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Legal Policy of Sexual Violence in Indonesia

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Abstract

The essence of the protection of the whole nation and the blood of Indonesia as a constitutional right is the protection of the glory as a whole human or in other words the protection of human dignity. In fact, however, person's right to be free from torture or the degrading treatment of human dignity has not fully functioned optimally. One of the causes is sexual violence. The results of the research indicate that the basic idea of sexual violence abolition departs from the fact of violence is more complex, which is not only related to criminal acts against sexual organs. Moreover, it is a manifestation of a form of discrimination caused by the perspective of gender bias in the cultural construction of patriarchal society. Legal issues also arise regarding the structure and culture of law enforcement that is not oriented towards the protection and fulfillment of the best interests for the victim. Such regulatory conditions, it seems difficult to rely only on efforts to abolish comprehensive sexual violence through existing regulations. It takes a strong commitment in the effort to abolish sexual violence with the paradigm of human dignity protection, as mandated by the 1945 Constitution. The essence of sexual violence abolition is to realize efforts to preventing, deal with and restore sexual violence due to gender-based violence as a form of justice in the values of respect for human dignity.

Keywords: Human Rights, Legal Policy, Sexual Violence

1. Introduction

The 1945 Constitution of the Republic of Indonesia as the supreme law affirms that Indonesia is a constitutional state that one of its purposes is to protect the whole nation and the blood of Indonesia. The essence of the protection of the whole nation and the blood of Indonesia is the protection of the glory as a whole human or in other words the protection of human dignity. Although in detail the problem of human dignity is not explained, but in principle, the meaning of human dignity is respect for oneself and self-esteem, which is related to the integrity and empowerment of physical and psychological.[1] Therefore, the human dignity will be disadvantaged or at least will be disrupted by unfair actions based on personal traits or circumstances that are not related to the needs, capacities or characteristics of a person in the context of the abolition of sexual violence.

The protection of human dignity is in line with the values of Pancasila, especially the fair and civilized values of humanity that have been believed to be the basis and way of life of the Indonesian nation. In the context of an independent Indonesia, the protection of human dignity is instrumented through the protection of human rights contained in the 1945 Constitution of the Republic of Indonesia. One arrangement of the human rights in the constitution, as set forth in Article 28G of the 1945 Constitution concerning the right to security and protection from threats and free from torture or degrading treatment of human dignity.

Recently, person's right to be free from torture or the degrading treatment of human dignity has not fully functioned optimally. One of the causes is sexual violence. Based on the data, victims of sexual violence mostly occur in vulnerable groups, one of them is women and girls. The facts of sexual violence based on reports from the National Commission on Violence Against Women show that sexual violence with women and girls victims is one of the most common types of violence in the realms of domestic (household) and public (community).

In the last thirteen years (2012-2015), cases of sexual violence is 93.960, one-fourth of all case reported is 400.939. In fact, in 2012 the National Commission on Violence against Women concluded at least 2 women became victims of sexual violence every 3 hours and increased by 181% from the previous year.[2] In 2016, a report of The National Women' Life Survey (SPHN) from the Central Bureau of Statistics shows that the prevalence of sexual violence is quite high achieve 15.3%. This figure will increase significantly if seen on the aspect that sexual violence is not stand-alone but become a concomitant of physical violence. In short, physical

[1] Harkrisnowo, H. (2002). "Pancaila sebagai Paradigma Pembangunan Nasional Bidang Hukum dan Hak Asasi Manusia". in *Kapita Selekta Pendidikan Pancasila untuk Mahasiswa.* A Project for Improvement the Academic Officers at Directorate General of Higher Education, National Education Department, Jakarta.

[2] *Catatan Tahunan* (CATAHU) the National Commission on Violence against Women in Indonesia of 2012, 2013, 2014 dan 2015.

violence experienced by women is also very vulnerable coupled with sexual violence, i.e 9%. 1 of 3 women experienced it during their life and 1 in 10 experienced in the past 12 months.[1]

The sexual violence (*strafbar van de dader*) is a crime against humanity that can have a very serious (dead) and life-threatening traumatic effect. Even, in several cases, sexual violence may even encourage suicide. As a sensitive event of sexual violence occurring in the community, it can also cause the balance of relations and community order to be disturbed.

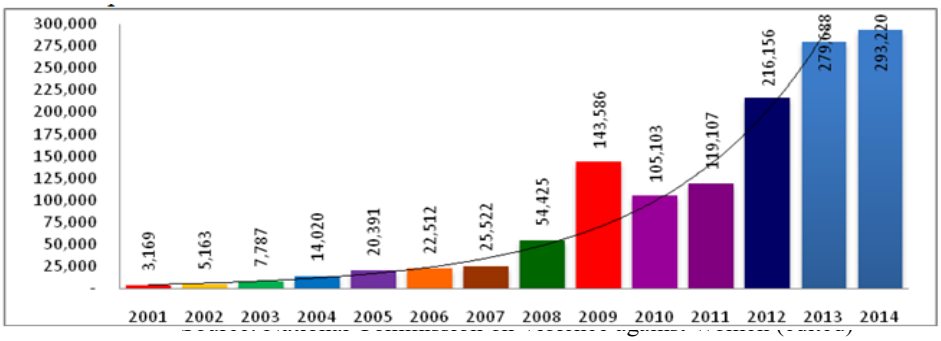
Observing the increasing number of sexual violence in the midst of society, at least it caused by 3 (three) main factors i.e firstly; cultural construction and perspectives that still see women as sexual objects, secondly; there is no regulation on sexual violence that is oriented towards the comprehensive protection of human dignity, thirdly; the response of law enforcement officers who have not been responsive to the victims.

On the one hand, the relationship between the abolition of sexual violence and to the impact arising from sexual violence between the victim and the offender from the personal and community sides is an interesting point for further investigation. For that, as part of academic endeavor related to the importance of sexual violence abolition with the dimension of the protection of human dignity as the constitutional rights of citizens in the abolition of sexual violence in order to bring about legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*) then a dissertation research is conducted titled Law-Politic of Sexual Violence in Indonesia which will discuss the law issues of sexual violence abolition as a basic idea of the abolition of sexual violence; to analyze the law of abolishing sexual violence when it is associated with the citizens' constitutional rights as well as the concept of law regulation on the abolition of appropriate sexual violence and oriented towards the protection of human dignity as regulated in Article 28G of the 1945 Constitution of the Republic of Indonesia?

2. Abolition of Sexual Violence: A Systematic Overview

Sexual violence as a form of discrimination is a beach of human dignity. Sexual violence especially against vulnerable groups, i.e women and children has received attention in various laws. For example, the Indonesian Criminal Code, although not mention specifically of sexual violence, but there are delict of rape, copulation and fornication. Act No.23 of 2004 on the Abolition of Domestic Violence, explicitly regulates sexual violence; Act No. 35 of 2014 on the amendment of Act No. 23 of 2002 on the Protection of Indonesian Children, also has regulated about child sexual violence; Act No. 21 of 2007 on the Crime of Human Trafficking has provided arrangements on sexual violence/exploitation both for non-commercial and commercial interests.

State' efforts and commitments to prevent and manages also through other policy tools. Nevertheless, when observing the data, sexual violence actually experienced an increasing trend from year to year (Graphic 1).



Empirical facts show the increasing of sexual violence from year to year, it indicates that there are still problems related to prevention, handling and restoring of sexual violence cases in Indonesia. One of the crucial issues is in the context of regulation of sexual violence. Although there are already several laws regulating sexual violence, it appears that the existence of the law has not been able to provide optimal protection, especially for victims of sexual violence. If the problem is not resolved, then the further impact of the situation is the emergence of issues of fulfillment of the right to protection of human dignity as mandated by the 1945 Constitution of the Republic of Indonesia.

[1] A Report of *Survey Pengalaman Hidup Perempuan Nasional* (SPHPN) by the Central Bureau of Statistics in 2016.

If seen from the material side, several policies are a form of diversification of a legal policy. In the context of pragmatic law-politics, the diversification of legal policy is required to close the gaps of legal void.[1] A number of laws and regulations have regulated the issue of sexual violence, but all the regulations have not fully comprehended the issue of sexual violence. In addition, legislation is still complete, both material and formal laws, need to be revised, and have not provided a mechanism for prevention, protection and handling that stand up for the victim. As well as, the law of abolition of sexual violence can provide a deterrent effect and cut impunity for offenders of sexual violence until no occurs again.

If observes the legal substance, legal structure, and legal culture are not operate properly. In terms of legal substance, the available legislation has not been able to provide legal certainty in the handling of sexual violence case, and protection for victims' rights.[2] Not understand the forms of sexual violence causes the existing law to be unable to shelter and provide a solution of the obstacles experienced by the victim in the legal process.

In the perspective of legal substance, it is generally can be found the content material as follows:

a) The problem of evidence of sexual violence cases in the Criminal Procedure Code is treated similarly to other crimes, whereas sexual violence is a crime targeting vulnerable groups, especially women and children, so special handling is needed.
b) The presence of a number of provisions that regulate sexual violence as crime by complaint in some legislation, but this implies the assumption that sexual violence is a private matter and can be revoked or reconciled.
c) Limited scope of sexual violence itself as regulated in the Criminal Code, Act No. 23 of 2004 on the Abolition of Household Violence, Act No. No. 39 of 1999, Act No. 21 of 2007 on the Abolition of Human Trafficking, Act No. 5 of 1998 on Ratification of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Act No. 23 of 2002 as amended by Act No. 35 of 2014 on Child Protection, Act No. 52 of 2009 on Population and Family Development, Act No. 13 of 2006 as amended by Act No. 31 of 2014 on Protection of Witnesses and Victims, Act No. 26 of 2000 on Human Rights Court, Act No. 39 of 1999 on Human Rights, Act No. 36 of 1999 on Health, and Act No. 44 of 2008 on Pornography. The limited scope of sexual violence, limits the problems of sexual violence experienced by victims. For example, relating to sexual violence, sexual exploitation, rape and coercion for abortion, marriage, prostitution, sexual torture, and sexual slavery.
d) Limited protection of victims in the Criminal Code, Act No. 31 of 2014 as amended Act No. 13 of 2006 on Witness and Victim, in which the victim only gets protection if they take legal process. Whereas, Act No. 23 of 2002, as amended by Act No. 35 of 2014 on Child Protection is limited to the protection of children.
e) The absence of arrangement for some types of sexual violence in legislation opens impunity for offender because law enforcement officers do not have a normative ground for processing through the criminal justice process for sexual violence that has occurred but has not been regulated in any law. Also, impunity occurs due to legislation to exclusively enforce the judiciary for certain actors and discriminatory policies in certain areas that allow the possibility of sexual violence by the authorities in the name of performing duties.
f) The fact of losing by the victim has not been optimally accommodated in law enforcement practice, not all victims receive compensation or restitution from the offender as a result of his actions so it is important to affirm the form and mechanism of restitution in the regulation.

If seen from legal structure for sexual violence in Indonesia, as the publication of the National Commission on Violence against Women illustrates that in this aspect, there are problems of inadequate handling of cases of sexual violence and victim protection.[3] This is seen when law enforcement officers such as Police, Attorney and Courts have not fully provided special treatment in the handling of sexual violence cases. Even in some places there is progress, but it is uneven in all regions. For example, inadequate facilities for the examination of victims in a separate space from others who can follow the course of the examination, there are still law enforcement officers who understand the legal substance with a view that does not victim-based; there is still inadequate ability of the law enforcement apparatus to understand the victims' need to be ready to provide information.[4]

If seen from the aspect of legal culture, we found the law enforcement apparatus that does not victim-based. As a result, the sexual violence is considered private, trivial, and preferably putting reputation, family, and

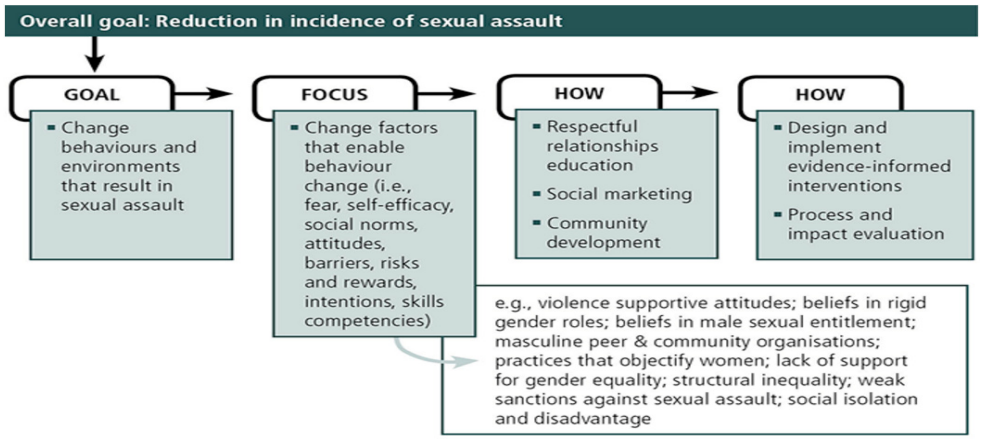
[1] These three levels refers to Friedman, L.M. (1975). *The Legal System: A Social Science Perspective*, New York: Russell Sage Foundation.
[2] *Ibid*
[3] A Serial of Publication for the Partnership of Women and Law Enforcers, *"Sistem Peradilan Pidana Terpadu yang berkeadilan jender dalam penanganan kasus kekerasan terhadap perempuan, kertas Kebijakan",* Komnas Perempuan, pages. 37-38.
[4] A Serial of Publication for the Partnership of Women (43)

community. This assumption is reflected in the behavior of the law enforcement apparatus and state officials in addressing the occurrence of cases of sexual violence, such as not showing empathy to women victims, and even tend to blame the victim.[1] The victim must tell many times the sexual violence that experienced from the investigation to the trial. The secrecy of victims also often becomes neglected. Lack of expertise to understand cases of sexual violence and the absence of a victims' perspective becomes an issue in the handling of cases of sexual violence.[2]

The problem of substantive, structure and culture of some arrangements (diversification) of sexual violence in turn makes the regulation of sexual violence has not yet comprehensively provided protection for victims of sexual violence, ensuring recur of sexual violence, and it not yet creates an effective prevention system. Certainly, this has an impact on the lack of justice, certainty and law benefits of sexual violence, especially for victims of sexual violence.

Sexual violence as part of gender-based violence is understood to have several contributing factors. The most appropriate conceptualization in terms of sexual violence is socio-ecological that shows the interactive nature of the factors that cause violence.[3] The socio-ecological model describes the interconnectedness of various areas of social life and between individuals and their environment in a comprehensive way. The multifactorial conceptualization of sexual violence with the socio-ecological approach according to Bronfenbrenner as illustrated in Figure 1.

Figure 1. Ecological Model of the factors influencing sexual violence perpetration[4]



Abolition of sexual violence as an effort and a comprehensive approach to sexual violence is not happen, stop sexual violence, and prevent recur of sexual violence. Through comprehensive efforts and approaches, the subjects involved in the abolition of sexual violence begin from subjects in the personal (individual), family, community and state level. Subject model refers to an ecological framework that allows interaction between one level and another to achieve a common goal. All components of both approach and subject become an integral part of a system of abolition of sexual violence.

The 2002 WHOs report states that sexual violence is a very complex phenomenon and rooted in the interaction of many factors i.e biological, social, cultural, economic, political and legal.[5] Hence it is inevitable that the basic idea of the abolition of sexual violence is often intertwined with various perspectives and fields of scholarship. Nevertheless, in outline efforts to abolish sexual violence can be done through three levels of prevention namely; *primary prevention, secondary prevention and tertiary prevention.*[6]

Primary prevention is defined as a decrease in the incidence of a problem. In other words, the purpose of primary

[1] *Ibid*
[2] *Ibid*
[3] Quadara, A., & Wall, L. (2012). *What is effective primary prevention in sexual assault? Translating the evidence for action* (ACSSA Wrap No. 11). Melbourne: Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies.
[4] *Ibid.*
[5] Centers for Disease Control and Prevention. Sexual violence prevention: beginning the dialogue. Atlanta, GA: Centers for Disease Control and Prevention; 2004.
[6] *Ibid*

prevention is to influence the individual before any negative behavior occurs.[1] In the context of sexual violence, primary prevention include preventing offender from attacking, and altering societal norms to reduce supportive attitudes toward behaviors that lead to sexual violence.

In the context of the abolition of sexual violence comprehensively, primary prevention is crucial. Public education related to the risk of sexual violence and reproductive health may be part of preventing sexual violence. In order to obtain a legal structure, the regulation of prevention in the sense of primary needs to be regulated in a law. Also, synergism in primary prevention efforts from government, community and other stakeholder levels is needed to maximize primary prevention efforts as part of comprehensive abolition of sexual violence. As well as, in this primary prevention that preventive intervention are established and adapted depending on their local contextual conditions.[2]

Secondary prevention or early-intervention is aimed at individuals or groups that show evidence of being offenders or victims of sexual violence. This prevention of sexual violence in the form of law enforcement, restoration efforts for victims, individual intervention (rehabilitation) of offender, and communal intervention to restore balance in the community order.[3] The function of secondary prevention is a response in providing protection and handling of sexual violence. Its main protection will be given to victims of violence and the handling of offender of sexual violence. In secondary prevention is not only uses legal settlements, but also medical and psychosocial must be ensured to run synergistically.

Furthermore, tertiary prevention focuses to describe responses that occur after sexual assaults that deal with the immediate and long-term effects of sexual violence for the victim in order to prevent recur violence.[4] It is realized that sexual violence is a cyclic violence so it is very likely to happen recur violence. Therefore, efforts that can be done in tertiary prevention are restoration and rehabilitation. In tertiary prevention approach can be done through an individual approach through restoration mechanisms for victims and rehabilitation for offender of sexual violence. And the communal approach which is done through the restoration of balance by involving the community.

3. Assessing Legal Policy of Sexual Violence in the Future

Human dignity is a basis of the regulation of human rights in the 1945 Constitution. Therefore, the arrangement on the abolition of sexual violence in the future should not be separated from the basic framework of the protection and fulfillment of human rights.

In the concept of law-politics, Wahjono[5] defines the law-politics as the basic policy that determines the direction, form and content of the law to be established. Furthermore, law-politics is the policy of State organizers about what is used as criteria to punish something. In this case the policy may be related to the establishment of the law, the application of law and its own enforcement. Understanding law policy including the process of making and implementation of law that can indicate the nature and direction of which the law will be built. According to Mahfud M.D,[6] law-politics provides a basis for a more appropriate process of law formation, situation and conditions, culture and value that evolve in society by taking into account the needs of society against the law itself. There is a process of an existing law (*ius constitutum*) to an idealized law (*ius constituendum*).

In order to develop a concept of law-politics of comprehensive abolition of sexual violence based on the 1945 Constitution, there are at least 4 (four) main points to be considered: *First*; related to the prevention policy (*primary prevention*) all forms of violence; *Second*, the protection of the interests of rights and restoration for victims of sexual violence; *Third*, penalties (*matregels*) for rehabilitation for offender of sexual violence; *Fourth*, restoration of balance order (*restitutio an integrum*) and community participation.

In this context, the main points in law-politics are the abolition of sexual violence as regulated and implemented through 3 (three) policy concepts, namely: *First*, penal policy (*criminal*); *Second*, non-penal policies; *Third*, integrative policies (penal and non-penal). Furthermore, the authors identify two approaches or strategies in the law-politics as used of the three policies: *First*, prevention policies can use ecological framework approaches; *Second*, law policy uses penal means and integrative policies in restoring by using restorative justice.

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[1] Centers for Disease Control and Prevention. Sexual violence prevention: beginning the dialogue. Atlanta, GA: Centers for Disease Control and Prevention; 2004.

[2] *Ibid*

[3] The US Centers for Disease Control (2004) and VicHealth (2007) accessed on https://aifs.gov.au/publications/what-effective-primary-prevention-sexual-assault/what-primary-prevention

[4] *Ibid*

[5] Wahyono, P. (1986). *Indonesia Negara Berdasarkan Atas Hukum*, Second edition. Jakarta: Ghalia Indonesia, page 160.

[6] Mahfud, MD. (2009). *Politik Hukum Di Indonesia*. Jakarta: Rajawali Pers. p. 9

3.1. Primary prevention through non-penal policies

The concept of law-politics for the abolition of sexual violence through non-penal policy is directed at the prevention aspect in the primary prevention of all forms of sexual violence. In other words, the purpose of primary prevention is to influence before any negative behavior occurs.[1] In the context of sexual violence, primary prevention efforts include preventing offender from attacking, and altering community norms to reduce supportive attitudes toward behaviors that lead to sexual violence and community attitudes that tend not to provide support for victims.

If effort for action reparations and restoration focus on responses after the onset of sexual violence, but in the context of policy then the focus is to eliminate the risk or vulnerability of the causes of sexual violence. If it is related to the causes of sexual violence, then it attracts what Arivia says,[2] which says that the issue of sexual violence is not a matter of sex (because it is not intercourse with the subject) but about the power and make victim as an object. He further explained that there are 2 (two) points of sexual violence, that is to use people without their consent and to occupy women as goods, not to have the privilege as being human. Thus, there is a question of power relation imbalance that plays a major role. In addition, the perspective of sex offender who position victims as objects is also closely related to the distortion of human dignity.

The power as mentioned above is derived from patriarchal ideology, which constructs men as privilege holder in all roles and social positions rather than women. Social construction on the basis of such perspectives legitimizes men as authority and superiority holders and women are placed in a weak, subservient, and inferior position. In terms of sexual violence, the perspective of women inferiority is manifested as sexual object and sexuality of men. Inequality of gender-based power relations will get worse when the offender has more control over the victims, in the aspects of economic, knowledge, social status and others. Many things underlie the occurrence of violence. However, related to sexual violence with almost all victims are vulnerable groups (women, girls, and disabilities), sexual violence is one type of gender-based violence.

Gender-based violence can affect anyone, both men and women. However, women and girls are more likely to be victims, as gender differences cause more injustice for women such as: marginalization; subordination; stereotypes (negative labeling); double burden; violence. Gender inequality experienced by women occur almost all levels of life, both in personal relationships with their spouses, within their families, communities, even in the context of the structure and policies of the state and global.[3]

If so, then the law policy on the prevention of sexual violence is a process oriented to the transformation of values and social norms based on the value of justices and gender equality. The process can be done through increased knowledge, awareness and skill on relational aspects, roles and functions that are equal and fair between men and women. Therefore, the prevention approach with the process and objectives is done through an ecological framework approach, in which the whole process of transformation of values and gender equitable norms is done at every level of personal, family, community, and state institutions.

Prevention of sexual violence is one of the most important parts of the effort to combat or abolish sexual violence. The widespread sexual violence at all levels of society involves sadistic ways, the prevention cannot be done sectorally, partially and rely on one institution. Prevention of sexual violence must be done comprehensively, integrated between sectors and carried out at all levels of government based on the States' maximum ability and the development of community participation, especially the sexual eradication movement.

Non-penal policy can be done to overcome sexual violence with ecological framework approach and also can be collaborated with other approaches such as psychology, women empowerment, medical, religion, culture and global cooperation. Another non-penal policy, namely the cultural approach in the policy of the abolition of sexual violence by awakening the sensitivity of the citizens, including parents and law enforcers to the issue of sexual violence and teaching sex education in reproductive health materials in order not to be sexually deviant.

3.2. Policies for the Prevention of Sexual Violence through Penal Policy

The concept of law-politics for the abolition of sexual violence through penal policy (crime) is directed towards responding to sexual violence. Policies in this context include *first;* the best interest protection (right) policy for victims; *second*; a policy of repression and rehabilitation for offender of sexual violence.

Simply can be differentiated that the effort of crime prevention through the penal policy is more focused on the nature of "repressive" (oppression/ eradication/extermination) after the crime occurs, while the non-penal policy

[1] Centers for Disease Control and Prevention. Sexual violence prevention: beginning the dialogue. Atlanta, GA: Centers for Disease Control and Prevention; 2004.
[2] Arivia, G. *Kekerasan Seksual dalam Perspektif Filsafat* ,paper, pages 3-4
[3] Population Report: *Ending Violence Against Women***,** Volume XXVII, Number 4 December 1999

is more emphasis on preventive action (control) before the crime occurs, but in repressive action also contained preventive actions in a broad sense.[1] It means, that after the sexual violence occurs, then it is stopped, and strived not to happen again. That is why repressive action is included in the secondary prevention level.

In this paper, the term "*kebijakan*" is taken from the term "*policy*" (English) or "*politics*" (Dutch). Depart from these two foreign terms then the term "criminal law policy" can also be referred to as "criminal law politics". In foreign literature the term "criminal law politics" is often known by various terms, including "*penal policy*", "*criminal law policy*" or "*strafrechtspolitiek*."[2] According to Sudarto, the law politics are;[3] the first, efforts to realize good rules according to circumstances and situations at a time. Second; policies of the state through the competent bodies to establish the desired rules and are expected to be used to express the will of the people and to achieve what is desired.

In the context of the abolition of sexual violence, the direction of criminal politics is similar to what has been produced in the National Criminal Law Reform Symposium of 1980, which states:[4]

> *"In accordance with the criminal law politics, the purpose of punishment should be directed to the protection of society from crime and balance and harmony of life in society by taking into account the interests of the public/state, victims and offender.*[5]

As described above, the abolition of sexual violence using criminal policy or criminal law politics gives the protection of humanitarian values and human dignity both related to offender or victim. In the context of modern punishment, then punishment is not just a suffering given to offenders of criminal acts by State institutions. Punishment must be a moral education of the offender not to repeat their actions and to improve their evil nature. Seeing the character of sexual violence and offenders of sexual violence, such punishment may form the basis for determining the punishment policy of sexual violence. By looking at the concept of punishment, the purpose of punishment in the context of the most appropriate sexual violence is as suggested by Wayn R. Lafave that:[6]

a) Serves as a deterrence-effect so that the offender will no longer repeat their actions;
b) Serves as a means of public education so that people know what actions are prohibited and how to prevent it;
c) The function of rehabilitation or reparation. It means that the offenders must get the process of behavior change towards the better so that when returning to society can be accepted;
d) Function of social or community protection. This is reinforced by the opinion of Marc Ancel who is a member of the French *Cour de Cassation* argued that punishment purposes are protecting the order of society with the emphasis on re-socialization or re-enforcement with law enforcement that does not emphasize formal jurisdiction but also social nuances; and
e) Aims to restorative justice. With this restorative justice approach, the settlement process is oriented to restore the original situation to the victims, the community and the offenders rather than the retaliatory approach.

In line with these concepts, Bagir Manan explained that restorative justice is a concept of punishment, but as the concept of punishment is not limited to criminal law provisions (*formal and material*).[7] Although Bagir Manan defines restorative justice as the concept of punishment, he remains in line with the idea that the concept of punishment should promote justice, affirmed by the term integrated justice, a justice for the offenders, victim and society.

Thus, the concept of punishment and the purpose of sexual violence punishment with a restorative justice approach are directed: *first*; to provide protection and restore justice for victims of crime; *second*, to provide a deterrent effect and rehabilitation for the offenders of crime; *third*, restore the balance of order in society.

If we mention about the types of criminal, then in general the type of criminal (sanction) in Indonesia adheres to double track system because known sanction (penal) and action (*matregel*). In the case of sexual violence, there is a *specialist lex* in determining the type of crime. So criminal and action must go concurrently. Because the first purpose of the punishment for offender is to provide deterrence-effect while simultaneously improving the behavior of the offenders so as not to repeat their actions.

In order to provide a deterrent effect, it can be through the criminal penalty that seizes the independence of the

[1] Sudarto, (1986). *Kapita Selekta Hukum Pidana*. Bandung: Alumni, p. 118.
[2] Arief, B.N. (2005). *Bunga Rampai Kebijakan Hukum Pidana*, 3rd Edition, Bandung: PT. Citra Bakti, page 24
[3] Sudarto, *Op.Cit,* pages, 24-25
[4] Report: Simposium Pembaharuan Hukum Pidana Nasional, BPHN Departemen Kehakiman, 1980, pages 6-7.
[5] Underline by the author.
[6] Hiariej, E.O.S. (2014). *Prinsip-Prinsip Hukum Pidana*, Cahaya Atma Pustaka, Yogyakarta, pages. 35-36
[7] Rizky, R (ed). (2008). *Refleksi Dinamika Hukum (Rangkaian Pemikiran dalam Dekade Terakhir).* Jakarta: Perum Percetakan Negara Indonesia, page 4.

offenders (prison) and the fine. While, action as a form of sanctions that aims to change the behavior of offenders of sexual violence can be done through the obligation to follow counseling behavior change or other actions that have the purpose of rehabilitation for the offenders. Criminal alternatives in addition to prisons are also optional such as restitution and customized compensation and losses/damages incurred.

3.3. Integrative Policy for Restoration through Restorative Justice Approach

The concept of integrative law-politics for the abolition of sexual violence is directed to the context of restoration and rehabilitation. Restoration is conducted for victims of sexual violence as well as restoring balance in the community order. While rehabilitation is directed to offenders of sexual violence in order to change the perspective and negative behavior so that after the period of punishment does not repeat sexual violence. It is called integrative law-politics, because in its setting it integrates policies in the context of criminal (penal) and policies other than criminal (non-penal).

The prevention and abolition of sexual violence needs to be pursued by the integration between criminal politics and social politics and there is integration between penal and non-penal efforts.[1] Prevention of crime must support the goals "*social welfare*" and "*social defense*". Both aspects are very important; the aspect of welfare/protection of society that is immaterial especially the value of trust, truth, honesty and justice.[2]

The mechanism of protection for human dignity in the context of sexual violence is through the fulfillment of the rights of justice for victims of sexual violence, repression and rehabilitation of offenders of sexual violence and the restoration of the balance of the community order. Protecting the rights to justice for victims including restores victim post-sexual violence is one of the efforts to restore the human dignity, especially to the victims. With complete restoration the victim will again become a whole person both physically and spiritually.

For offenders of sexual violence, it is important to take decisive action to bring a deterrent effect. In the concept of human dignity, the offenders of sexual violence have in fact lost the value of glory as human beings because of their disgraceful deeds. That is why rehabilitation for offenders of sexual violence in order to change the perspective and behavior to be a way to restore the glory of people who have been torn.

Based on the protection of human dignity, then the fulfillment of the best interests of victims of sexual violence as well as decisive action for offenders of violence has a meeting point. It is because in the concept of human dignity both the subjects whether the victims or the offenders are the people who torn as a whole person. Although both are very different if viewed from events or deeds that resulted in the loss of human dignity. In the victim the integrity of human dignity can be distorted by the act of the offenders who conduct sexual violence. With these actions, the victim will get physical, psychological and social impact. While, the offenders the distortion of human dignity because he is doing a dishonorable act that are not appropriate done by human beings and naturally have good values.

The emergence of offenders of sexual violence (*strafbar van de dader*) cannot be separated from the concept and the value of self in seeing himself and the victim. Especially if viewed in the previous explanation that sexual violence is not only related to sex but also the perspective of offenders of sexual violence that mostly men and see the victims of sexual violence mostly women. A perspective on the self of offenders who feels superior to the inferior victim and the self-esteem of an offender who degrades the victim of sexual violence in criminal law is seen as a mental attitude (*mens rea*).

The relationship between the self-esteem of offenders of sexual violence and the occurrence of sexual violence can be regarded as a *coditio sine quanon*, in the sense that both have a strong causal relationship. The existence of power and control attitude makes the offenders is not enough to be stopped only by the punishment of deprivation of liberty or imprisonment but must be made efforts to change the perspective and behavior for offenders of sexual violence in the criminal process.

In practice, the concept of punishment in Indonesia has actually developed not only oriented to punishment for crime but also aims to improve behavior and re-socialization. Both of these matters are important because if we trace the criminal element then in addition to *actus reus* (physical element) in the criminal act, there is also *mens rea* (inner attitude). Thus, punishment is not only aimed at the physical aspect as a form of punishment, but also on the psychological-mental aspects in order to change the behavior of the offenders, so that after undergoing criminal punishment ready to re-socialization.

The concept of re-socialization is an essence of the correctional system in Indonesia. This concept is more emphasizing to socialize the offender back into a good and useful citizen. Thus, the problem of re-socialization is

[1] Arif, B.N. *Op.Cit*, page 3
[2] Arief, B.N. (2001). *Masalah Penegakan Hukum dan Kebijakan Penanggulangan Kejahatan*, Bandung: Citra Aditya Bhakti, page 74

not only related to the approach of re-establishing the social behavior of prisoners with new value or norms, but also involving problems in making the right decision at the stage of coaching. This decision-making is very important if we want to interpret this re-socialization as re-adaptation into society.[1]

The process of punishment of offender in Indonesia is conducted by a Correctional Institution.[2] The purpose of prison in a penitentiary in the context of "re-socialization" to changes the nature, way of thinking and behavior, and building educational interaction. Intensive educative interaction is necessary, so that collectively grow awareness of the assisted citizens about the behavior that should be done.[3] However, the ideal purpose of re-socialization in criminal prosecution conducted in Correctional Institution seems to have not materialized. Once the prisoners are free for serving the sentence and coaching it is desirable that the prisoner will not return to the crime, but those who repeat the act of violating a similar law called the recidivist are still encountered, not least in the context of sexual crimes.

The failure of the coaching goal as expected at Correctional Institute is not only caused by technical problems such as the absence of facilities or human resources, but there are fundamental issues related to the approach taken. Among other things because it is done without going through the stages of self-realization process, which is a process that carefully observes the experiences, expectation values and ideals of inmates, including the cultural background, institutional and the conditions from which it originated.[4]

If it is related to the values and self-image of offender of sexual violence that plays an important role in criminal acts, then the coaching conducted in the Correctional Institute has not touched on the aspect of the transformation of values, norms and behavior of the offender of sexual violence. This condition resulted in ex-prisoners who came out of the Correctional Institute still assume that he still has the power and control over everything, a way of view that puts men on the assumption of superiority so common to do anything including sexual violence. Under such conditions, men are not only in a vulnerable position to repeat their crimes (recidivists) but also become very risky not to be accepted by both families and communities when they come out of prison. If so then re-socialization process cannot run optimally. This is also due to the absence of community involvement in the detention. Whereas one of the purposes of punishment is in order to restore the balance of the social order (*restitutio an integrum*).

By considering that the issue of self-image or self-esteem of offender of sexual violence is very influential in the crime and the importance of re-socialization, it is necessary the pattern of guidance and rehabilitation that targeting to transformation of, norms and behavior of offender, one of which can be through the stages of self-realization process of prisoner. With this approach, it is hoped that post-free from a penitentiary not only a man has a perspective and behavior that is far from violence but also has a strong self-foundation to not repeat actions if the situation of the community has not been able to immediately accept them.

Related to restorative justice, then restorative justice programs in sexual violence are based on the basic principle that criminal behavior not only violates the law, but also injures victims and society. Any attempt to address the consequences of criminal behavior must involve victims, the community and the offender and the injured, in addition to providing the victims and offender with the necessary assistance and support.[5] Thus, the enforcement of penal law policy related to sexual violence is a process that not only involves the offender facing law enforcement agencies but also prioritizes the interests of the protection of victims and the community.

In view of the above integrative policies, it is interesting what said by Ole Mulyana W. Kusuma that sex crimes and sex-related crimes formulated in criminal law as morality offenses must always be understood contextually in relation to cultural development and change in social structure that exist in the community.[6] It means that the values that grow in society must be respected in order to ensure the balance of social order and to realize the

[1] Sholehuddin, M. (2003). *Sistem Sanksi Dalam Hukum Pidana*. Jakarta: Rajawali Pers, page 114.

[2] The presence of prisons is regulated by Act No. 12 of 1995 on Correctional Institutions, the Decree of the Minister of Justice of the Republic of Indonesia No. M. 02-PK.04.10 of 1990 on Pattern of Prisoners. In Article 2 of Act No. 12 of 1995 it is stated that "Penal system is organized in order to establish prisoners to be fully human, to realize mistakes, to improve themselves and not to repeat criminal acts so that they can be accepted by the community environment, to be actively involved in the development, and can live a reasonable life as a good and responsible citizen." In the ministerial decree is clearly mentioned about the responsibility of prison in the process of re-socialization

[3] Cooke, D.J et al. (2008), *Menyingkap Dunia Gelap Penjara*, Jakarta: Gramedia, page 1.

[4] Moenir, A.S. (1991). *Pendekatan Manusia dan Organisasi Terutama Pembinaan Pegawai*. Jakarta: Gunung Agung.

[5] UNODC, *Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series*, (Vienna: UN New York, 2006), page 5.

[6] Mulyana W. Kusuma, *"Perumusan Tindak Pidana Kesusilaan (Perzinaan Dan Pemerkosaan)dalam rancangan KUHP Baru ditinjau Dari Aspek Kebijakan Kriminal Dan Aspek Sosial Budaya*", A paper presented on a day seminar about *Tinjauan Terhadap Rancangan KUHP Baru Khususnya Tindak Pidana Kesusilaan*, Faculty of Law, Katolik University of Soegijapranata, Semarang, 20 February 1993, page. 1.

protection of human dignity. It should be noted, however, that basing the resolution of sexual violence solely on the enforcement of morality by the community will also affect the disparity of justice. With a patriarchal social structure, it does not close the possibility of restoration of victims will be hampered and the possibility of recurring the violence.

In the context of sexual violence then the value of decency becomes important to be considered in order to restore balance in society. However, it needed a more concrete formulation in a law unification of sexual violence. This is to avoid misinterpretation of the community that affects the law enforcement process. The harmony between the value of decency and the legal norms that regulate such sexual violence that we have not yet met. Judging from the moral aspect of the legal norms that regulate sexual violence, so far does not provide a balanced settlement between the offender, the victim and the community. Inevitably, people often feel that their justice is still in danger and must be restored in their own way.

The restoration of disturbed values in the community is part of social defense and to realize social welfare. In the context of restoration there are two main objectives: *first*, actively involving the community in prevention efforts (*primary prevention*) for all sexual violence in the community; *the second* involves the community in monitoring the action against the offender, *the third*, involving the community to become a support system for the restoration of victims of sexual violence.

In addition to the participation or involvement of the community in maintaining the balance of damaged values due to the violation of decency of sexual violence, the legal policy that can be done is to accommodate sanctions in the form of "payment of compensation" and "fulfillment of customary obligations." Both types of sanctions are included as additional criminal types, because in reality it is often revealed that the formal juridical problem solving by imposing basic criminal sanction on the defendant has not been felt by the community as a problem solve completely. With two approaches of community participation and recognition of community pay back mechanisms, the concept of sexual violence abolition through integrative policies can work well. In the end, it is hoped that the restoration of human dignity in society can restore the balance of order in the community.

4. Conclusion

The basic idea of sexual violence abolition departs from the fact of violence is more complex, which is not only related to criminal acts against sexual organs. Moreover, it is a manifestation of a form of discrimination caused by the perspective of gender bias in the cultural construction of patriarchal society. Legal issues also arise regarding the structure and culture of law enforcement that is not oriented towards the protection and fulfillment of the best interests for the victim. Such regulatory conditions, it seems difficult to rely only on efforts to abolish comprehensive sexual violence through existing regulations. It takes a strong commitment in the effort to abolish sexual violence with the paradigm of human dignity protection, as mandated by the 1945 Constitution.

The essence of sexual violence abolition is to realize efforts to preventing, deal with and restore sexual violence due to gender-based violence as a form of justice in the values of respect for human dignity. The legal policy of abolishing sexual violence can be implemented through three policy concepts: penal, non-penal, and integrative (penal and non-penal). To implement the legal policy, there are two approaches that can be used: *firstly*, prevention policy can use ecological framework approach; and *secondly*, the legal policy of repression and restoration through a restorative justice approach.

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