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Comparison of Criminal Justice Systems Between Indonesia and Malaysia Regarding Sexual Violence

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Article

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Abstract

Sexual violence is a crime that is a problem throughout the world, especially in Indonesia due to several factors such as politics, poverty, patriarchal culture and the difficulty of handling cases of sexual violence that are sensitive for the victim. This is also experienced by Malaysia, which is a neighboring country of Indonesia and has similar conditions to Indonesia. Malaysia in addressing sexual violence in its country built the Anti-Sexual Harassment Tribunal which is quite unique and different from other countries from Indonesia, then a study was formed that will compare the rules regarding the criminal justice system and protection of victims in it related to the crime of sexual violence between Indonesia and Malaysia, using a legislative and comparative approach. This study will look at the comparison of these two countries in responding to cases of sexual violence with the regulations that have been made and implemented, as well as looking at the efforts of each country to improve the protection of victims of sexual violence from the regulations in their respective countries categorized by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power indicators.

INTRODUCTION

Sexual violence is a serious crime that harms victims physically and psychologically. This situation is now a global concern, occurring not only in developing countries but also in developed ones. This human rights violation continues to occur, particularly against women and children. *The World Health Organization* (WHO) states that 1 in 3 people have experienced physical and/or sexual violence by someone with whom they have an intimate relationship or someone with whom they have not had a sexual relationship (World Health Organization, 2021)

Sexual violence can damage victims physically and psychologically. The impact of sexual violence not only affects individuals, but also the country as a whole, according to " *The Economic Costs of Violence Against Women* " a report by *the World Bank*

in 2019 stated that the direct and indirect costs of sexual violence against women can reach 6 trillion USD annually. This source also explains that the economic impact of sexual violence is very large, not only limited to victims but also society as a whole (Puri, 2016) . Sexual violence can also affect the political and social stability of a country because it can increase public dissatisfaction with the government due to the lack of protection for citizens (Diah Irawaty, 2017) Therefore, many countries are currently trying to create regulations related to this issue to control the level of sexual violence in their country.

Indonesia is one of the countries striving to regulate this issue due to the drastic increase in cases of violence against women over the past 10 years. 2021 recorded the highest number of cases of Gender-Based Violence (GBV), at 338,496, a 50% increase compared to 2020 (National Commission on Violence Against Women, 2022) . Victim protection is crucial to eradicating sexual violence. Adequate protection can help victims feel safe and support their recovery, ensure justice, punish perpetrators, and prevent further sexual violence.

Countries around the world, including Indonesia, have enacted regulations on sexual violence to protect victims of sexual violence, but many challenges remain in their implementation. Several factors contributing to the high number of sexual violence cases in Indonesia include social factors caused by a lack of public education and training, cultural factors of "taboo" which make someone feel embarrassed to share their experiences because they feel inappropriate and unpleasant to hear, in addition to a patriarchal culture that considers men to have a superior position, while women are considered subordinate (Modiano, 2021) . This can lead to arbitrary behavior towards women who are considered to be in a position below men in society , there are also economic factors in the form of poverty which is one of the factors in the rise of sexual violence, as well as political factors in the form of a lack of support from the government in providing adequate protection and law enforcement for victims of sexual violence (Sariningsih, 2022) .

According to Asni Damanik, the Coordinator of the TPKS Bill Substantive Team and Dr. Bahrul Fuad, MA (Commissioner of the National Commission on Violence Against Women), the judicial system in Indonesia has not sufficiently facilitated the protection of existing victims due to several things such as: Violence and sexual harassment are considered to not have strong legal certainty, especially in terms of evidence in court, the long judicial process often makes this case hampered, the legal culture that still applies a patriarchal culture makes victims exhausted both psychologically and financially which causes them to choose to withdraw charges, and the emphasis on peace between the perpetrator and the victim without legal channels (Student Executive Board (LEM) FH UII, 2021) . To address this, the Indonesian government on April 12, 2022, inaugurated the latest regulation regarding sexual

violence, namely Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence (hereinafter referred to as the TPKS Law).

The TPKS Law is expected to provide fulfillment of rights and post-incident recovery for victims of sexual violence and also regulates handling during the legal process. The implementation of the TPKS Law is a good first step, but often encounters obstacles due to the lack of implementing regulations, resulting in law enforcement in some regions being reluctant to use it and law enforcement officials not siding with victims. According to Andy Yetriyani, three women in Indonesia experience sexual violence every two hours, based on government statistics. However, the National Commission on Violence Against Women estimates that this figure is only 30% of actual incidents, saying that victims are often afraid to report to the police (Guzman, 2022) . Therefore, from this data, it can be concluded that the situation after the TPKS Law was passed is that many victims do not have enough trust in the implementation of the justice system for cases of sexual violence after the TPKS Law was passed. Indonesia needs action to build public trust in the justice system in Indonesia. Passing the TPKS Law is an excellent step, but also requires improvements related to this justice system.

Malaysia as a neighboring country also faces the same challenges as Indonesia in terms of cultural, economic, and political factors because they are in adjacent regions and have the same cultural group. Regarding sexual violence, Malaysia regulates it in the Malaysian *Penal Code*, but this regulation is still very general and less specific, similar to the Indonesian Criminal Code. The Malaysian Penal Code was tested in the case of Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor, in that case, the victim was a subordinate of the perpetrator and had filed a complaint of sexual violence against the perpetrator which was then denied by the perpetrator and then the perpetrator filed a claim against the victim to state that the perpetrator did not harass her and that the victim had defamed her. *The Federal Court*, which is the highest court, agreed with *the High Court* and *the Court of Appeal* to reject the perpetrator's appeal on the grounds that there was ample evidence showing that the perpetrator had made vulgar and sexually abusive comments, both directly and indirectly in front of the victim, with the aim that the victim heard them. *The Federal Court* finally upheld the decision of *the High Court* which had awarded general damages and aggravated damages of RM 120,000.00. This case is the first case where the Malaysian High Court awarded compensation to a victim of sexual violence in the workplace and opened the door for victims to file lawsuits against perpetrators, especially in the workplace, and the Federal Court judge also said (Star, 2016) :

" It is timely to import the tort of harassment into our legal and judicial system, *with* sexual harassment being part of it."

This incident also made the government move and made better regulations for the prevention and protection of sexual violence. According to existing data from the

Malaysian Ministry of Human Resources, it states that with this regulation, the number of reports of sexual violence in Malaysia has increased significantly from the last 5 years, which was initially 1,010 cases in 2016 to 1,289 in 2021. This increase is not based on the inability to handle cases of sexual violence, but according to the Malaysian Ministry of Human Resources, many people initially did not trust the legal system in Malaysia because it was considered not to be in favor of protecting victims. After seeing real steps from the government, people began to trust the legal system in Malaysia and dared to report their cases (Ministry of Human Resources, 2022) . The regulation This is a good first step, but there is no regulation in Malaysia that specifically addresses sexual violence in general, until the enactment of a regulation called the Anti-Sexual Harassment Act 2022 or often called *the Anti-Sexual Harassment Act 2022 (Act 840) in 2022*. The creation of this regulation is expected to raise awareness and prevent sexual violence in Malaysia. What is interesting about this regulation is that there is a special regulation regarding the " *Tribunal of Anti-Sexual Harassment* " in the justice system which is quite different from the sexual violence regulations in other countries, including those regulated in Indonesia. This regulation establishes a special institution to try perpetrators of sexual violence and is expected to help victims to be protected in their rights to be heard and treated fairly in court. This step shows the seriousness of the Malaysian government in addressing existing cases of sexual violence, this is a good example for Indonesia and this is certainly interesting to compare, especially regarding the aspect of victim protection in the justice system which is often complained about by the Indonesian people, even after the TPKS Law has been passed and implemented This *tribunal* was established to hear complaints related to sexual violence and provide a mechanism for victims of sexual violence to seek redress. The *tribunal* will consist of five or more individuals with knowledge or practical experience in sexual harassment matters. Cases will be heard by panels of three judges, with at least one woman on each panel. The *tribunal* will be empowered to make rulings and orders, including ordering the defendant to cease the violence, pay compensation to the victim, or take other action to remedy the situation. *The tribunal* will have 60 days from the date of the first court hearing to make a decision. This *tribunal* is a new mechanism for addressing sexual violence in Malaysia, and its establishment is a positive development in the country's efforts to prevent and address sexual harassment. The *tribunal* will play a crucial role in providing a fair and just process for victims of sexual harassment to seek redress.

As a country with a culturally similar situation to Malaysia, Malaysia's steps are quite interesting and bold in encouraging victims to report, and through these reports, the government can be more aware of existing cases and can prevent and handle such cases. Therefore, the author is interested in discussing the comparison between the existing justice systems in Indonesia and Malaysia to see the comparison between the two and how these justice systems provide protection for victims of sexual violence.

According to Van Apelddorn, comparative law is an auxiliary science to dogmatic law in the sense that it is used to weigh and assess existing legal rules and court decisions with other legal systems. Indonesia and Malaysia are two countries with different legal systems, but in terms of economic and social development, they have similarities that make these two countries comparable to each other (Marzuki, 2005) .

This study will examine the comparison of these two countries based on their criminal justice systems which are built on 4 sub-systems, namely the investigation sub-system, prosecution, trial, and execution (Sari et al., 2020). In addition, it will also be compared regarding the aspect of victim protection which will be compared with the theory of victim protection based on the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which is a declaration formed by the UN to be implemented by its member countries to be able to see how these two countries compare, and how to make victim protection, especially in Indonesia, better for victims of sexual violence. Therefore, the title of the study was taken Comparison of the Criminal Justice System between Indonesia and Malaysia against Sexual Violence.

METHOD

The researcher will use legal research. Legal research according to Prof. Peter Mahmud Marzuki (Marzuki, 2005) . The researcher will examine the existing legal regulations related to sexual violence, the justice system, and victim protection including laws, policies, government, and court decisions in Malaysia and Indonesia. The researcher will also use books, journals, literature, and other legal documents to gain a deeper understanding of sexual violence, the justice system, and victim protection with a legislative and comparative approach that will be collected with library study techniques that will be analyzed with prescriptive techniques so that it can provide results in the form of a better criminal justice system and can be applied in Indonesia.

RESULTS AND DISCUSSION

1. Comparative Analysis of the Justice Systems regarding Sexual Violence in Indonesia and Malaysia

His Sexual violence cases are difficult to resolve, especially in the context of Indonesian and Malaysian society, which considers this a taboo subject. This complex level of difficulty, coupled with the reluctance of the public to report and process their cases due to the complicated, lengthy, and victim-biased legal process due to the patriarchal culture that is still strong in both countries, means that effective and victim-friendly solutions must be found so that sexual violence cases can be resolved in both countries. One step to addressing the complex and lengthy case of sexual violence is to implement regulations that protect victims' rights and build victims' trust to report and process their cases. The process of processing cases in Indonesia and Malaysia after the enactment of laws regulating sexual violence since 2022 has brought significant changes, and in both countries

there are certainly several similarities and differences in their justice systems regarding sexual violence. This process of processing cases also shows the strengths and weaknesses of each law in each country so that the weaknesses and strengths of each regulation of both countries can be found.

Indonesia has a better public trial process than Malaysia, because the investigation process up to the trial is protected by the TPKS Law. The victims are assured of their identity being protected and it is also ensured that the legal officers who process the case from the investigation level to the panel of judges have the experience and also special training to handle the case, in contrast to Malaysia where the regulations regarding sexual violence in public trials do not regulate much about the victim's rights regarding privacy and the professionalism of the legal officers handling the case so that there is no confidentiality in the investigation up to the trial which makes sexual violence trials open there.

This public trial itself has both positive and negative impacts, the positive impact is that it can increase transparency and accountability in the legal process, in addition to opening support from the community for the victim, but in addition to the positive impact there is also a negative impact that results in stigmatization and discrimination against the victim, and can worsen the trauma experienced by the victim and this can lead to secondary victims (Viera Valencia & Garcia Giraldo, 2019) . In the science of Victimology, secondary victims are victims who arise due to inadequate treatment from a criminal justice system or society towards a crime that results in a person experiencing additional suffering mentally, physically, or socially due to the lack of protection for victims in the justice system (Triananda, 2011) , in the case of sexual violence, this additional suffering is stigmatization and discrimination against victims of sexual violence, especially in the midst of a culture that still considers cases of sexual violence as something taboo. Therefore, the lack of victim privacy in Malaysia's public trial arrangements has more negative impacts than positive impacts and in this case the regulations regarding privacy in public trials for victims Sexual violence cases are difficult to resolve, especially in the context of Indonesian and Malaysian society, which considers this a taboo subject. This complex level of difficulty, coupled with the reluctance of the public to report and process their cases due to the complicated, lengthy, and victim-biased legal process due to the patriarchal culture that is still strong in both countries, means that effective and victim-friendly solutions must be found so that sexual violence cases can be resolved in both countries. One step to addressing the complex and lengthy case of sexual violence is to implement regulations that protect victims' rights and build victims' trust to report and process their cases. The process of processing cases in Indonesia and Malaysia after the enactment of laws regulating sexual violence since 2022 has brought significant changes, and in both countries there are

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Another difference lies in the alternative actions that victims of sexual violence can take. As is known, cases of sexual violence are complex, and the existing law enforcement system is often slow and complicated. In some criminal cases other than sexual violence, the government may recommend implementing *restorative justice* first. *Restorative justice* is an approach within the criminal justice system that focuses on restoring and reconciling relationships damaged by criminal acts. This approach emphasizes efforts to address the root causes and the psychological, social, and emotional impacts of criminal acts, both for the victim, the perpetrator, and society as a whole. *Restorative justice* is the resolution of criminal acts by involving the perpetrator, the victim, the perpetrator's family, the victim's

family, community leaders, and the courts, all of which play a role in maintaining public order (Rangkuti, 2023) . *Restorative justice* is highly recommended in some criminal cases, especially those involving children as victims or perpetrators. But not all problems can be resolved with *restorative justice* , because in *restorative justice* an agreement needs to be formed between both parties, but often the perpetrator does not admit his mistake, the victim is unable to forgive the perpetrator, and the perpetrator does not receive appropriate punishment for his actions (Indriyani, 2021) , so that in a study conducted by Natalia Widiasih, an academic and mental health specialist consultant forensic psychiatry, said that *restorative justice* for victims of sexual violence will only add to the trauma of the victim, because the victim will be confronted directly with the perpetrator, which can worsen the psychological and emotional impact they experience (Wahyuni, 2022) . Therefore, the TPKS Law does not allow for extrajudicial resolution for cases of sexual violence, but the absence of alternatives also has an obstacle according to Rocky Marbun at the investigation stage of sexual violence cases in Indonesia is often difficult to prove because it is often done in secret and only known by the victim and the perpetrator, so the criminal justice system is vulnerable to not siding with the victim because evidence is difficult to find (Anggono, 2015) . Therefore, further efforts need to be made to improve the capabilities of investigators and address the limitations of evidence, as well as to raise public awareness of sexual violence and the importance of protecting victims, because evidence that is difficult to find can make it difficult for cases to progress to the next stage.

Indonesia realizes that cases of sexual violence are often difficult to solve due to the difficulty in finding evidence so to deal with the difficulty in finding evidence, Article 25 of the TPKS Law states that:

"The testimony of witnesses and/or victims is sufficient to prove that the defendant is guilty if accompanied by 1 (one) other valid piece of evidence and the judge is convinced that a crime has indeed occurred and that the defendant is guilty."

This is certainly different from the Indonesian Criminal Procedure Code, which stipulates that at least two pieces of evidence are required for evidence to be considered sufficient. However, even with these qualifications, it remains quite difficult for victims to prove a crime has occurred, as gathering even one piece of evidence is quite difficult. The judge's conviction, which is one of the bases for this decision-making, should be objective and consider the evidence presented in court and meet the requirements stipulated in the law. However, according to several studies, the judge's conviction in the criminal justice process is often subjective. Judges can subjectively assess witness evidence, which is generally not binding, as is the case with testimony, including in cases of sexual

violence. Judges are free to assess its completeness and accuracy (Siagian & Sumarsih, 2020) . The judge's conviction is also influenced by subjective factors such as the judge's experience, court structure, and cultural and religious background (Tajudin et al., 2020) . This regulation aims to provide relief for victims, but the burden of proof remains quite heavy.

Due to the similar cultural differences, this issue is also faced by Malaysia. However, in light of these challenges, unlike Indonesia, which does not allow for the resolution of sexual violence cases outside of the general courts, Malaysia has established an alternative, *the Anti-Sexual Harassment Tribunal* . Malaysia recognizes the need for alternative measures for victims to seek justice, ensuring fairness and ensuring protection for victims. Due to the complexity of sensitive sexual violence cases and the need for specialized knowledge, this *tribunal was established* to provide a faster and more favorable path for victims. This *tribunal* also has several unique features that differ from regular trials in Malaysia. The standard of proof required for a defendant to be found guilty and subject to criminal charges is that the prosecutor must prove the case *beyond a reasonable doubt* . This means that the evidence must be sufficient to prove the defendant's guilt, leaving no reasonable doubt in the court's mind. The burden of proof rests with the prosecutor, and they must present evidence to prove the defendant's guilt. If the prosecutor fails to prove a *prima facie case* , the court will acquit the defendant. In contrast to *the tribunal of anti-sexual harassment* which uses the balance *of probabilities standard* , this is stated in Section Number 9 point 5 which states:

" *The Tribunal shall determine the complaint of sexual harassment on the balance of probabilities* " which can be interpreted as "The Tribunal will decide the complaint of sexual harassment based on the balance of probabilities".

The balance of probabilities is a legal standard used in civil cases to decide the outcome of a dispute. This standard requires that the dispute be decided in favor of the party whose claim is more likely to be true (Davies, 2009) . This standard means that a court will declare an event to have occurred if it deems, based on the evidence, that the event is more likely than not to have occurred. Simply put, proving something on the balance of probabilities means proving that it is more likely than not to have occurred. This is unique because this standard is not usually used in criminal cases, but in civil cases. As is known, it is very difficult to find evidence in cases of sexual violence, whether in the form of evidence or witnesses. However, with this standard, victims only need to prove that the sexual violence they experienced was more likely than not to have occurred, reducing the burden of proof on the victim.

The Balance of Probabilities is not used in criminal cases because the consequences of a criminal conviction are generally loss of liberty or

imprisonment, unlike in civil cases where the penalties are limited to financial compensation or an order to do something. (Mulyadi Lilik, 2003) . However, in some cases, this standard is used as a theoretical justification for implementing a reversal of the burden of proof in certain provisions, such as in corruption cases (Vernanda Mariana Siahaya & Pinasang, 2021) . In practice, this would be similar to a weather forecast showing a 70% chance of rain. This is not a definitive answer like "it will rain tomorrow," but rather a possible answer based on the evidence presented (Chung, 2023) . Although this standard is not widely used in criminal cases in Indonesia, thinking in developed countries discusses the use of this standard in cases of sexual violence, for example in Canada, which is regulated in the Canadian *Human Rights Code* . This indicates that this standard has urgent importance to consider in the context of criminal cases because it can help resolve cases of sexual violence that are difficult to prove.

The balance of probabilities standard still considers all aspects, although its standard of proof is weaker than the standard often used in criminal trials. Therefore, in this system, someone must prove that the event is more likely than not, rather than the evidence itself. The balance of probabilities operates on a binary system where the only values are 0 and 1 (Davies, 2009) . The fact either occurred or it did not occur. If the court remains in doubt, this doubt is resolved by the rule that one party or the other bears the burden of proof. If the party bearing the burden of proof fails to do so, a score of 0 is returned, and the fact is deemed not to have occurred. If the party succeeds in proving the event, a score of 1 is returned, and the fact is deemed to have occurred. The victim will lose if the judge concludes that there is a 50% probability that the victim's case occurred. Conversely, if the judge concludes that there is a 51% probability that the victim's case is true, the victim will win. However, while the balance of probabilities standard can help in difficult-to-prove cases, it carries the potential for abuse. Judges must ensure that their decisions are based on strong evidence and that no external pressures influence the outcome.

One of the challenges in using the balance of probabilities standard is the concern that judges will experience external pressure in deciding cases so that the decision can still provide justice to the victim. To overcome this, the composition of judges was formed. *Section* 4 *Number* 1 of *the Tribunal of Sexual Harassment* itself has a court structure that is divided into 3 groups, namely (McKenzie, 2022) :

1. A Chief Justice and a Deputy Chief Justice who serve as members of the Judicial and Legal Services;
2. Five or more members who are former or currently serving as members of the Judicial and Legal Services, or advocates and lawyers with a minimum of 7 years of service;

3. Five or more members who have knowledge or practical experience in sexual harassment issues.

So, with a court structure like that, Section 12 (1) explains that in each trial the composition of the judges is:

The Chief Judge may be assigned to the Chief Justice or Deputy Chief Justice or someone from group 2 (office holders in the Judicial and Legal Services), and the remaining two members must be from group 3 (members who have knowledge or practical experience in sexual harassment matters).

This regulation also requires in Section 12 (2) that there must be at least 1 woman in the composition of existing judges, with this composition it is hoped that it can ensure that the interests and perspectives of victims, especially women who are vulnerable and often become victims of sexual violence, can be represented in the trial, in addition, female judges are also expected to provide a different perspective in the trial. The perspective of female judges is expected to help to see cases of sexual violence from the perspective of victims, especially women. In addition, judges in this tribunal are also allowed to ask questions and make decisions with a high court judge as a reference. If there is a matter that becomes a reference, then a Federal Advisor will be appointed who is authorized by the Attorney General to be present on behalf of the Court in every process representing the High Court Judge.

Indonesia itself does not have specific regulations regarding the composition of judges in sexual violence trials, but it does have provisions regarding the type of judges who can preside over sexual violence trials. The first requirement aims to ensure that law enforcement officers handling the case possess strong core values, namely honesty, fairness, and a pro-victim attitude. Furthermore, law enforcement officers must also possess in-depth knowledge and understanding of human rights, particularly the rights of victims of sexual violence. The second requirement aims to ensure that law enforcement officers have adequate skills and knowledge to handle such cases. This training is expected to equip law enforcement officers with knowledge of the law, procedures, and practices for handling sexual violence cases, as well as an understanding of trauma and the impact of sexual violence on victims. The composition of judges in Malaysia demonstrates a higher level of specificity, dividing judges into three distinct groups. Meanwhile, the criteria in Indonesia provide more flexibility by emphasizing values and knowledge that can be applied to various types of cases.

The next difference concerns the criminal sanctions that exist in Indonesia and Malaysia. Since the enactment of the TPKS Law, there have been quite significant changes to the criminal sanctions for sexual violence cases, because initially Indonesia used the Criminal Code which was a legacy of Dutch colonial law so that the things regulated are no longer relevant to the current

situation of Indonesian society because criminal acts are now much more complex, and the Netherlands has also made quite a lot of changes to the Criminal Code in their country with the most recent change being made on July 1, 2023. Therefore, special and more relevant regulations to increasingly complex cases of sexual violence need to be provided, but basically the punishment in Indonesia for cases of sexual violence is imprisonment or a fine accompanied by payment of compensation to the victim.

Meanwhile, Malaysia still uses the Malaysian *Penal Code*, similar to the Malaysian Criminal Code, to determine sanctions for perpetrators of sexual violence, and the forms of punishment provided by the Malaysian Penal Code are more diverse. One of the most visible is that Malaysia has caning as a form of punishment in addition to imprisonment and fines. Caning itself was introduced by the British during their colonial period in the 19th century, and many corporal punishments are still implemented due to the influence of Islamic law (Voices, 2023) . This punishment is a form of corporal punishment that has been accepted and practiced in Malaysia for a long time, both at home, school, and prison. Although there have been calls to abolish caning as a form of punishment in Malaysia, it remains unclear whether the public supports such a change because Malaysia is also a country with a very strong Islamic influence and this is permitted under Sharia Law (Ahmed, 2020) . So in conclusion, Malaysia still uses caning as a criminal punishment due to historical precedent, cultural acceptance, the legal framework, and public opinion.

Apart from the sanctions set out in public trials, there are also sanctions set out by *the Tribunal of Anti-Sexual Harassment* for perpetrators of sexual violence. Section 20 (1) states several forms of sanctions that can be given in this *tribunal , namely:*

(a) an order to the perpetrator to issue a statement of apology to the reporter as specified in the order;

(b) if the complaint relates to an act of sexual harassment committed in public, an order to the perpetrator to publish a statement of apology to the complainant in any manner as specified in the order;

(c) an order to the defendant to pay compensation or damages not exceeding two hundred and fifty thousand ringgit for any loss or damage suffered by the complainant in connection with the act of sexual harassment; or

(d) an order to the parties to attend any program deemed necessary by the Tribunal."

It can be seen here that the provisions of sanctions determined by this *tribunal* do not include imprisonment, because as discussed in the previous discussion, this *tribunal* uses a lower standard than that used in general courts so that crimes that are "depriving" of a person's freedom cannot be carried out in this *tribunal* ,

but sexual violence is also a complex problem that makes people who experience sexual violence have different needs. Some people only want compensation for medical or other costs, or for the negative impact of violence that occurred in their lives (Inga Ting, 2020) , so it can be seen that such methods can help victims to get the justice they want. After the trial, there will be a 30-day monitoring phase for the perpetrator to do what has been determined in *the tribunal* , if not given, they will be given a fine of double the amount of compensation and/or a minimum of 2 years imprisonment. If the victim is not satisfied with the decision determined by *the tribunal* , they are allowed to appeal to the High Court.

The analysis above shows that each regulation has its own differences and uniqueness in addressing the problem of sexual violence. Indonesia and Malaysia have different approaches in processing these cases. Indonesia has a processing flow that begins with a report of sexual violence, which can be made by the victim, witnesses, or parties who have knowledge of the incident. The investigation and inquiry process follows the rules stipulated in the Criminal Procedure Code (KUHAP) and the Law on Sexual Violence Crimes (UU TPKS), then the trial is conducted in a general court after the investigation process is completed. Malaysia has an additional option, namely *the Tribunal for Anti-Sexual Harassment* , regulated in *the Anti-Sexual Harassment Act 2022.* , *which* provides an alternative for victims to report cases directly to *the tribunal* without going through a lengthy investigation process. However, victims are also allowed to go directly to a general court, which can offer a faster resolution and focus on the victim's rights. There are also general trials in Malaysia that follow the procedures stipulated in *the Criminal Procedure Code* (CPC). Meanwhile, Indonesia does not allow extrajudicial settlements. Overall, this comparison reflects the efforts of both countries to improve access to justice for victims of sexual violence, with Malaysia paying particular attention to faster processing and protecting victims' rights, and Indonesia further improving access to justice by fulfilling victims' rights within the scope of general courts.

Regarding the standard of proof, Malaysia uses the " *balance of probabilities* " standard in *the Tribunal of Anti Sexual Harassment* . This means the court will decide based on the balance of probabilities, namely the extent to which an event is likely to occur, but in general the court still uses the principle of " *beyond reasonable doubt* ". Meanwhile, Indonesia has a higher standard of proof but also provides relief from proof to victims that is different from other crimes, namely witness and/or victim testimony that is sufficient to prove that the defendant is guilty, accompanied by one other valid piece of evidence accompanied by the judge's conviction. In general, a new crime is considered valid if accompanied by at least two pieces of evidence. This shows the difference in approach in determining the level of proof in sexual violence cases in the two countries, namely Malaysia,

especially in its *Tribunal of Anti Sexual Harassment,* prioritizes victim protection with a standard of proof that is easier to meet but limited to compensation, while Indonesia is more careful in imposing sentences, with a higher standard of proof and requiring stronger evidence, because there are also prison sentences that take away a person's right to freedom and must be decided carefully.

The differences in the composition of judges between Indonesia and Malaysia also reflect efforts to ensure balanced representation and a thorough understanding of sexual violence issues. While Indonesia does not have specific regulations regarding the composition of judges, moral and knowledge requirements are maintained to ensure fair handling. In contrast, Malaysia, where court judges generally do not have specific qualifications, *the Tribunal for Anti-Sexual Harassment* does provide several qualifications regarding the composition and qualifications of judges in sexual violence *trials* .

Finally, regarding criminal sanctions, both countries have quite severe penalties for perpetrators of sexual violence, with sanctions in Malaysia being more varied and including caning, which does not exist in Indonesia. This reflects the difference in approach to corporal punishment between the two countries, as the influence of Islamic law is quite strong in Malaysia, resulting in many penalties for certain types of sexual violence crimes being adopted by the Malaysian *Penal Code* , unlike Indonesia, which has abandoned this form of punishment due to human rights considerations.

Through this comparison, the advantages of each regulation can be seen, it can be concluded that Indonesia has an advantage in its general courts which have used special regulations, namely the TPKS Law, so there is a specificity regulated in the TPKS Law so that the judicial system in general trials in Indonesia is more appropriate to the conditions of victims of sexual violence, especially psychologically, while Malaysia still uses the CPC in its judicial system regulation, which means there is no special treatment for victims of sexual violence in Malaysia. In the regulations in Indonesia, it can be seen that there is attention and protection given to victims so that victims get justice in cases of sexual violence with a court process that is quite different from other criminal cases, such as regulations regarding evidence and special qualifications that must be possessed by Indonesian law enforcement officers in handling sexual violence. However, sexual violence regulations in Indonesia have shortcomings, namely that although these regulations provide a stronger legal basis in handling cases of sexual violence, there are still problems in terms of law enforcement and fulfillment of victims' rights, including limited evidence collection due to the difficulty of finding evidence that strengthens the occurrence of acts of sexual violence, for example, the lack of reports from victims or witnesses that can be used as evidence in the judicial process (Kadek Diva Hendrayana, Ni Putu Rai

Yuliartini, 2022) although it is permissible to submit victim statements alone, but still must be supported by valid evidence which makes it difficult to progress to the stage after the investigation and the judge has difficulty in giving his conviction on a case. Meanwhile, Indonesia also does not allow sexual violence cases to be resolved outside the trial so there is a contradiction here, namely Indonesia provides leniency to go to the trial process and determine the perpetrator is guilty, but it turns out that this leniency is not enough to make this case advance to the trial stage because according to the Criminal Procedure Code the evidence must be sufficient before moving on to the next process, namely prosecution and trial.

Malaysia has several shortcomings, namely that the general trial still uses the CPC, which certainly makes it difficult for victims to prove their cases with the principle of *beyond reasonable doubt* that is adopted and also lacks in maintaining the privacy and comfort of victims in court, but of course with this regulation there are harsher penalties than those in Indonesia because in certain types of sexual violence crimes there are inclusions of the death penalty, caning, and other corporal punishments that cannot be decided easily by the judge because the judge must truly have confidence in his decision because it is also related to a person's Human Rights. But with these shortcomings it can be seen that Malaysia does something unique in its criminal justice system by having an alternative route, namely *the Tribunal of Anti Sexual Harassment* which previously did not exist in other countries. In general, the legal fields that are made into a *tribunal are tax, immigration, and employment, but in Malaysia this tribunal* concept is used for sexual violence. Malaysia understands that the crime of sexual violence is a special crime and must be resolved in a special forum as well, so that victims also receive protection and resolution of their cases.

The conclusion from the comparison of these two countries shows Malaysia's advantages that Indonesia does not have and it is good to adopt what Malaysia has done well in Indonesia, namely viewing cases of sexual violence as special crimes and correcting the blind spots in Indonesian regulations that do not allow for any other resolution other than in court.

2. Comparative Analysis of Protection for Victims in the Criminal Justice System related to Sexual Violence in Indonesia and Malaysia

Mochtar Kusumaatdmadja said that the law has the purpose to harmonize and become the embodiment of order in society (Mochtar Kusumaatmadja, 1970) . Legal order is also a manifestation of the balance between justice, usefulness and legal justice as known as the theory of legal objectives pioneered by Gustav Radbruch (Muslih, 2013) . Justice is known as something abstract, however, conceptualism in justice is closely related to the protection of rights, equality before the law, and prioritizing the principle of balance between social

and individual interests so as not to harm one party or even both (Julyano et al., 2019) . As intended by Satjipto Rahardjo, legal protection can be interpreted as a provision of protection for Human Rights that are concretely harmed by others so that the harmed person can still enjoy their rights granted by law even though they have been harmed.

The rights of victims referred to by van Boven are the right to know, the right to justice and the right to reparation (recovery), namely rights that refer to all types of recovery, both material and non-material, for victims of human rights violations (Ismail, 2018) . Therefore, it can be said that the justice system, especially regarding sexual violence, is an effort made by each country with one goal, namely to realize adequate protection for victims of sexual violence and achieve justice. The United Nations (UN) made a declaration which is an appeal to its member countries, including Indonesia and Malaysia, called *the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. This declaration is an important document that states what victims' rights must be fulfilled by a country. Some of the main principles outlined in the declaration include:

a. Access to Justice: Victims must have access to the justice system and be treated with fairness, respect and dignity throughout the legal process;
b. Restitution: Victims have the right to seek and obtain restitution from the perpetrator of the crime for the harm they have suffered, which may include the return of property or compensation for financial losses. In cases where restitution is impossible or insufficient, victims have the right to seek and obtain compensation from the state or other sources for the harm they have suffered;
c. Assistance, Support, and Protection: Victims must receive appropriate assistance and support to aid their recovery, including medical, psychological, and social services. Victims and their families must also be protected from intimidation, retaliation, and further harm resulting from their involvement in the criminal justice process.

These principles emphasize the importance of recognizing and addressing the needs and rights of victims in the criminal justice system, ensuring that they are not neglected or marginalized in the pursuit of justice ("Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," 2021) . This declaration also includes the theory of victim protection , which states that protection occurs for victims of crime and their recovery after being victimized. The main principle of this theory is that criminal law must consider the interests and needs of victims in the judicial process (Trechsel, 2009) . It can be seen in this regard that the points conveyed in the declaration and the theory of victim protection not only accommodate victim protection during the process in a particular case, but also after the case occurs, because it cannot be denied that many regulations specifically post-trial are only

burdensome to the perpetrator and unequal to the victim, especially in cases of sexual violence in many countries around the world. Therefore, legal protection is something that protects human interests, including in the effort to seek justice. This protection has two meanings, namely protection against becoming a victim of a crime and protection to obtain legal guarantees/compensation for the suffering/loss of people who have become victims of a crime (Arief, 2005) .

Protection of victims is not only during the trial, but after the trial is very important because when a crime occurs, losses arise for the victim, including costs for treatment, medical, costs for damage or loss of goods, costs for mental health care, criminal justice costs, and loss of time, for example in the case of victims who have to be treated in the hospital leaving school, seeing a doctor, or the police, prosecutors, replacing damaged goods (Doerner, 2012) . A victim can experience suffering, mental loss, physical loss, social loss. According to JE Sahetapy, a good measurement of compensation can be seen from whether or not the regulations are able to support the settlement of appropriate, fast, and affordable compensation, so that victims of criminal acts do not become structural victims (Sahetapy, 1987) . Therefore, we will see whether Indonesia and Malaysia have provided good protection for victims based on the points that have been explained previously and if not, what are the things that can be improved that we will compare with legal protection in Malaysia with efforts to create good protection for victims of sexual violence.

Based on this and several efforts by both countries to fulfill legal protection in each country for victims of sexual violence, this will be compared with the points contained in *the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* as an indicator. First, regarding access to justice, it can be seen that Indonesia has strived to provide good victim protection in its trials. Indonesia ensures that victims are treated with dignity, also maintains the victim's privacy, and strives to establish specific qualifications that must be possessed by law enforcement officers handling these cases because Indonesia recognizes that sexual violence cases are sensitive cases and for fairness to proceed, law enforcement officers who thoroughly understand how to navigate sexual violence cases. Indonesia has also provided specific provisions regarding evidence. Previously, the victim's statement alone could not be used as evidence, but now it can be used as evidence if accompanied by one other piece of evidence with the conviction of the judge. This shows that Indonesia is trying to improve access to justice for victims, especially after the enactment of the TPKS Law. However, it cannot be denied that evidence for sexual violence cases is difficult to obtain, resulting in sexual violence cases often being stopped and not progressing to the next stage or judges having difficulty determining the suspect's guilt, because even though there are regulations regarding the qualifications of law enforcement officers, many law enforcement officers do not meet the qualifications to handle sexual violence cases in Indonesia. Indonesia also does not allow other solutions outside the courts,

which makes *restorative justice* or other forms of resolution impossible except in cases involving children. However, with no other way out than the courts, sexual violence cases are also difficult to resolve and make it difficult for victims to get access to justice because it is difficult to get proper legal certainty.

Malaysia has a general court system that is arguably worse than Indonesia's. The comparison above shows that Malaysia, which still uses the CPC and treats sexual violence as if it were not a general crime and does not create specific provisions in its handling, will certainly make victims feel uncomfortable and cause additional trauma. However, with this weakness, there are also advantages: Malaysia is trying to create *a Tribunal for Anti-Sexual Harassment* , which provides an alternative for victims to take their cases to court without going through an investigation. However, this *tribunal* can only award compensation to the perpetrator, and imprisonment can be imposed if the perpetrator fails or is late in paying the compensation fee set by *the tribunal.* Therefore, crimes that "deprive" a person of liberty cannot be carried out in this *tribunal.* However, sexual violence is also a complex problem that makes people who experience sexual violence have different needs. Some people simply seek compensation for medical or other costs, or for the negative impact of the violence that occurred in their lives (Inga Ting, 2020) . Therefore, the decision to create this tribunal also has a positive side that can be emulated so that victims of sexual violence can receive justice.

The second point of difference concerns compensation, which is also related to the first point. The TPKS Law is quite good in regulating the flow and technicalities of granting restitution and compensation so that victims can be assured of receiving compensation. However, because the TPKS Law does not regulate the technicalities of requests and rejections of restitution by the court, this regulation still uses Supreme Court Regulation No. 1 of 2022 concerning Procedures for Settling Requests and Granting Restitution and Compensation to Victims of Crimes, just like other criminal cases. If the request is rejected, as stated in Article 9, then the path that can be taken is a civil lawsuit (Mahkamah & Republik, 2022) . Meanwhile, civil lawsuits also have several shortcomings because in practice, civil courts have difficulty resolving cases (Manik, 2022), especially in cases of sexual violence, which results in a slow process, high costs, and the need for a judge's prior determination that a crime has occurred. Furthermore, the lack of a nominal amount means that the judge's decision can be lower than what has been requested and does not correspond to the costs that the victim must bear for their losses. According to the LPSK (Indonesian Victim Protection Agency) report in 2022, there were quite a number of cases where the restitution amounts differed from those decided by judges. Furthermore, although it is stipulated that law enforcement officers handling sexual violence cases must have special qualifications, some officers still argued that this occurred because they lacked experience with the restitution mechanism. As a result, judges ultimately only decided on the material value and failed to accept the immaterial assessments requested by

victims. The LPSK Annual Report also reported that the restitution execution for victims was less than 10 percent of the court's decision, which was only around Rp101 million. This is despite the LPSK's restitution assessment being around Rp7 billion, while the court's decision was only Rp1.3 billion. One year later, the restitution settlement for the victim remains unchanged. Of the total court verdict of Rp 3.7 billion, the perpetrator has only paid Rp 279 million.

Meanwhile, in Malaysia, because it has *a Tribunal of Anti Sexual Harassment* , Malaysia has an alternative way that victims can take before going to court, then the victim can file a report to *the Tribunal* first and if they are not satisfied with the results in this *Tribunal* , they are allowed to file an appeal to the High Court to process the case further and fight for compensation for restitution and compensation costs, so the settlement of the case is not longer like in Indonesia with a Civil Lawsuit, but is submitted as an appeal. This system makes the legal protection of victims regarding their rights to compensation guaranteed, in addition there are already nominal standards of minimum and maximum amounts that have been set by *the Tribunal of Anti Sexual Harassment* which makes victims able to estimate in advance regarding the cost of compensation obtained before choosing to take this alternative route or take the general trial route which is more complicated and complex and does not necessarily get compensation costs that are commensurate with the losses suffered, because there is no precedent standard for fair judge decisions to be a benchmark for nominal restitution decisions in Malaysia which results in it often being unfair. However, it can also be noted that Malaysia sets a maximum standard for the nominal compensation for victims, which is not necessarily good for the victims because if the cost of the victim's losses is above the maximum standard, there is no further clarity from Malaysia regarding the regulations on this matter.

In addition, Malaysia does not have additional regulations regarding what happens if the perpetrator cannot pay the damages, while in Indonesia there are regulations regarding this, namely there is a seizure of the defendant's assets and if it is not enough there will also be compensation from the government for the victim to pay the shortfall, although in its implementation it is also an obstacle for Indonesia because a special *victim fund is needed* for this, because according to Rainy Mairike Hutabarat, Commissioner of the National Commission on Violence Against Women, this Victim Assistance Fund can be obtained from philanthropy, society, individuals, corporate social and environmental responsibility, other legitimate and non-binding sources and the state budget in accordance with the provisions of laws and regulations. Unfortunately, until now, the Victim Assistance Fund along with the implementing regulations as mandated by the TPKS Law in the form of government regulations and presidential regulations are still in the process of being finalized. This victim assistance fund system is quite good in Indonesia and can be emulated by Malaysia, but its implementation is less effective (Jasmine Floretta VD, 2023) .

Another difference concerns the institutions that provide assistance, support, and protection. Although not specifically handling sexual violence cases, Indonesia does have the LPSK (Lembaga Perlindungan Sosial / Lembaga Masyarakat ...

Based on these findings, several recommendations can be drawn to improve victim protection, particularly in Indonesia. First, Indonesia can adopt the *Anti-Sexual Harassment Tribunal* as an alternative for victims. Indonesia can provide a more accessible forum for victims who are reluctant to report to the authorities, and the resolution process will be faster than in public courts. Adopting this *tribunal system* can be a solution and allow victims to seek alternative avenues besides public courts, which can ensure protection for victims because it has clear regulations and qualifications. Similar to Malaysia, this can be a solution for victims who cannot or do not want to process their cases in public courts due to the complicated and expensive process, but with several adjustments that must be made. The adoption of *the Anti-Sexual Harassment Tribunal* in Indonesia needs to involve several important steps to ensure its success and effectiveness.

First, regulatory adjustments are needed to ensure that the new regulations accommodate the establishment of *the Tribunal of Anti Sexual Harassment* in accordance with the Indonesian legal context, because Indonesia does not understand the concept of a tribunal in its legal system, so this system can be created with a Special Court for Sexual Violence like the Corruption Court and the Children's Court.

Second, Indonesia can implement a minimum restitution system to ensure victims receive at least enough funds to cover physical and mental medical expenses. This provision could be formulated as a Ministerial Regulation (Permen) to establish technical guidelines and operational standards regarding the minimum restitution amount, which is currently mandated by the TPKS Law and has not yet been finalized by the government. This determination is considered crucial to ensuring victims receive the necessary recovery after the incident.

Based on these conclusions, both countries have implemented several effective mechanisms for victim protection, despite some shortcomings, particularly Indonesia. It's undeniable that Malaysia has weaknesses in its legal protection, particularly in its courts, compared to Indonesia. However, regarding compensation, Indonesia can learn from Malaysia to develop a better system than the current one. This alternative criminal justice system, in the form of *a tribunal*, could also be an effort to improve legal protection in Indonesia with appropriate adjustments and adoption.

CONCLUSION

Based on the research that the author has conducted, two conclusions were obtained, namely:

1. A comparison of these two countries reveals differences in how they address sexual violence cases, using established and implemented regulations. These differences are evident in the judicial process, the adjustments in evidentiary

standards implemented by the two countries, the composition and qualifications of judges required to handle sexual violence cases, and the sanctions imposed by each country.

2. The efforts of each country to improve the protection of victims of sexual violence from the regulations existing in each country are categorized as quite appropriate according to the indicators of *the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

SUGGESTION

Based on the research that has been conducted, the author provides the following suggestions:

1. In addressing the lack of alternative solutions related to sexual violence, Indonesia can adopt the *tribunal system* that has been implemented in Malaysia, with adjustments to the Indonesian context because this alternative concept is not known in Indonesia, so Indonesia can build a special court for sexual violence.
2. Indonesia can also learn from Malaysia to provide certainty about the minimum nominal compensation for victims based on the average nominal recovery for sexual violence that can cover the costs of victims to obtain legal services, as well as physical and psychological recovery.

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