

## Restorative Justice from a Feminist Jurisprudence Perspective in Domestic Violence Cases



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**ABSTRACT:** This research aims to explore the alignment of the application of the concept of Restorative Justice in handling domestic violence cases in Indonesia with a feminist approach that takes into account the interests and rights of women as victims, which is part of efforts to reform gender-just laws. This is an integral part of the transformation of the legal system in Indonesia towards a more inclusive, just and gender-equitable future.

The research method used is normative juridical, with statutory and conceptual approaches and prescriptive data analysis of relevant legal concepts. By emphasizing on several important indicators, namely equal participation, focus on the welfare of victims, access to justice for marginalized voices, criticism of the traditional legal system, and community involvement. Restorative Justice changes the perspective from offender-oriented to victim-oriented. The history of the feminist movement has brought positive changes for women's rights, which points to the need for criminal law reform to improve law enforcement. Future laws should accommodate both approaches: Restorative Justice which focuses on restoring relationships and social integration, and Feminist Jurisprudence which prioritizes gender justice and victim protection.

This research emphasizes that by understanding victims' experiences, the law can become a more equitable tool for women. However, the success of Restorative Justice relies heavily on the position of the victim who should be the main focus of the process. Legal policy needs to ensure that the application of Restorative Justice in domestic violence cases does not only focus on the integrity of the household, but also on the effectiveness of punishment in accordance with the social and cultural values of the community. Therefore, it is important to adjust this mechanism in order to protect female victims thoroughly and fairly.

**KEYWORDS:** Restorative Justice, Feminist Jurisprudence, Domestic Violence

### I. INTRODUCTION

All forms of violence, especially domestic violence, are violations of human rights, crimes against humanity and are even said to be a form of discrimination. In written history, the presence of laws born out of the state's desire to have a direction to protect human rights in the private sphere, especially women. The Elimination of Domestic Violence was passed on September 22, 2004. The presence of this law provides a new spirit for the general public that the state protects its citizens in the private sphere, namely the household<sup>1</sup>.

The spirit of the enactment of the PKDRT Law focuses on the protection of women, who are often victims of mistreatment from men or husbands. Although Indonesia has had Law No. 23/2004 on the Elimination of Domestic Violence for almost 20 years, its enforcement and implementation are still questionable, given that domestic violence cases continue and are akin to an iceberg phenomenon. The negative stigma against women as victims of domestic violence, which is often considered a domestic issue, contributes to the violence experienced by women from various aspects and dimensions.

In the past, women were not allowed to go to school like men, but Raden Ajeng Kartini and Dewi Sartika challenged this by establishing an all-girls school on January 16, 1904. The premise of feminism arose from women's awareness of the injustice of roles in society. The women's movement in Indonesia still faces an imbalance in roles, responsibilities and opportunities, with women often under the dominance of men. The issue of domestic violence in modern society is a form of liberation for women.

Over time, cases of domestic violence, especially between husbands and wives, have not shown the improvement expected from Law No. 23/2004. In fact, women as victims still find it difficult to obtain justice. Some of the factors that influence this

<sup>1</sup> Evi Yanti, Heni Susanti. *Study Komparatif: Perlindungan Hukum pada Perempuan Korban Kekerasan Dalam Rumah Tangga Di Indonesia dan Malaysia*. UIR Law Review, Vol 7 No.2 2023

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situation include the unclear substance of the law and the persistence of gender bias. The law is supposed to be the supreme authority, to which all powers must submit<sup>2</sup>.

Feminist legal theorists argue that problems in criminal law related to domestic violence occur because the government as a legal provider cannot accommodate problems in the private sphere<sup>3</sup>. Criminal law is often seen only as public law, then the public interest (the general public) becomes a benchmark in making criminal law. In fact, the interests of the general public should extend to more private spheres such as households.

Legal policy aims to make the law a permanent rule that protects the rights and obligations of all citizens. Law must be in line with justice and sustainable in human life to create order. The application of Restorative Justice in cases of domestic violence can help maintain family unity. The imposition of punishment should not only consider the severity of the criminal offense, but also the effectiveness and compatibility with the social and cultural values of the community. The concept of Restorative Justice was introduced by Albert Eglash in the 1950s and 1960s, who emphasized the responsibility of the offender towards the victim and the importance of repairing the damage caused, and proposed reparation as an alternative to retributive and rehabilitative justice approaches<sup>4</sup>.

The women's movement in Indonesia still faces an imbalance in roles, responsibilities and opportunities between women and men. Law No. 23/2004 on the Elimination of Domestic Violence was born as a result of feminist political struggle to integrate women's voices into the legal system, so that they can be free from violence and discrimination. Many women are victims of violence, which makes them dependent on the support of the state and society. Therefore, it is important for women to receive protection to avoid violence, torture and degrading treatment. The feminist view of history is that the law is an instrument to perpetuate the position of women under the subordination of men.<sup>5</sup>

Domestic violence should be seen not only as a women's issue, but also as a humanitarian issue. Feminist jurisprudence emerged as a critique of the existing legal system and has played an important role in debates about sexual violence, workplace inequality, and gender discrimination. Feminists have shown how seemingly neutral legal norms can disadvantage women in various areas, such as employment, divorce, and domestic violence, and that the law needs to be reconstructed.

Restorative justice is a peaceful principle that emphasizes that justice and peace are inseparable. Not all crimes should be resolved through the criminal justice system and prisons, which are often ineffective. Instead, it encourages the active role of the community in restoring the circumstances before the crime occurred. Law is necessary to create social order and prevent conflict. The rate of domestic violence in Indonesia fluctuates and is influenced by various factors such as economic, social, educational and religious. In the context of domestic violence, the Restorative Justice approach is not always in line with the principles of gender justice contained in feminist jurisprudence. However, in its position, Restorative Justice is relevant to be applied to domestic violence cases in Indonesia<sup>6</sup>.

Restorative justice is said to be a peace principle that reminds us that justice and peace are inseparable, that not all crimes can end up behind bars. Imprisonment is not a good solution for solving problems, especially for crimes where the damage done to the offender and society can still be repaired as before.<sup>7</sup> According to Tony F. Marshall "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future".<sup>8</sup> From this definition, we can conclude that the focus in resolving crimes through restorative justice is on reaching an agreement between the parties for future benefits.

Meanwhile, criminologist Adrianus Meliara said that the restorative punishment model was introduced because the current criminal and penal justice system is problematic.<sup>9</sup> In the current prison system, the purpose of punishment is deterrence, revenge and suffering due to one's actions. The indicator of punishment is measured by how well the inmate complies with prison rules. Therefore, this approach is about security (security approach).

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<sup>2</sup> Boy Nurdin. *Kedudukan dan fungsi hakim dalam penegakan hukum di Indonesia*. (Bandung : Penerbit Alumni : 2021), Hlm.6

<sup>3</sup> Ola W. Barnett, *The Politics of Domestic Violence* (New York: Routledge, 1998), 45.

<sup>4</sup> Achmad Doni Meidianto, *Alternatif penyelesaian perkara kekerasan dalam rumah tangga: dalam perspektif mediasi penal*. (Makassar : Nas Media Pustaka, 2021), Hlm 12

<sup>5</sup> Heri Setiawan, Steven Ouddy, Mutiara Girindra Pratiwi. *Isu Kesetaraan Gender Dalam Optik Feminist Jurisprudence Dan Implementasinya Di Indonesia*. *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum*, 5(2), 2018, Hlm.128

<sup>6</sup> S.S.A.Zanubiya, Marjan Miharja, *Pertimbangan Hakim dalam Memutus Perkara Tindak Pidana Kekerasan Dalam Rumah Tangga*, *Jurnal Mimbar Keadilan* Vol.16 No.2, Hlm. 278

<sup>7</sup> Achmad Doni Meidianto, *Loc. Cit*, Hlm. 5

<sup>8</sup> Reda Manthovani., Rocky Marbun., Adnan Hamid., Andi W.B., & Rachman, C. I. L. The Practice of Applying the Concept of Restorative Justice In Law Enforcement in Indonesia. *Russian Law Journal*, 11(5), 2023, Hlm.1460.

<sup>9</sup> Asep Nugroho., Abdul.H.S., & Intihani, S. N. Analisis Yuridis Penerapan Restoratif Justice Dalam Kecelakaan Lalu Lintas Golongan Berat Yang Menyebabkan Orang Lain Meninggal Dunia Menurut Uu Nomor 22 Tahun 2009 Dalam Perspektif Keadilan. *Veritas*, 8(2), 2022, hlm. 21-39.

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Applying the Restorative Justice Paradigm in resolving criminal cases in Indonesia has a strong foundation both in philosophy, history and protecting human rights as well as religious and cultural values adopted by the community<sup>10</sup> The pluralistic Indonesian society needs support to get back on track. Restorative Justice in criminal law should aim to restore the situation to what it was before the crime occurred. When someone breaks the law, the situation changes. Therefore, the role of law here is to protect the rights of all victims of crime. Every indication of a criminal act, regardless of the escalation of criminality, will continue to be rolled out into the realm of law enforcement which is only the jurisdiction of law enforcement (*tata tentrem kerta raharja*).<sup>11</sup>

Feminist jurisprudence has played a significant role in legal scholarship, influencing debates on sexual violence, domestic violence, workplace inequality, and gender discrimination. However, the implementation of the law often fails to protect women due to cultural biases that normalize violence against women in the family<sup>12</sup>. Through various approaches, feminists have identified gender components and implications of seemingly neutral legal norms, which have disadvantaged women in terms of employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment, so that the law needs to be restructured. Women's struggles do not only occur in Indonesia, but also in various countries with different experiences and challenges.

Simone De Beauvoir in her work entitled "The Second Sex" where women are marginalized by social construction making them only move in the private sphere even socio-cultural Indonesia currently shows its injustice by only giving a quota of 30% for women to contribute to political activities, it is stated in Law Number 8 of 2012 concerning the Implementation of General Elections for the DPR, DPD and DPRD.<sup>13</sup> However, currently there are many Indonesian women who are fighting for equality with various cases that occur such as domestic violence, divorce and many Indonesian women are still fighting for the existence of inherent rights.

A person can be said to have committed a criminal act if the act has been regulated by law, in accordance with the Principle of Legality in Article 1 paragraph (1) of the Criminal Code which states that no act can be punished except by virtue of criminal regulations in existing legislation, before the act is committed. A criminal act is an act that is prohibited by a legal rule, the prohibition of which is accompanied by a threat (sanction) in the form of a certain penalty, for anyone who violates the prohibition<sup>14</sup>. According to Lamintang, all crimes in the Criminal Code can be divided into two types: subjective and objective. Subjective factors relate to the perpetrator and include everything in the perpetrator's mind, while objective elements relate to the situation or circumstances in which the perpetrator's actions are carried out<sup>15</sup>.

In Criminal Acts, there are elements of crime regulated in the Criminal Code, where sanctions can be imposed if the law is violated. A crime must include external elements, such as the fact of the act, behavior, and the consequences caused. This includes prohibited acts as well as criminal liability. The elements of a criminal act must meet the provisions of the law as a formal requirement and be unlawful as a material requirement. There are two perspectives on the causality of criminal acts: monistic and dualistic. The monistic perspective integrates the elements of a criminal act with criminal liability, where a person can only be punished if he can be held accountable for his actions.

Violence against women, especially in the household, is divided into two forms, namely light and heavy. According to Article 1 of Law Number 23 of 2004 concerning the Elimination of Domestic Violence (UU-PKDRT). This law, among other things, prevents, overcomes, and reduces acts of violence or crimes that are increasingly rampant in the family environment<sup>16</sup>. The meaning of domestic violence is any act against a person, especially a woman, which results in physical, sexual, psychological misery or suffering, and/or neglect of the household, including threats to commit acts, coercion, or unlawful deprivation of liberty in the domestic sphere.<sup>17</sup>

The division of social roles between women and men causes injustice, one of which is violence against women. To overcome the problem of domestic violence, joint action is needed from all parties, including the community, the authorities, and well-functioning legislation, so that the problem of violence in Indonesia can be handled effectively<sup>18</sup>. The impact of domestic violence (DV) on women is very large, so psychological empowerment is needed to restore the motivation of victims. This success depends on the role of companions in achieving justice, including asking law enforcement and the courts to provide protection for victims. The goal of forming a happy household will create a safe and peaceful society and country, so understanding and implementing related laws are important<sup>19</sup>.

<sup>10</sup> Bambang Waluyo. *Relevansi Doktrin Restorative Justice dalam Sistem Pemidanaan di Indonesia*. Hasanuddin Law Review, 1(2),(2015), Hlm.222

<sup>11</sup> *Ibid.*, 225

<sup>12</sup> Etheldreda, et all. *Telaah Kritis Efektivitas Pasal 66 UU Perlindungan dan Pengelolaan Lingkungan Hidup Bagi Perempuan Pembela Hak Asasi Manusia Atas Lingkungan*. Jurnal Hukum Lingkungan Indonesia, 8(1), 2021, Hlm. 55

<sup>13</sup> Indah Dwiprigitaningtias., Yuniar R, *Op.Cit*, Hlm.64

<sup>14</sup> Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta : PT Rineka Cipta,2008), Hlm 59.

<sup>15</sup> Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, (Bandung : Sinar Baru), 1984, Hlm. 183.

<sup>16</sup> Bambang Waluyo. *Viktimologi (Perlindungan Korban dan Saksi)*, (Sinar Grafika : Jakarta Timur), 2022, Hlm. 86

<sup>17</sup> Pasal 1 UU No. 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga .

<sup>18</sup> Adam Chazawi, *Tindak Pidana Mengenai Kesopanan*, Raja Grafindo Persada, Jakarta, 2006, Hlm. 37

<sup>19</sup> Bambang Waluyo, *Op.cit*, Hlm. 87

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Criminal law is a legal instrument of a country that can regulate all forms of crime and protect its victims. Criminal law is a set of regulations that regulate what actions are prohibited and included in criminal acts, as well as what punishments can be imposed on the perpetrators of these actions. Legislation as a law maker can be a tool to protect the rights of individuals and communities that are very relevant to programs that protect women from violence.<sup>20</sup>

The problems that will be examined further based on the background that has been described earlier in this study are : 1. What is the relationship between the principles of restorative justice and feminist jurisprudence in its development? 2. How is the renewal of the application of Restorative Justice principle in cases of domestic violence when viewed from the perspective of feminist jurisprudence in Indonesian law in the future (*ius constituendum*)?

### RESEARCH METHODS

In this research, the author uses normative legal research methods to find rules, principles, and doctrines relevant to the issue at hand. The approaches used include a statutory approach and a conceptual approach. Data was collected qualitatively, including interviews with experts, and analyzed prescriptively to ensure that the law can respond to the needs of society. The main sources of data are legal documents and literature, including primary legal materials that are authoritative, secondary legal materials that are summarized in overview and review cards, and tertiary legal materials that provide additional explanations. All of these legal materials are used to discuss the issues in this research. Through this approach, the research seeks to explore the potential of restorative justice in creating a legal system that is more responsive to the needs of female victims, as well as to evaluate the alignment of restorative approaches in domestic violence cases with the principles of feminism, including gender equality and addressing unequal power relations between perpetrators and victims.

### DISCUSSION

#### A. The relationship between the principles of Restorative Justice and Feminist Jurisprudence in its development

Presence of law is needed in creating order in human social life. It is intended to avoid conflict between humans with one another<sup>21</sup>. The number of domestic violence in recent years has fluctuated due to the fact that the measures taken by state institutions to combat this crime are quite massive. John Austin, a pioneer of the analytical School of positive law, argued that law should be separated from morals and ethics. He emphasized that law is a system of objective rules established by the authorities, and should not be influenced by subjective values. Thus, laws can be analyzed rationally and scientifically, focusing on clarity and consistency, without getting caught up in moral debates.

The application of Restorative Justice in this judicial process not only emphasizes punishment, but rather the rapprochement between the perpetrator and the victim, as well as ensuring a better social reintegration of the perpetrator. From a number of these regulations, there is a fundamental similarity about the meaning of Restorative Justice, namely the entire rule is still centered on the orientation of "settlement of cases". This can be interpreted to mean that the orientation of Restorative Justice is still limited as a "result" and not a combination of "process and purpose".<sup>22</sup>

Restorative Justice should not be construed narrowly as a cessation of the case. Termination of cases based on restorative justice is sometimes considered inappropriate in its implementation. Currently, the concept of Restorative Justice in Indonesia is not in accordance with the basic principles, which aims to ensure that all parties involved in a case can find a way out of the imbalance caused by criminal acts that occur.

The concept of Restorative Justice places the interests of the victim as the main focus for finding a way out, in contrast to conventional justice systems that often limit the victim's space to be heard and their needs accommodated. The way out achieved in Restorative Justice is not the termination of the case, but the settlement in another form that suits the needs of the victim, whose initiative also arises from the point of view of the victim freely.

Restorative Justice shifts the focus from retributive justice to a broader concern for victims, offenders, and society, as conceived by Tony F. Marshall. Restorative justice does not distinguish gender in its application, but generalizes all parties, with the aim of solving the problems that occur. The concept of Restorative Justice emphasizes the importance of sitting together to seek and explore what all parties involved want.

The use of the term Feminist Jurisprudence was first recognized in the 1970s by Ann Scales at the Harvard Law School Women's graduation celebration conference. The term was published in the first edition of the Harvard women's Law Journal

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<sup>20</sup> Karenina Aulery Putri Wardhani. *Perlindungan Hukum terhadap Perempuan Korban Kekerasan dalam Rumah Tangga (KDRT) pada Tingkat Penyidikan Berdasarkan Undang-Undang No. 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga (UUPKDRT)*, Jurnal Riset Ilmu Hukum, Volume 1, No.1, Tahun 2021, Hal: 22

<sup>21</sup> Beniharmoni Harefa. *Kebenaran Hukum Perspektif Filsafat Hukum*, Jurnal Komunikasi Hukum Vol 2, No. 1, Pebruari 2016, Hlm.12

<sup>22</sup> <https://www.kompas.id/baca/opini/2023/05/10/restorative-justice-bukan-penghentian-perkara> diakses Pada Selasa, 14 Januari 2025, Pukul. 00.51 WIB.

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published in 1978.<sup>23</sup> The link between Restorative Justice and Feminist Jurisprudence can be seen in efforts to build a more empathetic and Victim-Friendly justice system, especially for women. Through the Restorative Justice approach, which is in line with the values of Feminist Jurisprudence, women victims of domestic violence in Indonesia are expected to get the opportunity to participate in the case resolution process, voice their experiences, and avoid revictimization that often occurs in the conventional legal system.

The idea of feminist legal theory stems from basic assumptions about the relationship between women and the law. Reality shows that laws are informed by men and are aimed at strengthening patriarchal social relations. The relationships in question are those that are based on the norms, experiences and strengths of men, and ignore the experiences of women<sup>24</sup>.

The fundamental principles of the feminist perspective of creating space for women's voices, encouraging women's autonomy and empowerment, engaging communities, changing patriarchal structures and ending violence against women are central to the feminist agenda and can be realized through restorative justice.<sup>25</sup> Koss Wilgus & Williamsen in their work entitled "The Restore Program of Restorative Justice for Sex Crimes: Vision, Pro-Cess, and Outcome" explains that "restorative justice can help injured people reclaim power that may have been felt lost, particularly in the context of gender-based harm, rectifying the helplessness inflicted by assault"<sup>26</sup>.

Feminist jurisprudence focuses on gender issues and the experiences of women in the practice of law. This approach believes that discrimination against women in law is due to ongoing historical factors. Legal reform efforts through feminist jurisprudence begin with the recognition that laws based on masculine values have limitations and often reflect oppressive social values. Taking into account these conditions, adherents of Feminist Jurisprudence are required to strive to reform the legal system, including legal instruments and principles that exist in various areas of law that discriminate against women. Hopefully, this reform can make the law more responsive and reflect the perspective of women<sup>27</sup>.

Restorative Justice and Feminist Jurisprudence are intertwined in their goal of creating a legal system that is more equitable, inclusive, and responsive to gender issues. Both approaches emphasize the importance of recovery and empowerment of victims rather than simply punishing perpetrators. Restorative Justice focuses on improving the relationship between perpetrators and victims by giving victims the opportunity to be directly involved in the settlement process, while Feminist Jurisprudence highlights the importance of recognizing as many dominant women as victims, especially in cases of gender-based violence such as domestic violence. Both complement each other in dealing with existing inequalities in the legal system.

In the context of domestic violence, Feminist Jurisprudence encourages the legal system to give female victims control over the recovery process, so that they are not just passive parties. The Restorative Justice approach in this perspective emphasizes transformative justice, which aims to change social structures and increase public awareness of gender equality and protection of victims of domestic violence. Every citizen has rights and obligations stipulated in the law and customary law, and the fulfillment of rights and the execution of obligations must be balanced to prevent conflicts.

From a feminist perspective, the application of Restorative Justice in domestic violence cases requires caution, focusing on the balance between Victim Recovery and perpetrator accountability. In the context of the criminal justice system in Indonesia, Restorative Justice reflects the philosophical values that exist in the paradigm<sup>28</sup>. Restorative Justice should not be used to avoid proportionate punishment, especially in cases of severe violence such as domestic violence.

This approach must be accompanied by strict supervision so as not to ignore the experiences of victims, especially women, who are vulnerable to intimidation from the perpetrator during the mediation process. The recovery of the victim must include physical, emotional and psychological aspects. In addition, equal access to justice must be observed, without sacrificing the victim for the sake of pseudo-harmony in domestic relations.

Feminists have not ended as long as they see the injustices that are served to women in particular, in addition, legal reform must also be based on considerations about whether existing legislation provides access to control participation and benefits for women from the establishment of a legal instrument that affects it<sup>29</sup>.

Article 1 of the law on the elimination of domestic violence defines domestic violence as an act that can affect anyone, especially women, resulting in sexual, economic, physical harassment and neglect. This law protects both women and men, who

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<sup>23</sup> Cain, P. A. *Feminist jurisprudence: Grounding the theories* [1990]. *Feminist Legal Theory: Readings in Law and Gender*, 2018, Hlm. 263–280 <https://doi.org/10.4324/9780429500480> , dikutip dalam Berliantha Ilma, *Perempuan Dalam Hukum Pidana Di Indonesia (Kajian Feminist Legal Theory)*. *Iblam Law Review*, 3(2):16

<sup>24</sup> Sulistyowati Irianto, *Teori Hukum Feminis*, ditemukan dalam Sulistyowati Irianto dan Lidwina Inge Nurtjahjo, eds , Hlm. 44

<sup>25</sup> Leight Goodmark. *Restorative justice as feminist practice*. *Int'l J. Restorative Just.*, 1, 2018, pp. 372.

<sup>26</sup> Koss, M.P. The Restore Program Of Restorative Justice For Sex Crimes: Vision, Pro- Cess, And Outcomes. *Journal Of Interpersonal Violence*, 2014 29(9), 1623-1660. Dalam Leight Goodmark. *Restorative Justice As Feminist Practice*. *Int'l J. Restorative Just.*, 1, 2018, Pp. 372. *The International Journal Of Restorative Justice* 2018 Vol. 1(3) Pp.375

<sup>27</sup> Aga Natalis, *Reformasi Hukum Dalam Rangka Mewujudkan Keadilan Bagi Perempuan: Telaah Feminist Jurisprudence*, *Jurnal Crepido*, Volume 02, Nomor 01, Juli 2020, Hlm. 13

<sup>28</sup> Bambang Waluyo. *Penegakkan Hukum di Indonesia*. (Jakarta : Sinar Grafika,2020), Hlm.130

<sup>29</sup> Aga Natalis. *Reformasi Hukum Dalam Rangka Mewujudkan Keadilan Bagi Perempuan : Telaah Feminist Jurisprudence*, *Jurnal Crepido* Volume 02, Nomor 01, Juli 2020, Hlm.13

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can also become victims of domestic violence, although the norms of society often consider domestic conflicts to be a personal matter. Law No. 23 of 2004 on the elimination of domestic violence does not distinguish the sex of the victim, recognizing that a husband, wife, child, or other family member can be a victim. Gender constructs that consider men as "strong" and women as "weak" are at the root of the problem. Feminist jurisprudence can encourage more inclusive and equitable legal reform for all victims of domestic violence, regardless of gender.

Violence is a physical act that often occurs in our lives. Violence refers to acts of aggression and offenses such as torture, beating, and rape and others. There is a law that regulates acts of violence, which is contained in Law No. 23 of 2004, Article 44 paragraph (1) on the elimination of domestic violence. It is stated that everyone who commits domestic violence is threatened with imprisonment for a maximum of five years or a maximum of Rp. 15,000,000.00 (Fifteen Million rupiah)<sup>30</sup>.

Indicators for assessing the alignment of Restorative Justice with Feminist Jurisprudence include several important aspects: First, the existence of equal participation by providing opportunities for all genders to be actively involved in the process so that the voice and perspective of each individual is valued. Secondly, focus on the well-being of the victim. Recognition of the experiences of victims, especially women, in a context-sensitive manner. Third, access to justice and empowerment of marginalized voices. Fourth, criticism of the traditional legal system. Fifth, Community Involvement and support with the aim of achieving inclusive justice where the process takes into account the social and cultural context

Here is a table that shows some indicators or benchmarks to assess whether the restorative justice approach is in line with feminist jurisprudence:

No	Indicators/benchmarks	Description
1.	Equal participation	The Restorative justice process ensures that all parties including victims and perpetrators have equal opportunities to participate. Feminist jurisprudence focuses on the analysis of law from a gender perspective, seeking to address the injustices experienced by women in the legal system. Restorative justice, as a process that involves all parties involved in a criminal offense to discuss and find solutions together, places the family as a key element. <sup>31</sup> <b>It reflects the principle of equal participation in achieving justice.</b>
2.	Focus on the well-being of the victim	Both Restorative justice and feminist jurisprudence prioritize the needs and voices of victims, especially women who experience violence and discrimination. Restorative justice seeks to restore relationships and provide a platform for victims to express their experiences and needs. feminism's central goal of ensuring gender equality requires punishing violence against women just as all other crimes are punished—something only the state can do. <sup>32</sup> <b>Both put the welfare and recovery of victims as a top priority in the legal process.</b>
3.	Access to justice and empowerment of marginalized voices	Access to justice is a fundamental right that must be possessed by every individual, including those who are marginalized. The Restorative justice process provides fair access for all individuals, especially those from vulnerable groups. In some cases, restorative justice has the potential to meet the needs of victims of intimate violence <sup>33</sup> . Feminist jurisprudence advocates for the empowerment of marginalized groups, including women and underrepresented communities. <b>Restorative justice aligns with this by facilitating a dialogue that allows these voices to be heard and validated in the justice process.</b>
4.	Criticism of the traditional legal system	Restorative Justice offers an alternative with a focus on restorative outcomes rather than punishment. Feminist jurisprudence criticizes traditional legal systems for their inadequacy in addressing women's issues, while feminist jurisprudence criticizes patriarchal structures that silence women's experiences "transforming patriarchal

<sup>30</sup> Pasal 44 ayat (1) UU No. 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga

<sup>31</sup> Yuni Priskila., Ozora, A., et.al. Upaya Penyelesaian Tindak Pidana melalui Upaya Restorative Justice dengan melibatkan Keluarga Pelaku/Keluarga Korban. *Jurnal Pengabdian West Science*, 3(04),2024, Hlm. 417.

<sup>32</sup> Goodmark, op. cit., 374.

<sup>33</sup> Angela Cameron. *Gender, power and justice: A feminist perspective on restorative justice and intimate violence* (Doctoral dissertation, University of British Columbia). 2003, pp.213.

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No	Indicators/benchmarks	Description
		structures and ending violence against women are all central to the feminist agenda and can be realized through restorative justice <sup>34</sup> ." while Restorative Justice seeks to redistribute power by involving all stakeholders including victims, perpetrators, and community members in the justice process. <b>Both challenge traditional power dynamics in the legal system.</b>
5.	Community involvement and support	Both Restorative Justice and Feminist Jurisprudence encourage community involvement in conflict resolution processes, creating broad social support for victims. Restorative justice invites the community to help determine what the responses to harm should be and to monitor those responses in tangible, concrete ways: by regularly checking in with those involved. <sup>35</sup> This community-based approach not only promotes healing, but also promotes social change, in line with feminist goals to create a safer and fairer environment. <b>Both emphasize the role of the community in supporting victims and holding perpetrators accountable.</b>

Restorative justice transforms the way victims are viewed by placing them at the center of the legal process, acknowledging their trauma, and giving them a voice and control in the process. This approach not only helps victims in the healing process, but also creates a more supportive and inclusive environment. In addition, feminism raises awareness about gender issues and injustices that are often overlooked, encouraging people to think critically about existing social norms and structures.

The presence of restorative Justice is positioned as a replacement procedure in resolving criminal cases that aims to minimize all the shortcomings that exist in the criminal justice system by including the participation of victims and perpetrators directly<sup>36</sup>. Restorative Justice in practice becomes a link between theoretical and philosophical. It aims at the legal values that grow in society, thus becoming the basis for the legitimacy of the development of the law itself<sup>37</sup>.

Feminist Jurisprudence and Restorative Justice are intertwined in an effort to overcome power inequalities, especially in patriarchal relationships against the backdrop of domestic violence. Feminist Jurisprudence criticizes male dominance in the legal system, while Restorative Justice focuses on reconciliation that empowers victims. The two interact to create more inclusive justice by prioritizing the voices of victims, especially women<sup>38</sup>. By integrating gender sensitivity in the process of rehabilitating offenders and empowering victims, these two approaches can create a more sensitive and equitable legal system for women, as well as stop the cycle of domestic violence.

### B. Renewal Of The Application Of Restorative Justice Principles In Domestic Violence Cases When Viewed From The Perspective Of Feminist Jurisprudence In Indonesian Law In The Future (Ius Constituendum)

Domestic violence is not only a personal problem, but also a structural problem that reflects the inequality of power relations in society. Perpetrators often use their dominant position to control the victim. This shows that domestic violence is a product of power relations. As it is the core of the problem of domestic violence and must be parsed through a holistic approach, involving law, education, and cultural transformation<sup>39</sup>. The presence of Restorative Justice is basically the opening key to rethinking the victim's position in a criminal case settlement.

In the past, criminal law had a limited scope, where the regulations only regulated actions that took place outside the boundaries of the home yard. This view causes domestic violence is often considered a private matter that cannot be intervened by law. As stipulated in Article 167 paragraph (1) of the Criminal Code and Article 257 paragraph (1) of Law Number 1 of 2023 which regulates the crime of entering someone else's house without permission. That the acts punishable in this article are:

- 1) by resisting the right of forced entry into the house, a closed room, and so on;
- 2) by opposing the right to be at home, a closed room, and so on, not immediately leaving the place at the request of the entitled person or on behalf of the entitled person.

<sup>34</sup> Goodmark, op. cit., 379.

<sup>35</sup> Goodmark, op. cit., 378.

<sup>36</sup> Gholin Noor., Pramudita, Muhklasin, et all. *Tinjauan Filosofis Keadilan Restoratif dalam Lensa Teori Keadilan. Hukum dan Politik dalam Berbagai Perspektif*, Jurnal Hukum dan Politik 3.,2024, Hlm. 257

<sup>37</sup> Mira Maulidar. *Korelasi Filosofis Antara Restorative Justice dan Diyat dalam Sistem Hukum Pidana Islam*. At-Tasyri': Jurnal Ilmiah Prodi Muamalah, 13(2), 2021, Hlm. 143

<sup>38</sup> R. Valantina Sagala, (2020). *Ketika negara mengatur kekerasan seksual*. (Bogor:Guepedia), 2020, Hlm.26

<sup>39</sup> Pingky Saptandari, *Buku Ajar Antropologi Pembangunan Dalam Bingkai Pluralisme Dan Feminisme*. (Airlangga University Press : 2022), Hlm.143

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The criminal act of domestic violence was initially considered as a problem of a private nature, limited to the scope of the household. so that violence that occurs in the house is considered a private matter. However, with the birth of Law No. 23 of 2004 on the elimination of domestic violence, domestic violence is now seen as a problem involving public law.

This law affirms that domestic violence is not only a private matter, but also a violation of human rights that must be dealt with by the state. Thus, domestic violence is not only an individual responsibility, but also a broader legal concern, reflecting a commitment to protecting victims and upholding justice.

Indonesia's Criminal Law system in its development is currently undergoing renewal. The practice of criminal law, which originally focused on emphasizing justice to retributive justice which focused on the deterrent effect so that the perpetrator changes, now leads to restorative justice, namely settlement with an approach that focuses on balanced justice for the perpetrator of the crime and the victim itself. The mechanism of procedural and criminal justice that focuses on punishment is transformed into a process of dialogue and negotiation by involving perpetrators, victims and related parties (affected communities) who are assisted by a mediator/facilitator to jointly seek a fair and balanced solution with an emphasis on recovery and not retaliation.

Restorative Justice has not been regulated independently explicitly or expressly in the applicable law in Indonesia to guide its implementation, but in its application Restorative Justice has been studied in several laws in Indonesia. Among them are Law No. 11 of 2012 on the Juvenile Criminal Justice System, Supreme Court Regulation No. 2 of 2012, Police Regulation No. 8 of 2021 on handling crimes based on restorative justice, and the most recent is regulated in Attorney Regulation No. 15 of 2020 on termination of prosecution based on restorative justice<sup>40</sup> and Supreme Court Regulation No. 1 of 2024 on guidelines for adjudicating criminal cases based on restorative justice. In the sense contained in the regulation, it has the same purpose in restoring the rights of victims and the involvement of various related parties.

The concept of Restorative Justice, which is applied in Perma Number 1 of 2024, confirms that restorative justice does not eliminate a person's criminal liability. The judge in deciding a case still considers a person's criminal liability but the concept of *ultimum remedium* in criminal law must be carried out as a last resort to solve a problem.

Restorative justice in Perma 1 of 2024 includes core components as stated by Danile W. Van Ness and Karen Heetderks cover inclusiveness, encounter, improvement and reintegration. The judge in carrying out the process of restoring the situation must put forward acceptance from the parties through a meeting that can mutually respect and restore conditions to the victim and the community<sup>41</sup>.

According to Subekti quoted by Ade Maman S. that the law serves the purpose of the state which in its essence is to bring prosperity and happiness to its people. In order to serve the purpose of the state, the law provides justice and order as a condition for the achievement of prosperity and happiness. Thus, law is considered as a means of achieving a balance between the needs of the individual and the interests of society.

Article 70 of the new Criminal Code (Law No. 1 of 2023) provides for the exclusion of prosecution for criminal acts that occur between family members, with some exceptions. In essence, this article adopts the principle of decriminalization of family disputes<sup>42</sup> in order to preserve the integrity of the family as a social unit, except in cases that are considered serious or dangerous. This article aims to resolve conflicts in the family with a more restorative than retributive approach.

Meanwhile, the essence of Article 70 of the new criminal code is to explain that the family is a subject of Special Law: in minor crimes committed between family members, prosecution can only be carried out if there is a complaint from the victim (offense of complaint). However, for exceptions in serious crimes such as domestic violence that cause serious injury, death, or sexual violence, a complaint is not required<sup>43</sup>.

Restorative Justice is able to be realized appropriately if the government as a regulator forms a special law on restorative justice. This can be used as a consideration if the parent regulation is ratified in the legitimacy process in Indonesia. The reason is that some regulations that discuss the implementation of resolving cases with the restoration of justice such as SEMA (Supreme Court Circular), Indonesian police regulations, Indonesian prosecutor's regulations and other provisions are solely appeals.

This becomes an obligation for policy makers to examine more in the process of the legality of the approach. Quoting the opinion of Eka Fitri Andriyanti which is based on the "UN Resolutions and Decisions adopted ECOSOC at its substantive session of 2002" or that basic guidelines are needed that must be established through responsive regulation with legislative products.<sup>44</sup> Therefore, the formulation of basic regulations on restorative justice must be well controlled.

<sup>40</sup> Bambang Waluyo, *Penyelesaian Perkara Pidana Penerapan Keadilan Restoratif Dan Transformatif* (Jakarta: Sinar Grafika, 2021), 72.

<sup>41</sup> Daniel W. Van Ness and Karen Heetderks, *An Overview of Restorative Justice Around The World*, materi yang dipresentasikan dalam Workshop 2: Enhancing Criminal Justice Reform Including Restorative Justice, 22 April 2005, diakses dari An Overview of Restorative Justice Around the World

<sup>42</sup> Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pendekatan Restoratif*, Bandung: Citra Aditya Bakti, 2010.

<sup>43</sup> Pasal 26 dan 27 Undang-Undang No. 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga

<sup>44</sup> Sumintak, Abdullah Idi. *Analisis Relasi Kuasa Michel Foucault: Studi Kasus Fenomena Kekerasan Seksual di Perguruan Tinggi*. Jurnal Intelektualita: Keislaman, Sosial Dan Sains, 11(1), 2022, Hlm.57

<sup>44</sup> Andriyanti, "Urgensi Implementasi Restorative Justice dalam Hukum Pidana Indonesia," 327– 28.



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To ensure the effectiveness of us Restorative Justice, it is necessary to update the criminal code or related laws that regulate implementation standards by paying attention to the rights of victims, especially women, and the supervision mechanism for the implementation of the Restorative Justice process in domestic violence cases. Therefore, more strict regulation in positive law is needed.

The legal basis related to the rejection of the Restorative Justice approach in domestic violence cases can be found in a number of regulations in Indonesia that affirm the protection of domestic violence victims and make gender-based violence a serious crime. "The application of the concept of restorative justice does not always lead to criminal punishment, but to a settlement that prioritizes the interests of restoring victims and holding perpetrators accountable"<sup>45</sup>.

MacKinnon in her book "Toward a Feminist Theory of the State" (1989) states that Restorative Justice can be applied to domestic violence cases if it meets the requirements of gender justice, such as a process that is safe for victims, a settlement that ensures structural change in power relations, and the involvement of third parties sensitive to gender issues. This approach emphasizes that the law should protect victims, not open up negotiation space to their detriment. In the context of domestic violence in Indonesia, feminist legal theory emphasizes the importance of the perspective of female victims, so that the law is not only considered as a criminal problem, but also considers the psychological and social impacts experienced by victims.

The process of investigation of the Criminal Court with Restorative Justice can be carried out on the formal basis of criminal law. The process is able to generate a sense of justice and legal justice with a humanist approach from a formal approach that is legally recognized and implemented. The legality plan of recovery will be better carried out with appropriate and comprehensive instruments<sup>46</sup>. By putting forward the values of feminism as stated by Leigh Goodmark in her work entitled "Restorative justice as feminist practice" that one of the eternal goals of feminism is to end gender-based violence. Feminists identify rape, sexual assault, intimate partner violence, and sexual harassment as critical issues that require public attention. They work to raise awareness, influence law reform, and build support systems for survivors. By adopting an intersectional approach, feminists seek to create a safer and fairer society, free from gender-based violence"<sup>47</sup>.

Ius constituendum refers to the desired law for the future. A formal legal approach that focuses on the protection of victims and the punishment of perpetrators in accordance with the principles of gender justice. The application of Restorative Justice in domestic violence cases must be oriented towards gender justice and victim recovery, so that Indonesian law can adapt to evolving social needs and realize comprehensive justice for women. It is necessary to formulate measures that strengthen the application of these two principles, taking into account the inequality of power between the perpetrator and the victim.

It should be emphasized that the application of Restorative Justice does not mean achieving peace and stopping the legal process, but rather prioritizing the rights of victims with a focus on recovery for all parties. Incomplete understanding of the concept of Restorative Justice by law enforcement officers can cause the implementation of Restorative Justice to be vulnerable to abuse.

Here are some suggestions and solutions to improve the effectiveness of the application of Restorative Justice in the Indonesian legal system in the future:

- 1) the establishment of a law on restorative justice in Indonesia that adopts a feminist jurisprudence perspective : It is important to make specific laws on Restorative Justice in Indonesia so that there is a clear and effective legal framework. This law should establish a process for resolving cases that is carried out fairly, involving all parties, and focused on rapprochement, especially in cases of domestic violence (domestic violence) and Social Security. The draft law (RUU) needs to establish clear definitions, principles, and procedures. At the moment, the assessment of the restoration's performance has not yet been completed, so the government needs to take measures to ensure its implementation. Restorative justice and feminist jurisprudence can be done together to realize justice that not only satisfies, but also reduces suffering, by improving the perspective of victims, especially women, in the process of struggle.
- 2) Innovation in the application of Restorative Justice to future domestic violence cases : In an evolving legal context it is important to renew the application of Restorative Justice in domestic violence cases. The reform should pay attention to the rights of victims, especially women to ensure that the judicial process does not impose reconciliation that may be caused by pressure in unequal relationships. The new regulations need to provide assurance that the recovery of victims remains a priority, while still involving the rehabilitation process for perpetrators in a fair manner. Restorative Justice in domestic violence cases needs to be aligned with the perspective of Feminist Jurisprudence to protect women's rights. In addition, criminal law reform must be carried out thoroughly, covering formal criminal law, material, and criminal execution.

<sup>45</sup> Achmad Fauzi, Rena Yulia, et. All. (2023). *Interpreting the Material Requirements of Recidivism: Realizing Restorative Justice in the Police Force. Kosmik Hukum*, 23(3), 281

<sup>46</sup> Nashir, M. A., Maharani, N., & Zafira, A. Urgensi Pembentukan Undang-Undang Restorative Justice Dalam Rangka Reformasi Keadilan Dan Kepastian Hukum Di Indonesia. *Sapientia Et Virtus*, 9(1),2024, Hlm. 355.

<sup>47</sup> Goodmark, op. cit., 380

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### CONCLUSIONS

Restorative Justice in Feminist Jurisprudence focuses on transformative justice that includes structural changes to resolve conflicts and raise awareness about gender equality and the protection of victims of domestic violence. A legal approach must empower victims and protect them from the inequalities that are at the root of violence. This theory reveals a patriarchal bias in the law that often fails to protect women.

Restorative Justice aims to create consensus, not just stop cases, and must accommodate both approaches: rapprochement and gender justice. Indicators of alignment between Restorative Justice and Feminist Jurisprudence include equal participation, a focus on victim welfare, access to justice, criticism of traditional legal systems, and community support. Restorative Justice shifts the focus from perpetrator to victim, making the victim's position very important in the process.

In the context of criminal law in Indonesia, the draft Criminal Code has accommodated the principle of Restorative Justice as a method of settlement outside the court. This process can reflect a sense of justice with a more humanist approach. The government needs to establish a special law on Restorative Justice to support its implementation.

### SUGGESTIONS

Legal policy needs to ensure that the application of Restorative Justice in domestic violence cases does not only focus on the integrity of the household, but also on the effectiveness of punishments that are in accordance with the social and cultural values of the community. This approach should emphasize the responsibility of the perpetrator to repair the damage and provide a recovery room for the victim. Strengthening the implementation of Law No. 23 of 2004 on the elimination of domestic violence is essential to protect women and address gender role imbalances. Domestic violence should be viewed as a humanitarian problem, not just a women's problem. Restorative Justice focuses on rapprochement between perpetrators, victims, and society, while Feminist Jurisprudence emphasizes the need to address gender inequality. Therefore, measures need to be formulated to strengthen the application of these two principles in the resolution of domestic violence cases, taking into account the inequality of power between perpetrators and victims.

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