scholars, namely the results of the deliberations of the Indonesian women's Ulema Congress (KUPI) in 2021 and 2022.

Explicitly, Islamic law, especially on fiqh sources including the Qur'an and Hadith, does not explain about the protection of victims of criminal acts of sexual violence, but there are verses that point to the violation of "coercive measures" in sexual matters and provide protection against victims of sexual violence, as outlined in the previous chapter. In Islam every soul is

¹⁸ Fatimah Mernissi. (1994). *Wanita Dalam Islam*. Bandung: Pustaka Pelajar

protected from sexual violence, including if it is a slave, as mentioned in QS an nur verse 33. God is forgiving and merciful.

Qiro'ah mubadalah Kiai Faqihuddin Abdul Kodir and Kiai Husein, literally, women become accessible by the Hadith. Women and men are both commanded to do good and forbidden to do evil and mafsadah so that it will provide justice for both parties (men and women). A person's faith will be perfect if he loves people as much as he loves himself.

Vision and mission in Islam is the teaching of monotheism which means the oneness of God. To believe in God is to acknowledge the oneness of God and the equality of man before God. There is no God but Allah, and there is no god among men. The king is not God to his people, the master cannot be said to be God to his workers, the husband is not God to his wife, the father is not God to his daughter nor can a man be God to his girlfriend (woman). Tawhid has a vertical dimension of servitude to God (hablun minallah) and a horizontal dimension of looking at fellow human equals (hablum minannas). A person who believes in Allah will serve him vertically and view everyone as equals, helping each other in building a better, prosperous and just life. This is called horizontal social monotheism. Such monotheism will bring about justice, so that no person is positioned as lame or a victim of a hegemonic and dominative social system.¹⁹

4. Conclusion

The protection of women victims of sexual violence based on the National Criminal Law includes; physical protection, fulfillment of procedural rights, legal protection, medical, psychological, psychosocial rehabilitation, compensation, compensation and/or restitution seen from the perspective of Islamic law is an urgent matter and a necessity because the actions of perpetrators of sexual violence are contrary to the Constitution and the dignity of humanity which has a tremendous impact on victims. So according to Islamic law, such actions in all their forms are unlawful, because they are contrary to human values that are metabolized in maqashid ash syariah; hifdzu ad din, hifdzu an nafs, hifdzu al aqli, hifdzu an nasl, hifdzu al mal, hifdzu al irdhi. Partially, sexual violence is regulated in the National Criminal Law, which is based on the Criminal Code, PKDRT law, Child Protection Law, TPPO law, health law, Perma No. 3 Year 2017 Tentang Tried The Case Of Women Who Faced The Law. However, the existence of the law has not been able to fully accommodate the comprehensive protection of victims, so that the presence of the PSK law and the TPKS law is a legal umbrella for the protection of victims of sexual violence which is religiously a prophetic mission to free, especially women and other vulnerable groups from injustice. Through the TPKS law, forms of sexual violence that previously did not exist have been disallowed. The TPKS law has also accommodated the prevention, protection and recovery of victims of sexual violence as a reflection of the letter An Nur paragraph 33 which has relevance to sexual violence.

In order to improve the implementation of protection so that the benefits of legal protection can be felt directly by women who are victims of sexual violence by

¹⁹ Faqihuddin Abdul Kodir (buku 4), *Op.cit.*, h. 33-34

prioritizing the victim's experience. Supposedly, the protection of victims of sexual violence, especially rape both in the form of psychological, bodily injuries due to tearing of the victim's hymen, including the cost of child abortion when the victim becomes pregnant due to rape, is a serious concern from the government.

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