

Impartiality of article 285 of the Indonesian criminal code against women victims of rape

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Abstract

Complaints of rape cases have increased, around 16 (sixteen) to 20 (twenty) percent annually based on the records of Komnas Perempuan in 2020. Of these complaints, only 10 (ten) percent have entered the legal process, and very few have been resolved until court decision process. The investigating apparatus still considers the element of coercion to be physically proven by using a *visum et repertum*. Physical evidence is very easy for a recent rape case, but it can be an obstacle for victims who do not immediately make a complaint, where the physical evidence is no longer visible. This is because the victim is still experiencing severe psychological trauma with myths and stigma against victims of rape, as the source of the rape. Even in the legal process, the question always arises, whether the victim fought back, and if there is no resistance then it will be difficult to physically prove it, even the assumption that the victim agreed to the rape. In a situation of fear, there is a motor reaction which results in a psychological result that makes the victim unable to resist, this is called tonic immobility. As a result, the legal process becomes difficult for rape cases or the legal process stops because there is no evidence of coercion being fulfilled. The victim experiences loss or blaming the victim. Even though in Article 285 of the Criminal Code, the criminal act of rape is an ordinary offense, which means that a criminal act can be prosecuted without the need for a complaint from the victim, in reality the legal process really requires the active role of the victim.

Keywords: elements of coercion, rape, women, Article 285 of the Indonesian Criminal Code

1. Introduction

The criminal act of rape is not a new phenomenon, but it can occur repeatedly with the same motive, whether committed individually or in groups or commonly referred to as gang rape. Rape can not only occur in the public sphere (schools, offices, public transport and so on) but can also occur in the private sphere (house, boarding room and so on). And it can also happen in a marital relationship, this is commonly known as marital rape. In a complex situation like this, the existence of a special regulation on sexual crimes is urgently needed but it has not received support from most legislators, until finally the Draft Law on the Elimination of Sexual Violence (hereinafter referred to as the PKS Bill), which specifically regulates sexual crimes, must be postponed for discussion.

In 2017, the Central Statistics Agency (BPS) conducted a survey. The survey results indicated that the forms of sexual violence experienced by respondents were in the form of rape and acts that demean women ^[1].

Table 1: Data on Sexual Violence from BPS

Doer	Physical abuse	Physical and Sexual	Sexual
Couple	7,7%	4,6%	6%
Besides the couple	5,2%	4,1%	14,4%

Source: Processed by researchers from the 2017 BPS Survey

From the BPS statistical data, it can be shown that rape against women can also occur in a paired relationship, the couple in question is a marriage bond (marital rape). Based on this data, BPS can reveal that one in three women has experienced sexual violence.

The special regulation on sexual crimes becomes very urgent because based on the results of monitoring by Komnas Perempuan from 1998 to 2015, it has proven that the increase in complaints of rape crimes is around twenty-three percent (23%) per year. Komnas Perempuan stated that there are 35 people every day who become victims of sexual violence including rape ^[2]. Only ten percent of them continued to legal proceedings, some of them even stopped until the police were issued with an order to stop

² Komnas Perempuan conducted monitoring for 15 years (1998 - 2013), which identified 15 forms of sexual violence as follows: (1) Rape; (2) Sexual Intimidation including Threats or Attempted Rape; (3) Sexual Harassment; (4) Sexual Exploitation; (5) Trafficking of Women for Sexual Purposes; (6) Forced Prostitution; (7) Sexual Slavery; (8) coercion of marriage including hanging divorce; (9) forced pregnancy; (10) Forced Abortion; (11) Forced contraception and sterilization; (12) Sexual Torture; (13) The punishment is inhuman and sexual in nature; (14) Traditional practices of sexual nuances that harm or discriminate against women; and (15) Sexual control, including through discriminatory regulations based on morality and religion.. *Executive Summary Naskah Akademis Rancangan Undang-Undang Penghapusan Kekerasan Seksual*. Komnas Perempuan, Jakarta, 2016, hlm 3.

¹ In the survey, BPS uses the term forced sexual relations which literally means the same thing. The number of respondents was 8757 women aged 15 to 64 years, who were in the household stated that the perpetrator of sexual violence was a partner and other than a partner. Non-partner means parents or parents-in-law, family, friends or neighbors, teachers or educators, strangers, security forces, employers and others. Data Collection Results, Women Life Experience Survey (SPHPN) 2016 Central Bureau of Statistics. <https://www.bps.go.id/brs/view/id/1375>. Retrieved on March 3, 2020, at 1.51 WIB.

investigation (SP3). This legal problem has occurred in India in 1998, based on a special report on India Abroad, showing a sample of 105 cases of rape that went to court, but only 17 cases convicted the perpetrator^[3].

The absence of legal firmness also contributes to making every woman in Indonesia a potential victim of rape, women who come from various age categories and social strata of society. According to Sadock, women aged 10 to 29 face the greatest danger of rape^[4]. The age range is the age range of children and adolescents based on the age formula of the World Health Organization (WHO)^[5]. This happened to Maria Schneider, an artist in the film *The Last Tango In Paris* in 1972. At that time Maria Schneider was 19 years old, Maria was raped in the film scene. The director, Bertolucci, conspired with Marlon Brando, Maria's co-star. Bertolucci's reasoning at that time, the rape scene had to get a real expression from Maria. As a result, Maria was severely traumatized until the end of her life. Only then did Bertolucci admit to his guilt in permitting and allowing rape to exist^[6]. Visualization of rape in the media is still happening. In today's digital era, actors can easily use technology to record them. It happened in the case of Rose Kalembe's rape in 2009, then the perpetrator uploaded it to the Pornhub site^[7]. In Lampung, the perpetrator deliberately recorded the rape and made it a status video on WhatsApp^[8]. The visualization of rape in the media causes the victim to become repeated victims, which is commonly referred to as re-victimization. Because the visual recording seemed to remind the victim of the rape that had occurred. Although the other side of the recording visualization can prove an element of coercion. Because law enforcement officials still understand that coercion must leave physical evidence such as torn genitals, bruises on the body, physical damage at the time of the incident and so on. This can be an obstacle for long-standing rape cases because not all victims immediately report what they experienced.

Based on the series of problematic experiences of victims in the introduction above, in this paper the authors formulate the following problems: why is the formulation of the element of coercion in the criminal act of rape Article 285 of the Indonesian Criminal Code is not responsive to women who are victims of rape, in the legal process?

2. Research Methods

³ Martha Nussbaum, *Women's Capabilities and Social Justice*, *Journal of Human Development* Volume 1 Nomor 2, 2000, hlm 25.

⁴ Arif Budijanto (dkk), *Kejahatan Seks dan Aspek Medikolegal Gangguan Psikoseksual*, Kalman Media Pusaka, Jakarta, 1982, halaman 30.

⁵ Pusat Data dan Informasi, *Kondisi Pencapaian Program Kesehatan Anak Indonesia*,

<https://www.kemkes.go.id/resources/download/pusdatin/infodatin/infodatin-anak.pdf>, diakses pada tanggal 17 September 2020, pukul 10.30 Wib.

⁶ Padahal, sebelumnya kritikus film memuji keseriusan adegan dalam film tersebut. Setelah 44 tahun, beberapa pegiat film Hollywood menginginkan seluruh rekaman film tersebut dihapuskan. Maria tidak pernah mendapatkan permintaan maaf langsung dari Bertolucci dan Marlon Brando. Dalam situasi ini, Bertolucci sedang membangun fantasi seksual untuk mendatangkan keuntungan ekonomi dan eksistensi diri tanpa persetujuan (*unconsent*) Maria. <https://m.solopos.com/ngeri-adegan-pemeriksaan-di-film-ini-ternyata-tanpa-rekayasa-774129>. Diakses pada tanggal 3 Maret 2020, pukul 20.00 Wib

⁷ Her rape took place in 2009 in Ohio, at that time Rose was still 14 years old. Rose Kalembe only learned about the incident in 2020 <https://www.bbc.com/indonesia/majalah-51442979>. Accessed on March 3, 2020, at 18.30 WIB.

⁸ <https://aceh.tribunnews.com/2018/06/06/ancam-pakai-golok-pria-ini-5-kali-perkosa-bidan-rekaman-rudapaksa-dijadikan-status-whatsapp>. Diakses pada tanggal 7 Maret 2020, pukul 09.30 Wib.

This study uses a normative research method because it explores the problems of legal formulation with a case approach and a comparative approach. The reasoning that departs from this case was introduced by Edward J. Levy with the statement "reasoning from the example from case to case"^[9]. Meanwhile, the comparison of law according to F. Pringsheim, quoted from Johnny Ibrahim, states that "comparative law without the history of law is an impossible task"^[10]. This comparative study also wants to know that it aims to fill the legal vacuum related to the formulation of the element of coercion in Article 285 of the Criminal Code. So in this approach, researchers mostly use the Criminal Code as the primary legal material. While for secondary law materials, researchers used the Judicial Review treatise Number 46 / PUU-XIV / 2016 concerning Application for Testing Article 284, Article 285 and Article 292 of the Criminal Code, Bengkulu District Court Decision Number 410 / Pid.b / 2014 / PN.Bgl and Court Decisions Negeri Banjarmasin Number 41 / PID / 2017 / PT BJM and 42 / PID / 2017 / PT BJM

3. Discussion

Martha Nussbaum has emphasized that this form of discrimination is inequality, with the following explanation:^[11]

In many nations, women are not full equals under the law: they do not have the same property rights as men, the same rights to make a contract, the same rights of association, mobility, and religious liberty.

Whereas the view that considers equality of women before the law can affect the enforcement of the law, so that the law has the potential to cause discrimination against women, especially women who have become victims. The framework of gender justice theory is important in the perspective of researchers to understand the flow of injustice experienced by women who have been victims of rape, so far they have been trapped in the myths of the crime of rape. Stereotypes and myths about rape and sexual violence have a detrimental effect on victims in cases of sexual violence. According to Temkin and Krahé, there is a link between documenting stereotypes and anti-victim attitudes to support rape occurring, this is widely shared by members of the criminal justice system and the general public. Based on this, the general public and criminal justice law enforcement officers who lack a gender justice perspective usually harm victims of rape^[12].

Therefore, understanding gender and sex must be interpreted deeply. The author understands gender and sex are two different terms, gender is the social sex while sex is the biological gender. Gender is a trait inherent in both men and women that is constructed socially and culturally, for example, women are gentle, beautiful, emotional or maternal. Meanwhile, men are considered strong, rational, manly and mighty. The traits of this trait are actually interchangeable, meaning that there are men who are emotional. The general public still teaches the aggressive attitude of strong and manly men. For example, Fauzi

⁹ *Ibid*, halaman 25

¹⁰ Johnny Ibrahim, *Op., Cit*, halaman 314

¹¹ Martha Nussbaum, *Loc. Cit*.

¹² Friederike Eyssel dan Gerd Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, *Journal Of Interpersonal Violence*, United States, 2010, hlm 2.

Bowo's statement in responding to the rape case in public transportation by stating that the victim first teased the perpetrator because the victim was wearing a mini skirt. This gender-biased view can justify the aggressive behavior of men as the perpetrator. So that a statement appears that causes the error lies with the victim which is called blaming the victim.

Mansour Faqih stated that there is a link between gender differences and gender injustice with the broader structure of societal injustice^[13]. Because gender differences can lead to injustice in the form of marginalization or the process of economic impoverishment, subordination or the perception of insignificance in political decisions, stereotyping or through negative labeling, violence, longer and more workloads (burden), and socialization ideology of gender role values. Violence (Violence) is an attack or invasion (assault) against a person's physical or mental integrity. Violence against fellow human beings basically comes from various sources, but one of the violence against one particular sex is caused by gender assumptions. Violence that is caused by gender bias is called gender related violence^[14], which is the result of social construction. Understanding the concept of gender is necessary to remember the concept of gender analysis. WHO itself admits that rape as a form of sexual violence contains elements of coercion with power relations. The uniqueness of power relations is a form of domination of masculinity or patriarchal culture. The elements of sexual violence emphasize coercive action (coersion), namely coercive efforts by exploiting the helplessness or weakness of the victim. In patriarchal culture, women have positioned women as weak creatures because their ability to give birth and breastfeed makes women have no physical strength so that women do not have power, including power over their own bodies.

Meanwhile, in the literature that discusses feminist legal theory, it is also known as feminist jurisprudence. According to Friedmann, quoted by Sudikno Mertokusumo, legal theory must include philosophical elements, "all systematic thinking about legal theory is linked at one end with philosophy and at the other end with political theory^[15]. The term jurisprudence is etymologically derived from Latin, namely from the words *juris* (law; law) and *prudens* (skilled; trained). In the legal terminology compiled by Ranuhandoko, *juris* means matters relating to rights and laws. Meanwhile, the word jurisprudence means law science; philosophy of law; legal system; or part of the law^[16]. However, the words legal theory and jurisprudence are used interchangeably, mixed up in a way that indicates an overlap with one another^[17]. This feminist jurisprudence approach was born in 1978 to coincide with the 25th Annual Conference of Women Scholars at Harvard Law School. At that time Professor Ann Scales was still a law student and co-moderated a panel discussion which was attended by feminist lawyers, law teachers and judges. Ann Scales is a professor at the University of Denver and Sturm College of

Law who co-pioneered the importance of a feminist approach in criticizing law. As Catharine MacKinnon keeps reminding us, she (the "female") cannot articulate her own definitions now "because his foot is on her throat."

Mac Kinnon articulates that men are not only male gender but also male-style thinking, or patriarchy. This way of thinking still dominates the process of law formulation and law enforcement in Indonesia. Niken Savitri stated that feminist legal theory or feminist jurisprudence emerged together with the existence of a critical legal movement, namely Critical Legal Theory..

Feminist Legal Theory, is a scientific approach that focuses on the subordinated experience of women, to criticize law. What is meant by subordination is experience - women's experience is not considered as a result of male domination or patriarchy. Patriarchy is the cause of discriminatory behavior against women, which causes social relations in which the male class has power over the female class because women are sexually inferior^[18]. There are so many spaces of injustice faced by women. Feminist legal theory is needed to reveal and raise to the surface the joints of women's life that are not visible to the study of the law of the general stream. So feminist legal theory becomes one of the scholarships that questions the neutrality of law or ungender.

So the ungender assumption continues by assuming that there is no gender difference between men and women despite the fact that there are differences. Mansour Faqih said that gender differences that occur in society have created distinctions so that differences can give birth to gender injustice. As explained by the researcher above, one form of gender injustice is negative labeling. It can take the form of the stigma that a woman who is raped is not a good woman because she has had sex outside of marriage and is considered a seductive woman. Negative labeling can lead to discriminatory attitudes towards female victims who are trying to seek justice so that it can allow blaming the victim to occur^[19]. The concept of blaming the victim is about justifying injustice by finding defects or mistakes in the victims of injustice^[20]. In the concept of Blaming the Victim, women are the most guilty victims, through the words and sentences in the media coverage, women are at one time portrayed as victims as well as triggers for the rape that befell her^[21]. Efforts to blaming the victim in the crime of rape are strengthened due to the social and structural constructs in law enforcement.

The peculiarity of feminist legal theory is that there is a process of empowerment called consciousness-raising (CR). Women are invited to reflect on their own experiences and then are invited to fight together. Likewise the opinion of Patricia. A. Cain, who said that raising awareness was a genuine effort from the application of feminist methods,

¹⁸ Maggie Humm, *Ensiklopedia Feminisme*, Pustaka Baru, Yogyakarta, 2002, hlm 334

¹⁹ *Blaming the Victim* is a term popularized by William Ryan, a sociologist from America, who focuses on the social problems of poverty due to racism. At that time in America there was a strengthening of racism against blacks. This concept identifies that the helplessness of marginalized people can be a source of blame for problems that occur because of their skin color and poverty. William Ryan, *Blaming The Victim*, Paperback, Amerika Serikat, 1976, hlm 31.

²⁰ *Ibid*, hlm 33

²¹ Dani Marsa Aria Putri, *Blaming the Victim: Representasi Perempuan Korban Pemerkosaan Di Media Massa (Analisis Semiotika Dalam Pemberitaan Di Koran Suara Merdeka Desember 2011 – Februari 2012)*, UNDIP, 2012, Semarang, hlm 9.

¹³ Mansour Faqih, *Analisis Gender dan Transformasi Sosial*, Pustaka Pelajar, Yogyakarta, 2013, hlm 3

¹⁴ *Ibid*, hlm 17

¹⁵ Sudikno Mertokusumo, *Teori Hukum*, Cahaya Atma Pusaka, Yogyakarta, 2012, hlm 2.

¹⁶ IPM Ranuhandoko BA, *Terminologi Hukum Inggris – Indonesia*, Sinar Grafika, Jakarta, 1996, hlm 363.

¹⁷ Sudikno Mertokusumo, *Op., Cit*

namely making safe spaces for women to share experiences and reflect on them as an effort to increase critical understanding [22]. Because listening to and believing stories of women's experiences is the main thing in the feminist method.

Lydia A Clougherty, a law professor at the Thomas Jefferson Law School in New York, underlines three methods of analysis, namely asking woman questions, feminist practical reasoning and consciousness-raising, this is what is called the feminist legal method [23]. The emphasis of feminist legal theory is to look for biases against women hidden in the legal formulation. Feminist practical reasoning, or arguments about women's experiences that have gained conscious awareness (conscious-raising), can take the form of personal narratives. That makes it possible to share findings and experiences together among women so that they can bring out women's perspectives [24].

Patriarchy is the cause of discriminatory behavior against women, which causes social relations in which the male class has power over the female class because women are sexually inferior [25]. This situation has been seen in the implementation of Hammurabi's law which is the oldest written law in human civilization. In it also regulates the act of rape. The penalty is very heavy, the death penalty for the perpetrator of rape if the victim is an unmarried woman. However, if the victim is a married woman, the victim and the perpetrator get a death sentence by throwing them into the river, because the act is considered adultery [26]. Hammurabi was published amidst the strengthening of the patriarchal cultural context so that it does not care about the experiences of women victims who experience rape, but only sees women's sexual status, namely married or not married.

This regulation shows that the act of rape has become a moral issue in the midst of a strong patriarchal culture with an ungender legal text. *Strafwetboek van 1867* also adopted it by categorizing rape as an act that violates the morality of society. Likewise, Article 285 of the Criminal Code (KUHP) is one of the articles in the section on morality. In the Big Indonesian Dictionary, morality is related to matters of morality; good customs; politeness; courtesy; civility. Lamintang explains morality as a form of appropriateness of words and actions which are viewed from the viewpoint or local people's habits in carrying out sexual life [27]. According to Soesilo, decency is the same as politeness. When it is related to the situation and condition, the views and habits in society still subordinate the position of women because it still applies. Mansour Faqih said that society's views and habits are still gender biased, especially towards women, so it's very easy to give negative labeling [28]. The formulation of Article 285 adopts the formulation of criminal acts regulated in Article 242 of the Netherlands

Strafwetboek in 1886 which reads [29] as follows:

“Hij die door geweld of bedreiging met geweld eene vrouw dwingt met hem buiten echt vleeschelijke gemeenschap te hebben, wordt als schuldig aan verkrachting.”

In a free translation: “Anyone with violence or threats of violence forcing a woman to have intercourse (carnal intercourse) with him outside of marriage is threatened for committing rape. In the formulation of Article 285, there are several elements of a crime with the following description:

- a. Deed: force
- b. This is done: (1) by force; and (2) threats of violence
- c. Object: A woman not his wife (outside the bond of marriage)
- d. Fucking with a girl.

In his explanation, R Soesilo revealed that forced sexual relations were possible for men but the only visible impact was on women, namely pregnancy [30]. Even though some of the rape victims also experienced psychological suffering that left them with ongoing trauma. In addition to the Criminal Code, the formulation of the criminal act of rape against adult women is also contained in Article 8 letter (a) in conjunction with Article 46 in conjunction with Article 53 of Law Number 23 Year 2004 concerning the Elimination of Domestic Violence, in which this regulation acknowledges the existence of forced sexual relations in within the scope of the household and the relationship of husband and wife, which is known as marital rape. However, this marital rape crime falls into the category of complaint offense. This is different from Article 285 which is an ordinary offense, meaning that a criminal act can be prosecuted without the need for a complaint.

The following is the regulation of rape as regulated in the Criminal Code and Law Number 23 of 2004 concerning the Elimination of Domestic Violence.

Table 2: Formulation of Rape Acts from the Existing Regulations

Regulations	Subjective Elements	Objective Elements
Article 285 of the Indonesia Criminal Code	The culprit is an adult male On purpose	Men and victims out of wedlock The existence of violence or threats of violence There is forced intercourse
Article 286 of the Indonesia Criminal Code	The culprit is an adult male On purpose	Adult men and women outside the marriage relationship There is forced intercourse The victim is unconscious or helpless
Article 8 in conjunction with Article 46 in conjunction with Article 53 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence	The culprit is the husband On purpose	Forcing sexual relations that are not reasonable / disliked / certain purposes The perpetrator and the victim have a marital relationship

Source: research results from various regulations

²² *Ibid*, hlm 192

²³ Lydia A Clougherty, *Feminist Legal Methods and The First Amendment Defense to Sexual Harassment Liability*, Nebraska Law Review, New York, 1996, hlm 3

²⁴ *Ibid*, hlm 9

²⁵ Maggie Humm, *Loc., Cit*

²⁶ Wendy Dens, 2010, *Verkrachting En Aanranding Van De Eerbaarheid*, Fakultas Hukum Universitas Ghent, Belanda, 2010, hlm 3

²⁷ PAF Lamintang dan Theo Lamintang, *Delik -Delik Khusus Kejahatan Melanggar Norma Kesusilaan dan Norma Kepatutan*, Sinar Grafika, Jakarta, 2009, hlm1

²⁸ Mansour Faqih, *Loc., Cit*.

²⁹ Anugerah Rizki (dkk), *Reformasi Pengaturan Tindak Pidana Perkosaan*, MAPPHI-UI, Jakarta, 2014, hlm 27

³⁰ Penjelasan Pasal 285. R Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Bogor, Politeia, hlm 210.

According to Soesilo, what is meant by the act of coercion is when the victim is unable to fight back and the victim is forced to want to have intercourse^[31]. Based on this explanation, it can be interpreted that coercion to have intercourse means that it is based on the absence of consent to have intercourse, and the victim does not want it to happen. In the Big Indonesian Dictionary (KBBI), force in a verb means doing something that is required even though you don't want to; whereas in the noun (noun) it is violence; rape. The word forcing means to treat, order, ask forcibly; and act with violence (urge, suppress); rape. According to Lamintang, the element of coercion shows that the act was deliberate. Coercion can take the form of actions and words^[32]. Likewise, the scope of the formulation of rape in Common law, by proving the three basic elements of rape, namely unapproved sexual relations (the sex was nonconsensual), coercion accompanied by violence, and not in accordance with the wishes (against her will)^[33].

Based on Merriam Webster's dictionary, consent is the compliance or approval of what other people do or propose. Laws in the State of Wisconsin define consenting sexual intercourse as actual words or behavior indicating freely given consent to sexual intercourse or sexual contact^[34]. Likewise, the Big Indonesian Dictionary (KBBI) shows that agreeing means agreeing (not contradicting, not disputing); and feeling happy or interested. Civil Law in Article 1337 of the Civil Code (KUH-Perdata) also regulates that the agreement is a kind of engagement for lawful causes, in this case it does not contradict law, morals, or with public order. In the case of rape that occurred in South Kalimantan, with case numbers 41 / PID / 2017 / PT BJM and 42 / PID / 2017 / PT BJM, it shows that the judges are hesitant to determine the element of coercion because the rape occurred 6 times against the victim. So that the judge decided the perpetrator was free, which consisted of 6 (six) people. This rape incident happened to Sum, a housewife. Because every night her husband has to work so he is not at home. The perpetrator is a friend of her husband as well as a neighbor. Sum only lives with her children. The perpetrator knows the victim's situation. In each incident, the perpetrator threatened the victim and the victim reacted silently. Until finally the victim dared to tell her husband even though it had been a long time ago. The evidence is considered insufficient, so it relies on the testimony of the victim^[35]. This is what William Ryan mentioned as a form of Blaming The Victim because women victims of rape are helpless (marginal)^[36].

In this situation, the judge is still of the opinion that one witness is considered not a witness or what is better known as the unus testis nullus testis principle. Although in this principle, the provisions of Article 185 Paragraph (4) of the Criminal Procedure Code (KUHAP) can be used which

states regarding chain testimony (kettingbewijs) that the statements of several independent witnesses can be used as valid evidence if the testimony the witnesses were in contact with each other to confirm an incident. The silent attitude of rape victims is still considered a form of agreement, even women victims who say they do not agree^[37].

So that in several interrogation processes, law enforcement officials often asked the question why did the victim stay silent when the rape took place? Did the victim fight with all his might? In the latest development of psychological science, the silent attitude of the victim actually proves to be a form of non-consent, this is called tonic immobility. This psychological symptom, a natural reaction of the victim by stunned silence and no resistance, is usually triggered when the victim is faced with threats, the victim's fear and unable to escape or fight the attacker. Thus, tonic immobility does not occur in cases where the victim agrees to the attacker's progress. Therefore, tonic immobility must be treated as sufficient evidence of non-consent and whose victim is able to prove the occurrence of tonic immobility during sexual harassment, through expert testimony or otherwise treated as without consent. At a minimum, the State can include tonic immobility in the existing inability to agree or reject the provisions. Preferably, the state could reform existing sexual harassment laws to include resistance exceptions and without consent provisions for victims who are able to demonstrate tonic immobility^[38].

Therefore, tonic immobility must be treated as sufficient evidence of non-consent and whose victim is able to prove the occurrence of tonic immobility during sexual harassment, through expert testimony or otherwise treated as without consent. At a minimum, the State can include tonic immobility in the existing inability to agree or reject the provisions. Preferably, the state could reform existing sexual harassment laws to include resistance exceptions and without consent provisions for victims who are able to demonstrate tonic immobility^[39].

Rape events that occurred repeatedly, in this case the victim usually knew the perpetrator very well. According to Arif Budijanto, 50% of the criminal acts of rape were known to the victim, and 7% of them were close family members. In addition, the perpetrator chose the victim who was smaller than the perpetrator^[40]. The physical vulnerability of women has the potential to easily make it a victim. Decision number 69 / PID / 2013 / PT.PLG at the Palembang High Court also shows this. The perpetrator took advantage of the victim's physical vulnerability by raping her in a car during a trip. The victim has expressed rejection and shouted but the perpetrator is stronger and forces the victim. However, in the decision to acquit the perpetrator, the judge

³¹ *Ibid*

³² Lamintang, *Loc. Cit.*, hlm. 100

³³ Catharine MacKinnon dan Reva B Siegel, *Direction in Sexual Harassment Law: A Short History of Sexual Harassment*, Yale Press, Amerika Serikat, 2003, hlm 4.

³⁴ John F. Decker and Peter G. Baroni, "No" Still Means "Yes": The Failure Of The "Non-Consent" Reform Movement In American Rape And Sexual Assault Law, *The Journal of Criminal Law and Criminology*, Northwestern University, 2011, hlm 1088.

³⁵ Lihat putusan 41/PID/2017/PT BJM dan 42/PID/2017/PT BJM. <https://putusan3.mahkamahagung.go.id/>, diakses pada tanggal 20 Januari 2018, pukul 10.00 Wib.

³⁶ William Ryan, *Loc., Cit*

³⁷ John F Decker, *Loc. Cit.*

³⁸ Möller's study revealed that of the 298 women, 70% reported significant tonic immobility and 48% reported extreme tonic immobility during attacks. Among the 189 women assessed at 6 months, 38.1% eventually developed Post Traumatic Stress Disorder (PTSD) and 22.2% experienced major depression. Tonic immobility was associated with a 2.75 times increased risk of PTSD and a 3.42 times increased risk of major depression. Most importantly, if the victim has a history of psychiatric disorders or trauma, the possibility of tonic immobility is greater. So if the victim who has experienced trauma and mental disorders then experiences rape, then when the rape occurs it has made the victim become silent, which is not his own choice. Moriah Schiewe, *Tonic Immobility: The Fear-Freeze Response as a Forgotten Factor in Sexual Assault Laws*, Depaul University, Amerika Serikat, 2019, hlm. 13

³⁹ *Ibid*

⁴⁰ Arif Budijanto, *Loc., Cit*, hlm30

considered the victim not to fight because there was no evidence to show coercion.

Apart from the physical vulnerability of the victim, the socioeconomic status background is also a vulnerability. In case number 69 / PID / 2013 / PT.PLG, the victim's parents owed a debt to the perpetrator and the perpetrator's wife. When the perpetrator came to the victim's parents' house, it happened that the victim was there. So that the victim was forced to come to the perpetrator's house to explain to the perpetrator's wife about the debt and credit. The victim's family comes from a lower economic status and the perpetrator comes from the middle economic class. The socio-economic situation and conditions are one of the triggers for rape, so rape becomes a means of subjugating victims who do not immediately pay off their debts. Conditions like this have occurred in the slavery situation in the United States. African-American female slaves were victims of rape by white employers, there was a class relationship between the perpetrator and the victim, namely employer and slave and race. The statement of a female slave who is a victim will not be heard in a political situation of domination on the side of the master. Henry MacNeal Turner with African American men issued a petition protesting the rape of African American women stating "*All we ask of the white man is to let our ladies alone, and they need not fear us*" [41]. Critics of feminist legal theory consider the experiences of women victims to show rape is not only a form of crime that has an impact on physical harm but has become a way to subdue the integrity of the female body as a human being.

In the early 20th century, several jurisdictions began to regulate consent as a requirement for the crime of rape [42]. In Indonesia, the panel of judges has expanded the formulation of the criminal act of rape, by making the agreement of persuasion as a form of a series of detrimental to the victim in the criminal act of rape as regulated in Article 285 of the Criminal Code, through the Bengkulu District Court decision Number 410 / Pid.b / 2014 / PN. Bgl. The Panel of Judges has applied a feminist legal approach by reflecting on the experiences of victims and raising an attitude to increase awareness raising awareness (consciousness-raising) [43], through the question "was the defendant's actions evil or not. This question arose by the Panel of Judges because the defendant lured the victim to the inn and after being raped, the victim bleeding and was left in the hospital.

The concept of agreement is accommodated by the draft law on the elimination of sexual violence (PKS), that rape in Article 11 paragraph (2) letter (e) is sexual violence committed in the form of violence, threats of violence, or trickery, or using the condition of someone who unable to give consent for sexual intercourse. According to Wendy Dens, Actions that qualify as rape properly imply a lack of consent. However, the element of consent does not apply to children (statutory rape), in this case there is an unwritten agreement from law enforcement officials that sexual relations between men and girls are a form of sexual violence [44].

⁴¹ Reva B.Siegel, *A Short History of Sexual Harassment Directions in Sexual Harassment Law*, Yale Press, Amerika Serikat, 2003, halaman 5

⁴² *Ibid*

⁴³ Lydia A Clougherty., *Loc. Cit.*

⁴⁴ Wawancara Hakim PN Wonogiri, 20 Oktober 2019

A. Conclusion

The formulation of the element of coercion contained in Article 285 of the Criminal Code (KUHP) has caused difficulties for rape victims in the legal process because victims must be able to prove the element of coercion by showing physical evidence of resistance reactions such as injuries to the body, as well as other physical evidence. This element of coercion does not only cause physical harm but also psychological harm to the victim because in a situation of fear the victim can experience tonic immobility so that the victim does not react to resistance and is just silent. This situation can occur in conditions of repeated rapes, victims who are intimidated and there is a power relationship between the perpetrator and the victim. Often this unopposed reaction is considered the victim's consent. In Indonesia, the application of elements without approval has been stated in the decision of the Bengkulu District Court Number 410 / Pid.b / 2014 / PN.Bgl.

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