



The Indonesian Restorative Justice Application during Covid-19 Pandemic

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Abstract. Since the first Covid-19 case was reported in March of 2020, the development of the Corona Virus Disease 2019 (Covid-19) pandemic in Indonesia has experienced active cases with the death rate graph dynamically increasing. Various efforts were continuously made within the Indonesian legal system, including how to protect the people who become victims of social stigma and discrimination in line with diagnosed and misdiagnosed Covid-19 sufferers. Covid-19 sufferers used to be burdened with humiliation, outcast, and disrespect occurred within the family or local community making them victims for restorative application. As stigma and discrimination had victimized into psychological effects and social conditions, McCold's suggestion of restorative application known as the Primary Stakeholder, explains losses recovery. Using the theory, Indonesian Legal System has responded, however limited to cases of minor crimes, women dealing with law, children, and narcotics.

Keywords: Covid-19; Indonesia; McCold; Restorative justice; victims

INTRODUCTION

Since the first Covid-19 case was reported in March of 2020, the development of the Corona Virus Disease 2019 (Covid-19) pandemic in Indonesia has experienced active cases with the death rate graph increasingly sharp. Active cases and deaths graphs tended to show fluctuation since the beginning of April 2020 but tend to slope up to 2.71%, in 2021 (KPCPEN, 2021). Various efforts are continuously made by the government in various aspects of legal, economic, social, and security policies. However, there are still other policies that must be done especially in respecting laws and human rights.

Issues on how to protect victims who are medically diagnosed as well as misdiagnosed as Covid-19 sufferers have arisen legal and social concerns. In many cases, actions in line with the status of pandemic Covid-19 have initiated stigmas of psychological effects within society. The act of misdiagnosing patients by stating the status of patients who were exposed to the virus and died often worsened the social victimization. This was inflamed by the misinformation stigma of the pandemic. A

study published in *The Journal Brain, Behaviour, and Immunity* (2020) involving 265 men and 137 women regarding mental health and psychiatry of sufferers showed that one of the reasons of exacerbated psychological condition in patients were instigated by the emergence of social stigmas about the Covid-19. Those who were exposed to the disease or misdiagnosed are the most affected object of social stigma and are surely experiencing unpleasant conditions or unfair social treatments. This is why legal provisions and human rights applications have to pay attention to them as victims that are entitled to receive appropriate treatment. An applicable approach of restorative justice is needed as social stigma has victimized them including those medical staff struggling with the pandemic.

This article is limitedly discussing restorative approaches of justice that could be given to victims of community and social stigmas of both patients-families and medical staff. To this, the Indonesian legal system has to continually implement restorative applications in the judicial system.

Diagnosing and Stigmas

During the COVID-19 pandemic, all forms of activities, policies, and state finances were massively deployed to break the chain of virus spread. By this, it is commonly seen in the news on the Covid-19 development incidences of misdiagnosing to virus exposed patients. As reported by Reuters, more than 1,300 people in the UK received medical misinformation stating their status as Covid-19 infected. The error was caused by a UK government lab's misdiagnosis of the virus testing and tracking system (*Reuters*). A similar incident also occurred in Singapore (*The Straits Times*) when an error was found in the result of suspected Covid-19 specimens of Jurong West Secondary School Tan Tock Seng Hospital (TTSH). It was said that the laboratory mislabelled the test sample without verifying the patient's identification on the specimen tube.

Similar incidents also occurred within the country as reported in *Deliserdang* (TuntasOnline.Com) where the *Mitra Medika Tembung* Hospital became a public concern because families of the Covid-19-suspected patient found an error in the identification and status label of the questioned corpse. Media of Kompas.com and other online media also reported the same various forms of misdiagnosis and treatments to patients that happened all over the country. These errors must be certainly concerning.

On the other hand, the term stigma is described as a negative view of someone with a certain disease or condition. In simple words, stigma is a sign of disgrace distinguishing a person from others, as he/she has a disease. Hence, he or she is no longer seen as an individual but as part of a stereotyped perspective where negative attitudes and beliefs towards them are applied. This is sometimes followed by the act of prejudice leading to negative actions and discrimination (<http://www.health.wa.gov.au>). Stigma and acts of social discrimination can

exacerbate the health and conditions of people to slowly getting the help needed (Health Division et al.). A simple example of stigma is the depiction that a criminal is often said to have certain mental illness characters as a 'dangerous' stereotyping that every mental illness is dangerous and should be avoided (Link & Phelan, 2001). Goffman identifies three types of stigma: (1) stigma associated with mental illness; (2) stigma associated with physical deformation; and (3) stigma attached to the identification of race, ethnicity, religion, ideology, etc. (*Deviance and Social Stigma - Social Sci LibreTexts*,).

Some of the impacts caused by the presence of stigma include the emergence of feelings of shame, hopelessness, isolation, reluctance to ask for help or treatment exacerbated by lack of understandings from family members, friends, or other people, lost opportunities to get a job or social interaction, intimidation, violence, physical abuse or harassment, or self-doubt where a person feels that he or she will never be able to cure their illness or achieve what they want in life (Barry et al., 2014; Pescosolido, 2013; Yanos et al., 2020a). The question is whether those who have been diagnosed with COVID-19 experience the stigma or feelings described? Legal Aid Foundation (LBH) of Makassar has released that the spread of Covid-19 has frightened the community since it was announced in March 2020. The death rate has made the public panic aggravated by the government's less transparency and attitude in responding to the spread of the Covid-19 Pandemic (*LBH Makassar | Press Release*). The impact of the 'over panic' ultimately caused the public's excessive fear responding to the spread of the Virus has impacted to negative social stigma and discrimination against those indicated to have Viruses. Even doctors and nurses who are acknowledged to have contacted and treated Covid-19 patients are also included in the stigma and discrimination. Families of patients who are suspected of being positive also suffer from negative stigma and are avoided by the community members as they are considered as disgrace carriers, although some finally received negative notes. This was shown when those Covid-19-labelled corpses are rejected to be buried by residents around the cemetery (*kompas.com*.)

Stigma and Victimization

Ejection from the rented house (<https://health.detik.com>), residents refuse to bury the family of a nurse who was diagnosed Covid-19 (<https://news.detik.com>), an ambulance driver who was shot fearing he carried covid-19 patients (<https://news.abs-cbn.com>), or a nurse who was doused with chemical liquids and refused to entry supermarkets, restaurants, laundry facilities, and public transportation are just a few of victimization forms experienced by medical staffs in line with social stigma during this pandemic. One of the reasons for discriminatory treatment and public stigma to medical staff is because they are considered members of groups who are frequently associated with the Covid-19 virus. This social victimization behaviour is caused by the unclear distribution of sceptical stigma

about the actual progress of a COVID-19 virus within a person. Hence, public education concerning the existence of the pandemic virus is not properly socialized. Residents remain to believe that viruses from corpse bodies of COVID-19 patients can still transmit surrounding the cemetery. The victimization process resulting from social stigma doesn't need pieces of evidence to prove the opinion, as normal legal procedure, but prejudice. Also, it can directly turn into 'guilt by association', a condition in which a general assessment is used to the overall situation of error although it was merely conducted by partially one or a few people (Molet et al., 2013).

On the other hand, Covid-19 patients and those misdiagnosed were also experienced victimization under social stigma and discrimination, as they also are experiencing social neglect, refusal, or ostracization from their society. They are all are victims, regardless of the cause of victimization including natural disasters, accidents, technological disasters, human rights violations, abuse of power, to victims of this massive pandemic, including them who then get stigma, discrimination, attacks, and insults (Fattah & Sacco, 1989). Criminology acknowledges them as secondary victimization, public negative reaction after primary victimization in the form of acts or attitude violates the rights of the victim. It is often interpreted as behaviours, attitudes, and practices that blame the victim committed by the community, which causes trauma or suffering to the victim.

Restorative Applications

To use the idea of restorative justice as an effort for a universal remedy is indeed not simple. The challenges faced are how to carry out and harmonize diverse perspectives and approaches in responding to dynamically evolving needs of the community (Barton, 2000)(Braithwaite, 2017) (Wachtel, 2013). In the past, the legal system that tried to find out who are the victims and who are perpetrators was considered to give a sense of satisfaction within the legal system.

This usually ended by bringing perpetrators into the prisons. However, not all crimes can be solved fairly by just bringing the perpetrators behind the bars (<https://www.victimsofcrime.vic.gov.au>).

Some crimes show a sense of suffering mostly from victims. Victims of a crime of rapes, or social stigma in the form of ostracism, expulsion, or slander by the community are crimes that focus more on the suffering experienced by victims rather than perpetrators. Therefore, the sense of satisfaction of victims after seeing the perpetrators put behind bars does not mean that justice has been achieved because there is another sense of social justice still missing. The community needs to feel a sense of satisfaction as a sense of social justice to extend the level of norms and law within the community's life.

For this reason, an approach of restorative justice is expected to provide a more harmonious concept in law under reasons that restorative justice application

ensure the participation of all stakeholders to restore peace and harmonious coexistence of conflicting interests in society while focusing on reintegration between victims and perpetrators and removing normal crime descriptions from society. Therefore, the victim's existence needs to be known as the main focus of the concept is to recover the condition of victims and the surrounding community. In searching for the victim, the concept and definition of the victim are necessary. The United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse mentioned the term 'victim' as *'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that violate criminal laws operative within the Member States, including those laws proscribing criminal abuse of power'*. Ezra's opinion (Fattah & Sacco, 1989) states that victims can occur from the process of stigmatization in society as well as those who were diagnosed or misdiagnosed as Covid-19 sufferers. It is clear that stigmatization has made people humiliated, outcast, disrespectful, or treated as criminals. It occurs within the family or local environments of the community.

Having theoretical support for this victim protection, McCold provides a restorative justice conceptual theory known as the Primary Stakeholder (McCold & Wachtel, 2003). The theory explains the conceptual structure of restorative justice within 'the Social Discipline Window, 'Stakeholder Roles', and 'Restorative Practices Typology'. The structure of the concept of Stakeholder Roles is explaining the losses caused by an existing crime where each stakeholder of a violation requires special needs to recover. In Restorative Practices Typology, the concept is determining best practices to repair any existing damages by looking at their necessary needs. This McCold's Primary Stakeholder concept could provide answers questions of what and how restorative justice applied especially for those who are victims of the negative social stigma of the Covid-19 pandemic.

	Harm	Needs	Responses
PRIMARY STAKEHOLDERS			
Victim(s)	Direct	specific	active
Offender(s)	Direct	specific	active
Families+	Direct	specific	active
SECONDARY STAKEHOLDERS			
Neighbors+	vicarious	aggregate	supportive
Officials+	vicarious	aggregate	supportive

Although the primary stakeholder theory is difficult to determine who the victim or perpetrator of a crime is, this concept is still suitable as the victims are

defined. Therefore, Restorative Practices Typology shows a process involving primary stakeholders in determining how to repair the damage done by a crime in the best way. The Typology of three existing primary stakeholders has different needs and responsibilities, and which must be taken up in achieving reconciliation. The relationship between the three main actors in the restorative justice process is carried out to interact with each other emotionally between the parties. This emotional interaction will be very meaningful in making restorative decisions, therefore this concept provides a significant opportunity for restoration, because, with this emotional interaction, the purpose of restorative justice will be seen.



Responding to this condition, a restorative application is shown within the Decree of the Republic of Indonesian Supreme Court (MARI) No:1691/DJU/SK/PS.00/12/2020 as Guidelines for the Restorative Justice Implementation with a general judiciary institution. However, the implementation of the concept is limited to cases of light criminal acts or minor crimes, women dealing with law, children, and narcotics. Also, the standpoint of victim term is not explicitly regulated in the Criminal Procedure Code, except for the description of the victim who is also standing as a witness.

Nevertheless, the Law no. 13 of 2006 concerning the Protection of Witnesses and Victims-UUPSK is a significant protection regulation for victims. This regulation also protects victims' family members who are entitled to receive compensation as ruled within the Government Regulation no. 44/2008 concerning Compensation, Restitution, and Assistance to Witnesses and Victims.

The question that arises is whether victims of social stigma in the Covid-19 pandemic are included as protected victims according to the UUPSK regulation? As Article 1 (2) of UUPSK states that 'Victim is someone who experiences physical, mental, and/or economic loss caused by a criminal act', the notion of 'caused by a criminal act' then should be defined accordingly whether those victims of Covid-19 are included. The same question is whether victimization is a criminal act? In Victimology, psychological/emotional damage, physical or sexual injury, or economic loss suffered by someone is important points to be considered as a victim, although perpetrators to the condition are legally unclear. Then, victims of social stigma are victims who should be protected as restorative justice applications. By this, the



Witness and Victim Protection Agency (LPSK) should, accordingly, add to the provision of Article 1 point 3 regarding the duties and authorities of the LPSK on the stigma victims protections. These protections are providing more psycho-social rehabilitation assistance or fulfilling accompaniment, information regarding their cases, costs reimbursement, legal advice, living expenses, and so on.

Also, these proposed protections are constitutionally supported as mentioned within the 1945 Constitution on Article 1 (3) stating that Indonesia is a state of law, therefore, everyone has the rights to recognition, guarantee, protection, and fair legal recognition and to receive legal certainty and equal treatment before the law (Art. 3 (2)). Article 5 paragraph (1) also states 'Everyone is recognized as an individual human being who has the right to demand and receive same treatment and protection following human dignity supported by the Article 28 (i) paragraph (2) stating that Everyone is free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment and the Article 281 paragraph (4) stating 'the protection, promotion, enforcement and fulfilment of human rights is the responsibility of the state. These constitutional restorative justice standpoints are the reason to have the concept apply in the covid-a9 victims.

Consequently, using Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP) as well as the Regulations of the Supreme Court followed by a Memorandum of Understanding of the Supreme Court, Law and Human Rights Ministry, Attorney General, and the State Police, the implementation of restorative justice is carried out as quick as possible in a simple way. The settlement of restorative justice is carried out harmoniously between perpetrators, victims, families of perpetrators/victims, and related community leaders. If peace is reached, the parties make an agreement signed by the defendant, victim and related parties mentioned the judge's decision. If the peace agreement is not successful, the judge will continue the trial while striving for peace and restorative justice application. Judges must proactively encourage children/parents/legal counsel and victims as well as related parties (Penitentiary Community Advisor Social Workers, Community Representatives) to seek peace. In the case that a child who is not yet 14 (fourteen) years old, the decision should consider returning to parents or to someone, special treatment in a hospital or LPKS, obligation to attend formal education and or training held by the government or private bodies.

The application of Restorative Justice to a victim of women as stated in The Convention on the Elimination of All Form of Discrimination Against Women that ratified by Law No. 7 (1984) as well as the International Covenant on Civil and Political Rights that ratified to Law No. 12 (2005) supported by Law No. 23 (2004) concerning the Elimination of Domestic Violence, judges has to consider gender equality and non-discrimination process to avoid social and gender stereotypes. By this, the judge must consider the losses suffered by the victim and the impact of the case as well as the need for recovery for the victim by notifying the victim of their

rights regarding the compensation. In addition, the Court is required to provide a list of Professional Social Workers according to their needs. Based on Article 10 of the Supreme Court Regulation No. 3 (2017), this can be done through long-distance audio-visual communications.

Socially, restorative justice is also applied to victims of social stigmas. Restoration applications could be in the form of suggestions:

1. Victims should get treatment where they should not be left afraid of being labelled with certain stigma names so as not to prevent them from seeking help. This treatment provides relief by identifying what is wrong to reduce bothersome symptoms.
2. Do not let stigma create self-doubt and shame as sometimes strikes are from internal families. Therefore this stigma must be controlled by self-education.
3. Do Not do self-isolating or shutting down to tell about the trauma. Family members, friends, religious leaders, or the community can support if they care. By contacting them, compassion, support, and understanding will help.
4. Don't equate victims' physical bodies as the disease. So instead of saying 'I am traumatized', it is better to say 'I have a trauma disorder'.
5. Therefore, victims should join local and national groups that offer programs and resources in reducing social stigma. In addition, assistances in schools, offices, or government institutions must be done to avoid discrimination, because discrimination is a violation of the law (Alonso et al., 2008; *Fight Stigma and Support Mental Health | Depression Center | Michigan Medicine*, n.d.; Oexle et al., 2018; Pescosolido, 2013; Schnyder et al., 2017; Sickel et al., 2019; *Stigma and Discrimination*, n.d.; Yanos et al., 2020b)

Closing Remark

Although McCold's primary stakeholder concept provides a significant explanation on the matter, it still shows the problematic application as first, emotional interaction carried out by the three main parties, even though using a mediator, could risk a 'street court' process as unilateral anarchism action of parties involved. Clashes of victims or families and other parties are not under the objectives of restorative justice. Secondly, the process of emotional interaction, whether carried out through mediation, or other means such as family conferencing, or the Restorative Circle will implicate Indonesian positive law that affects the existing application of the criminal system as well as the evidentiary process law, form of sanctions, and other legal consequences. This phenomenon is not a negative thing for Indonesian law development, but given the fact of varied forms in Indonesia's legal system, as well as poor law enforcement practices and inadequate legal culture, this picture is difficult to achieve (Irsyad Dhahri Samad, 2018).

Meanwhile, steps that have been taken by Indonesia on the concept of restorative justice have indeed become wide discourses and discussions by both

government and academic institutions. This gives hope for its development within the judicial system in the country. Although not all justice systems can apply this concept, the use of the concept has adapted to the Law 11/2012 concerning the Juvenile Criminal Justice System. The concept of a restorative justice settlement can prevent children from the stigma and will ensnare them in the future. In addition, the Prosecutor's Office and the Supreme Court have also applied the concept of Restorative Justice, especially against criminal threats under 5 years and fines below 2.5 million rupiahs.

However, the application of the restorative justice concept is not without obstacles. This is seen because the victim is an important factor in the settlement of criminal cases sometimes and tends to refuse to be reconciled. Also, the diversion settlement mechanism which so far has only relied on compensation and the mechanism 'return to parents' that is initiated by law enforcement officers often fails. The reason for the failure is the lack of significant understanding of the concept by the law enforcement officers who have so far still been oriented to the crime control model. In addition, the lack of infrastructures in implementing the model is inadequate where the sectoral ego of law enforcement agencies still high.

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