SETTLEMENT OF SEXUAL VIOLENCE AGAINST CHILDREN BASED ON BALINESE CUSTOMARY LAW

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Abstract

This study aims to examine and analyze related to the settlement of crimes of sexual violence against children based on positive law in Indonesia and Balinese customary law. This study uses normative legal research methods with factual approaches, statutory approaches, case approaches, and legal concept analysis approaches. The results of this study explain that arrangements related to sexual violence against children are regulated in Article 81 and Article 82 of the UUPA, regarding their settlement according to the criminal justice system according to the provisions of the Criminal Procedure Code. As well as the settlement of criminal acts of sexual violence against children in Balinese customary law is translated into two approaches to justice, namely criminal sanctions with a retributive approach or criminal sanctions with a restorative approach. And if the settlement is through a restorative approach, the rights of the victim need attention because the victim is an interested party who should have a (legal) position in the settlement process. However, in the criminal justice system in general, it is suspected that victims do not receive equal protection from the authorities in the criminal justice system, so that the true interests of victims are often neglected and even if they do exist, they are only fulfilling the criminal justice administration or management system.

Keywords: *Settlement, Sexual Violence, Children, Balinese Customary Law*

1. INTRODUCTION

The term violence appears in several regulations, according to Law Number 23 of 2004 concerning the Elimination of Domestic Violence, in Article 1 paragraph 1 of this Law what is meant by "Domestic violence is any act against a person, especially women, which results in physical, sexual, psychological, and/or domestic neglect, including threats to commit acts, coercion, or unlawful deprivation of independence within the scope of the household". Domestic violence is not only experienced by women, but children are often victims of domestic violence.

Article 1 point 4 of the Regulation of the Minister of State for Women's Empowerment and Child Protection of the Republic of Indonesia Number 01 of 2010 states explicitly that "Violence against children is any act against children that results in physical, mental, sexual, psychological misery or suffering, including neglect and ill-treatment that threatens the bodily integrity and degrades the dignity of children".

Regulation of the Minister of State for Women's Empowerment and Child Protection of the Republic of Indonesia. Number 1 of 2010 Article 1 point 2 explains that "Violence is any unlawful act with or without the use of physical and psychological means that causes danger to life, body or deprives a person of their freedom". Furthermore, Article 1 point 3 of the Regulation of the State Minister for Women's Empowerment and Child Protection of the Republic of Indonesia Number 1 of 2010 explains "Violence against women is any act based on gender differences that results in or may result in

physical, sexual or psychological misery or suffering of women, including threats of certain actions, coercion or arbitrary deprivation of liberty, whether it occurs in the public sphere or in private life".

There are various domestic violence, one of which is child sexual abuse. An example can be seen in the case of sexual abuse of children in Sudaji Village, Sawan District, Buleleng. Where a biological father who impregnated his child with the threat if not served then threatened to stop school, the child had refused but the father continued to force and threaten so that the child could not refuse.(Wicaksono, 2015a)

This case was resolved in the traditional manner by the dadia Kubukili of Sudaji Traditional Village. The settlement was marked by a ceremony to return the oath as is customary in the village. The Legal Aid Institute of the Indonesian Women's Association for Justice (LBH APIK) Bali urged the police to immediately process the case. Because even though it has been resolved in customary law by the dadia, his actions have not been accounted for in positive law.(Wicaksono, 2015b)

Cases like this are regulated in Law No. 23 of 2002 concerning Child Protection (PA Law) regarding sexual abuse of children, especially in the provisions of Article 82 "Every person who deliberately commits violence or threat of violence, forces, deceives, a series of lies, or induces a child to commit or allow obscene acts to be committed, shall be punished with a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah) and a minimum of Rp. 60,000,000.00 (sixty million rupiah)". 300,000,000.00 (three hundred million rupiah) and a minimum of Rp. 60,000,000.00 (sixty million rupiah)".

Harassment is "deviant behaviour, because it forces a person to engage in a sexual relationship or establishes a person as an object of unwanted attention. This means that sexual harassment can take the form of indecent behaviour, such as touching vital parts of the body, and it can also take the form of indecent words or statements". While the person who is the object of the touching or statement does not like it.(R. Sari et al., 2015)

Based on the laws applied in Indonesia, customary law itself is basically not allowed to conflict with national laws. The case that occurred in Sutaji Village, Sawan Subdistrict, Buleleng, which was only resolved by customary law and not processed through national law, which in this case included the crime of sexual violence, was not a complaint offence and was subject to sanctions in accordance with the Criminal Code, but justice would be difficult to obtain if it only reached customary law without using national law.

Previous research was conducted by Putu Eva Ditayani Antari with the title fulfilment of the rights of children who experience sexual violence based on restorative justice in the Tenganan Pegringsingan community, Karangasem, Bali (Antari, 2021) where the research examines related to the Child Protection Law, child victims of sexual violence are entitled to legal assistance and rehabilitation by authorised institutions, at the central and regional levels. In contrast, in Tenganan Village, children as victims of sexual violence are sanctioned to be forcibly married to the perpetrator and impose social sanctions through the nandan beling tradition on the parents of girls who are victims of sexual violence. Therefore, it is necessary to formulate the customary sanctions by adopting the concept of restorative justice in the Child Protection Law. Meanwhile, the research conducted by the author examines in general terms the regulation of the criminal offence of sexual violence against children in Bali based on positive law in Indonesia and the settlement of sexual violence against children in Bali based on Balinese customary law.

Based on the explanation of the background of the problem, this research aims to find out and analyse the legal arrangements related to the settlement of sexual violence against children based on positive law in Indonesia and Balinese customary law..

2. RESEARCH METHODS

This research uses normative legal research methods, which is research that places the law as a building system of norms. The system in question is about principles, norms, rules from laws and regulations, court decisions, agreements and doctrines (Fajar & Achmad, 2017). This research is conducted by examining existing library materials such as laws and regulations and then conducting research on legal issues. The approaches used in this research are the case approach, the statute approach, the fact approach and the analytical & conceptual approach. The statutory approach is carried out by examining all laws that are in accordance with the issues concerned. The fact approach is used based on facts that occur in society. The legal concept analysis approach is used to understand the criminalisation policy and law enforcement against the crime of sexual violence against children.

3. RESULTS AND DISCUSSION

3.1. Regulation of Criminal Offences of Sexual Violence Against Children Based on Positive Law in Indonesia

Criminal offence is a translation of "strafbar feit", in the Criminal Code there is no explanation of what exactly is meant by strafbaar feit itself. Usually, criminal offence is synonymous with delict, which comes from the Latin word delictum. In the large Indonesian dictionary, it is stated as follows: "An offence is an act that is subject to punishment because it is a violation of the criminal law.".(Rahmanuddin, 2019)

Furthermore, a criminal offence is a basic part of an error committed against a person in committing a crime. So for the existence of an error, the relationship between the circumstances and the actions that cause reproach must be in the form of intent or negligence (Dalimunthe et al., 2021). It is said that deliberation (dolus) and negligence (culpa) are forms of fault while the term from the notion of fault (schuld) which can cause a criminal offence to occur is because the person has committed an act that is against the law so that for his actions he must be responsible for all forms of criminal offences he has committed to be tried and if it has been proven that a criminal offence has been committed, then it can be sentenced to criminal punishment in accordance with the article that regulates it.(Utoyo et al., 2020)

The crime of sexual violence against children in general is contained in the provisions of Law No. 23 of 2002 concerning Child Protection (hereinafter referred to as UUPA) in Article 81 paragraph 1 which explains that "Every person who intentionally commits violence or threat of violence to force a child to have sexual intercourse with him or with another person, shall be punished with a maximum imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp 300,000,000.00 (three hundred million rupiah) and a minimum of Rp 60,000,000.00 (sixty million rupiah)". Furthermore, Article 81 paragraph 2 explains that "The criminal provisions as referred to in paragraph (1) shall also apply to any person who intentionally commits deceit, a series of lies, or induces a child t o have sexual intercourse with

him/her or with another person". Article 82 of the UUPA also explains "Any person who intentionally commits violence or threat of violence, forces, deceives, lies, or induces a child to commit or allow obscene acts to be committed, shall be punished with imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp 300,000,000.00 (three hundred million rupiah) and a minimum of Rp 60,000,000.00 (sixty million rupiah)".

The elements of a criminal offence are something that is very important to be understood and identified in the resolution of a criminal offence, while the elements of a criminal offence can be divided into:

a. Objective Elements:

1. Act or Action

The existence of act or action

The term "act" of "criminal offence" is an abbreviation of the word "action", which means that there is a person who commits an "action", while the person who commits it is called "petindak" (Eleanora, 2013). There is a psychological relationship between the actor and the act, a relationship between the use of one part of the body, the five senses, and other tools so that an act is realised. The psychological relationship is such that the actor can assess his actions, can determine what he will do and what he will avoid, can also not deliberately perform his actions, or at least by the community views that the action is despicable (Eleanora, 2015). As stated by D. Schaffmeister, N. Keijzer, and Mr E. PH.Sutorius that: "No punishment can be imposed for an act that is not included in the formulation of the offence. This does not mean that a punishment can always be imposed if the act is included in the formulation of the offence. For this reason, two conditions are needed: the act is unlawful and can be criticised.(Erick & Abidin, 2021)

2. Unlawful (no justification)

There is an unlawful nature (Wederrechtelijk)

One of the main elements of an objective criminal offence is the unlawful nature. This is related to the principle of legality implied in Article 1 paragraph 1 of the Criminal Code. In Dutch against the law is Wederrechtelijk (weder = contrary to, against; recht = law). In determining that the act can be punished, the legislator makes the unlawful nature as a written element. Without this element, the formulation of the law would be too broad. In addition, the nature of the offence is sometimes included in the formulation of the offence, namely in the formulation of the culpa offence..(I. Sari, 2021)

To impose a punishment, the elements of the criminal offence contained in the article must be fulfilled. One of the elements in an article is the unlawful nature (Wederrechtelijk) both explicitly and implicitly and explicitly in an article is still under debate, but there is no doubt that this element is an element that must be present or absolute in a criminal offence so that the perpetrator or defendant can be prosecuted and proven in court.(Lubis et al., 2019)

Subjective Element (Maker Element):

1. Accountable

Criminal responsibility in foreign terms is called toekenbaardheid or criminal responsibility in English which leads to the punishment of the perpetrator with the intention of determining whether a defendant or suspect is held accountable for a criminal offence that occurs or not. In order for the perpetrator to be punished, it is required that the act he committed fulfils the elements of the offence specified in the law. From the point of view of the occurrence of a prohibited act, a person will be held accountable for his actions if the act is against the law and there is no reason to justify or negate the unlawful nature of his actions. From the point of view of the ability to be responsible, only a person who is capable of being responsible can be held accountable for his actions.(Tarigan et al., 2021)

The elements of criminal responsibility according to several views are as described below. According to Pompe, criminal responsibility must have the following elements: (1.) The ability to think (psychisch) of the author (dader) which allows him to control his mind, which allows him to determine his actions; (2.) Therefore, he can determine the consequences of his actions; (3.) So that he can determine his will in accordance with his opinion.(Sya'bana et al., 2021)

1. Fault (no excuse)

The basis for the existence of a criminal offence is the principle of legality, while the basis for the criminalisation of the perpetrator is the principle of guilt. This means that the perpetrator of a criminal offence will only be punished if he/she has a fault in committing the criminal offence. When a person is said to have fault. This means that the perpetrator of a criminal offence will only be convicted if he/she is guilty of committing the criminal offence.(Sya'bana et al., 2021)

Based on the above Sudarto, also stated the same thing, that: "It is not enough for a person to be punished if he has committed an act that is contrary to the law or against the law. So even though the act fulfils the formulation of the offence in the law and is not justified (an objective breach of a panel provision), it does not yet fulfil the requirements for the imposition of punishment. For punishment, there is still a requirement that the person who commits the act has guilt or is guilty (subjective guilt). In other words, the person must be accountable for his/her actions or if seen from the point of view of his/her actions, his/her actions can only be accountable to the person". Furthermore, Sudarto stated that the principle of "no punishment without fault" (Keine strafe ohne schuld or geen straf zonder schuld or nulla poene sine culpa) applies here. "Culpa" here is used in a broad sense, including intentionality." Fault is the state of mind of a person who commits an act and the act committed is such that the person is liable to blame.(Hakim, 2019)

In criminal law, there is a principle called the Principle of Legality which is regulated in Article 1 paragraph (1) of the Criminal Code (KUHP) which reads: "An act cannot be punished, except based on the strength of the existing criminal legislation." The principle of legality applies in the realm of criminal law and is famous for von Feuerbach's legendary adage that reads nullum delictum nulla poena sine praevia lege poenali. Freely, the adage can be interpreted as "there is no criminal offence (delict), no punishment without a preceding regulation". In general, von Feuerbach divided the adage into three parts, namely: There is no punishment if there is no law; There is no punishment if there is no crime; There is no crime if there is no punishment based on the law.(Situngkir, 2018)

So, according to positive law in Indonesia, a person can only be convicted if there are rules about the act before the act is committed, this principle is the principle of legality.

In addition, to resolve a criminal offence is also regulated by a systematic Indonesian criminal justice system. Meanwhile, according to Mardjono Reksodiputro, the criminal justice system is a crime control system consisting of police, prosecutors, courts and correctional institutions (Kadri Husin & Budi Rizki Husin, 2022). After the enactment of Law No. 8 of 1981 on the Criminal Procedure Code (KUHAP), Het Herziene Regement (Stbl. 1941 No. 44) as the foundation of the Indonesian criminal justice system, the basis for the process of resolving criminal cases in Indonesia has been revoked. The components of the criminal justice system that are commonly recognised, both in the knowledge of criminal policy and in the practice of law enforcement, consist of the police, prosecutors, courts, and correctional institutions

a. Police

The police as one of the components of the criminal justice system is an institution that directly deals with criminal offences that occur in society. Law No. 2 of 2002 on the Indonesian National Police defines the police as matters relating to the functions and institutions of the police in accordance with laws and regulations. The function of the police according to Article 2 of the Law is: "one of the functions of state government in the field of maintaining security and public order, law enforcement, protection, protection, and service to the community."

b. Prosecutor's Office

The Public Prosecution Service in the criminal justice system works after a case is handed over from the police. The Public Prosecutor's Office is a government institution in the field of prosecution and other duties determined by law. Article 13 of KUHAP states that: "the prosecutor is a public prosecutor authorised by law to conduct prosecutions and execute judicial decisions."

c. Court

The court is the place where the judicial process takes place while the authority to hold the court itself is in the hands of the judiciary. This is stated in Law No. 48 of 2009 on Judicial Power. The duty of the court is to receive, examine, hear and resolve cases submitted to it. This task includes district courts, high courts, and the supreme court. In addition, the court is also obliged to provide assistance to justice seekers and is obliged to realise a simple, fast and low cost trial in accordance with the judicial principles established by the Criminal Procedure Code.

d. Correctional Institutions

Correctional institution is the last institution that plays a role in the criminal justice process. As the final stage of the criminal justice process, correctional institutions carry out the hopes and objectives of the criminal justice system, which include trying to prevent criminal offenders from repeating the crimes they have committed.

e. Advocate

Advocates are people whose profession is to provide legal services, both inside and outside the court who meet the requirements based on the provisions of the Law. Legal services are services provided by advocates in the form of providing legal consultation, legal assistance, exercising power of attorney, representing, accompanying, defending and conducting other legal bases for the legal interests of clients. With the enactment of Law No. 18/2003 on Advocates, advocates are also part (subsystem) of the criminal justice system, this is

confirmed in Article 5 paragraph (1) of the law, which states that: "advocates have the status of law enforcers, free and independent guaranteed by laws and regulations."

Operationally, crime prevention can be done through both penal and non-penal means. As stated by Hoefnagels that crime prevention can be done through penal (criminal law) and non-penal (outside of criminal law) channels. The two means are a pair that cannot be separated from each other, it can even be said that they complement each other in the effort to overcome criminal offences in society.(Pratama & Januarsyah, 2020)

Criminal offence countermeasures through penal means is by using criminal law as the main means, both material criminal law, formal criminal law and criminal implementation law implemented through the criminal justice system to achieve certain goals. Criminal countermeasures using criminal law is the oldest method, as old as human civilisation itself. Seen as a policy issue, there are those who question whether criminal offences should be countered, prevented, or controlled by using criminal sanctions.

Meanwhile, countering criminal offences through non-penal means can mean an atmosphere outside the criminal justice system and without using criminal sanctions. Criminal offence countermeasures through non-penal means can be carried out based on a restorative justice approach. Crime prevention efforts are essentially also part of law enforcement efforts. Therefore, it is often said that criminal politics or criminal policy is also part of law enforcement policy.(Wahyu et al., 2022)

So the settlement of criminal offences according to Indonesian Criminal Law must be an act that is against the law and has the elements of a criminal offence so that the criminal act that has been committed can be tried and if it has been proven that a criminal offence has been committed, then it can be sentenced to criminal punishment in accordance with the article that regulates it. In the case of criminal offences of sexual violence against children, the settlement is usually adjusted to the provisions in the UUPA, while in the criminal justice system used for settlement it is adjusted to the provisions in the Criminal Procedure Code.

3.2. Settlement of Sexual Violence Against Children Under Balinese Customary Law

Customary Law is the law that applies and develops within the community in a region. There are several definitions of Customary Law. According to Hardjito Notopuro, Customary Law is unwritten law, customary law with characteristics that guide people's lives in organising justice and community welfare and are familial in nature (Harahap, 2018). Soepomo, Hukum Adat adalah sinonim dari hukum tidak tertulis didalam peraturan legislatif, hukum yang hidup sebagai konvensi di badan-badan negara (parleman, dewan Provinsi, dan sebagainya), hukum yang hidup sebagai peraturan kebiasaan yang dipertahankan dalam pergaulan hidup, baik di kota mauun di desa-desa (Fadholi & Sari, 2022). According to Cornelis van Vollennhoven, Customary Law is a set of rules about behaviour for indigenous and foreign Easterners on the one hand having sanctions (because it is legal), and on the other hand being in an uncodified state (because it is customary).(Fadholi & Sari, 2022)

Indonesia is made up of various customs and cultures and customary law is recognised and inherent in Indonesian law. One example is the customary law in Bali, before the abolition of customary courts, village justices of the peace had an important

role in resolving cases of customary offences. In today's independent world, village justices of the peace no longer have formal authority. Practically speaking, this does not mean that customary leaders are no longer given a place to play their role in the resolution of customary offences.

In Bali, when a customary criminal offence occurs, the practice is to resolve it through a village meeting or sangkep attended by all village residents (krama), or sometimes it can also be resolved by an institution, consisting of customary village administrators plus several community leaders or customary leaders in the customary village concerned. Which way this is done depends on the severity of the case, the sensitivity of the case, and the potential consequences of the case. The institutionalised custom of resolving adat cases through a meeting or sangkepan is still being implemented. This means that materially, the resolution of cases of violation of customary norms is the authority of the customary village/pekraman or rests on the autonomy of the customary village/as a customary law association.

However, with the dynamics of social life in the future, it is not uncommon for customary cases to occur between pekraman villages. Seeing from these conditions, an institution that has an independent position is needed, namely MDP (majelis desa pekraman) which acts as an institution with the nuances of village pekraman in Bali, stipulating the decision of the main assembly of Bali village pekraman number: 002/Skep/MDP Bali/IX/2011 concerning the implementation guidelines and technical instructions for the settlement of speech. Understanding the position and function of MDP in resolving customary cases, it can be interpreted that the role of MDP is needed in its capacity as an arbiter or mediator in the event of customary cases. Its position as mediator can be accepted by pekraman villages that are in conflict or have problems as regulated in the provisions of article 16 of Bali Regional Regulation No.3 of 2001. Furthermore, in the Bali Regional Regulation No. 4 of 2019, it has also been explained in CHAPTER XI concerning the Indigenous Village Council, the third part of the Duties and Authority of Article 76 paragraph 1 letter b which confirms the duties of the MDA, one of which is "to provide advice, suggestions, and opinions / considerations regarding customary issues and local wisdom to the local government and various parties, both individuals, groups, and institutions".

Customary justice is an empirical fact, which actually exists, lives and is practised in the lives of the customary law communities of Pakraman villages in Bali. The institution that carries out the function of customary justice in Pakraman villages is Prajuru, which is carried out through a deliberation forum (Paruman Prajuru) attended by other institutional elements in Pakraman villages, namely Paduluan (for baliage villages / old villages) and or official village government officials (Head of Hamlet / Village Head) in the area or in the territory of the Pakraman village concerned. Considering that the Paruman Prajuru, actually has other functions besides the judicial function, the local term that is appropriately used to refer to the paruman prajuru in its function of organising justice in the pakraman village is Kertha Desa, which means village court or judge.(Sudantra et al., 2017)

In the case of sexual violence in Sawan Village, if based on the Bali Regional Regulation No. 4 of 2019 in Chapter VI concerning Customary Village Governance article 28 paragraph (3) The decision-making institution as referred to in paragraph (1) consists of: a. Indigenous Village Paruman; and b. Indigenous Village Pasangkepan; it has also been explained in CHAPTER XI concerning the Indigenous Village Council, the

third part of the duties and authority of article 76 paragraph 1 letter b which confirms the duties of the MDA, one of which is "to provide advice, suggestions, and opinions / considerations regarding customary issues and local wisdom to the local government and various parties, both individuals, groups, and institutions". Will fulfil justice based on customary law.

Penyelesaian Dari kasus Ayah Hamili Anak Kandung di Desa Sawan bisa di jabarkan menjadi dua pendekatan keadilan, yaitu sanksi pidana pendekatan pembalasan (retributive) atau sanksi pidana pendekatan pemulihan (restoratif). Teori retributive dalam tujuan pemidanaan disandarkan pada alasan bahwa pemidanaan merupakan "*morally Justifed*" (pembenaran secara moral) karena pelaku kejahatan dikatakan layak untuk menerimanya atas kejahatannya. Asumsi yang penting terhadap pembenaran untuk menghukum sebagai respon terhadap suatu kejahatan karena pelaku kejahatan telah melakukan pelanggaran terhadap norma moral tertentu yang mendasari aturan hukum yang dilakukannya secara sengaja dan sadar dan hal ini merupakan bentuk dari tanggung jawab moral dan kesalahan hukum si pelaku, Teori retributif melegitimasi pemidanaan sebagai sarana pembalasan atas kejahatan yang telah dilakukan seseorang (Jamilah, 2017). Kejahatan dipandang sebagai perbuatan yang amoral dan asusila di dalam masyarakat, oleh karena itu pelaku kejahatan harus dibalas dengan menjatuhkan pidana. Tujuan pemidanaan dilepaskan dari tujuan apapun, sehingga pemidanaan hanya mempunyai satu tujuan, yaitu pembalasan. Penjatuhan pidana kepada pelaku kejahatan dalam teori retributif ini, menurut Romli Atmasasmita mempunya sandaran pembenaran sebagai berikut : Pertama, dijatuhkannya pidana akan memuaskan perasaan balas dendam si korban, baik perasaan adil bagi dirinya, temannya, maupun keluarganya. Perasaan ini tidak dapat dihindari dan tidak dapat dijadikan alasan untuk menuduh tidak menghargai hukum. Tipe aliran retributif ini disebut vindicative. Kedua, penjatuhan pidana dimaksudkan sebagai peringatan kepada pelaku kejahatan dan anggota masyarakat yang lainnya bahwa setiap perbuatan yang merugikan orang lain atau memperoleh keuntungan dari orang lain secara tidak wajar, maka akan menerima ganjarannya. Tipe aliran retributif ini disebut fairness. Ketiga, Pidana dimaksudkan untuk menunjukkan adanya kesebandingan antara beratnya suatu pelanggaran dengan pidana yang dijatuhkan.(Hutajulu et al., 2014)

Sedangkan Konsep sanksi pemidanaan dalam pendekatan restoratif tidak mengenal metode pembalasan tetapi lebih kepada konsep pemulihan untuk tujuan membuat segala sesuatunya menjadi benar. Istilah umum tentang pendekatan restoratif diperkenalkan untuk pertama kalinya oleh Albert Eglash dengan menyebutkan istilah restorative justice. Dalam tulisannya yang mengulas tentang reparation, Albert mengatakan bahwa restorative justice adalah suatu alternatif pendekatan restitutif terhadap pendekatan keadilan retributif dan keadilan rehabilitatif. Pendekatan keadilan restoratif merupakan suatu paradigma yang dapat dipakai sebagai bingkai dari strategi penanganan perkara pidana yang bertujuan menjawab ketidakpuasan atas bekerjanya sistem peradilan pidana yang ada saat ini. Keadilan restoratif adalah sebuah konsep pemikiran yang merespon pengembangan sistem peradilan pidana dengan menitikberatkan pada kebutuhan pelibatan masyarakat dan korban yang dirasa tersisihkan dengan mekanisme yang bekerja pada sistem peradilan pidana yang ada pada saat ini. Di pihak lain, keadilan restoratif juga merupakan suatu kerangka berfikir yang baru yang dapat digunakan dalam merespon suatu tindak pidana bagi penegak dan pekerja hukum.(Pratidina et al., 2020)

Jadi dari dua prospektif penyelesaian kasus ayah hamili anak kandung di desa Sawan lebih memenuhi rasa keadilan menggunakan pendekatan keadilan restributif karena sudah jelas bagaimana rasa efek jera dan memuaskan si korban. Dan jika dalam penyelesaian masalah ini melalui pendekatan restoratif, hak korban perlu mendapat perhatian karena korban adalah pihak yang berkepentingan yang seharusnya mempunyai kedudukan (hukum) dalam proses penyelesaiannya. Namun, pada sistem peradilan pidana pada umumnya, ditengarai bahwa korban tidak menerima perlindungan yang setara dari pemegang wewenang sistem peradilan pidana, sehingga kepentingan yang hakiki dari korban sering terabaikan dan kalaupun itu ada hanya sekedar pemenuhan sistem administrasi atau manajemen peradilan pidana. Pendapat senada dikemukakan oleh Rowland, bahwa kepentingan-kepentingan korban sering bersimpangan dengan kepentingan kepentingan negara. Para pendukung terhadap konsep pelindungan bagi hakhak korban, di antaranya Karmen, juga berpandangan adalah jelas tidak adil bagi korban bila negara lebih mengindahkan kebutuhan-kebutuhan material psikologi, hukum, bagi pelaku pelanggar, sementara negara tidak memberikan tanggungjawabnya atas kehidupan yang layak bagi korban.(Pratidina et al., 2020)

4. CONCLUSION

Pengaturan terkait tindak pidana kekerasan seksual terhadap anak diatur dalam Pasal 81 dan Pasal 82 UUPA, terkait penyelesaiannya menurut system peradilan pidana disesuaikan dengan ketentuan KUHAP. Serta penyelesaian tindak pidana kekerasan seksual terhadap anak dalam hukum adat Bali dijabarkan menjadi dua pendekatan keadilan, yaitu sanksi pidana pendekatan pembalasan (retributive) atau sanksi pidana pendekatan pemulihan (restoratif). Dan jika dalam penyelesaianny melalui pendekatan restoratif, hak korban perlu mendapat perhatian karena korban adalah pihak yang berkepentingan yang seharusnya mempunyai kedudukan (hukum) dalam proses penyelesaiannya. Namun, pada sistem peradilan pidana pada umumnya, ditengarai bahwa korban tidak menerima perlindungan yang setara dari pemegang wewenang sistem peradilan pidana, sehingga kepentingan yang hakiki dari korban sering terabaikan dan kalaupun itu ada hanya sekedar pemenuhan sistem administrasi atau manajemen peradilan pidana.

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