



Juridical analysis of the crime of sexual violence based on victim protection in the university environment

Mirza Dwan Sanova¹, Dahlan², Teuku Ahmad Yani²

¹ Student, Law of Faculty, Syiah Kuala University, Banda Aceh, Indonesia

² Lecturer, Law of Faculty, Syiah Kuala University, Banda Aceh, Indonesia

Abstract

The rule of law that specifically regulates the crime of sexual violence in Indonesia has long been initiated, in 2022 Law Number 12 of 2022 on the Crime of Sexual Violence was passed. Before this law was passed, the Ministry of Education had issued Regulation Number 30 of 2021 concerning the Prevention and handling of Sexual Violence in the Higher Environment as an effort to fill the legal vacuum related to criminal acts of sexual violence in the university environment. However, this rule leaves problems, especially there are efforts to legalise sexual relations with the concept of consent, and regarding the forms of victim protection regulated in this regulation. For this reason, this paper wants to explain the problem of whether the rights of victims are protected regarding the sanctions applied in Ministerial Regulation Number 30 of 2021. The type of research is juridical-normative, using 2 approaches, the statute approach and conceptual approach. The method of analysis of this research is prescriptive analysis. The results of the study show that sexual violence includes a general meaning for all actions carried out by a person against another person with nuances of sexuality, whether verbal, visual, active actions, or in the form of using gesture symbols that show nuances of sexuality. Sexual consent in the context of sexual relations is a condition of whether the sexual relations are based on pressure or not, intimidation or not, so that it is called a criminal act of sexual violence. Sexual violence crime with the concept of sexual consent makes it a condition for determining the crime of sexual violence. The perpetrator cannot be convicted if there is consent from the victim, otherwise if there is no consent from the victim, the perpetrator can be sentenced.

Keywords: crime, sexual violence, victim protection, university

Introduction

Ministerial Regulation Number 30 of 2021 is present in order to eradicate the many cases of sexual violence that occur on campus, because so far there has been no specific regulation regarding the form and mechanism of prevention and handling. Even so, this regulation has caused pros and cons from various circles. On the one hand, some people evaluate Ministerial Regulation Number 30 of 2021 has been able to fill the legal vacuum regarding the handling of sexual violence cases in the university environment. On the other hand, some people who oppose this regulation tend to highlight the legal material contained in the regulation. (Rizkia Rahmasari, 2022, p. 79) ^[20].

Basically, the Ministerial Regulation Number 30 of 2021 regulates the principle of implementing and enforcing sexual violence laws solely in the best interest of victims. The intended victims are students, educators, education personnel, campus residents, and the general public who experience sexual violence related to the implementation of the Tridharma of University (the obligation of universities to organize education, research and community service), for example education, research and community service (Article 1 numbers 11, 12, and Article 4 letter e).

The problem that arises in this regulation is that there are articles that limit the category of sexual violence committed without the consent of the victim. The concept of sexual consent is a limitation set forth in the law that implies the presence or absence of legal validity in the consent given or received.

(Hanna Prabandari, 2004, p. 11) ^[7] For example, in Ministerial Regulation in Article 5 paragraph (2) letter b:

“Intentionally exposing the genitals without the victim's consent”.

Juridically, the legal material for sexual violence regulated in Ministerial Regulation Number 30 of 2021 tends to limit the actions that require the presence of a perpetrator and victim, giving rise to the element of forced sex from the perpetrator to the victim. Where in this regulation does not include rules against consensual sex. Article 14 which regulates penalties in the form of administrative sanctions (light, medium, and heavy administrative sanctions) can be imposed on perpetrators who are proven to have committed sexual violence. The problem is that there is no benchmark for imposing sanctions, the main benchmark can be submitted and recommended by the task force.

At this point, it does not fulfil the element of legal certainty. In the theory of legal certainty, one of the prerequisites that must be fulfilled by the content of statutory articles is that they are free from ambiguity of meaning, and avoid broad interpretation of the articles in question. (Achmad Ali, 2017, p. 235) ^[1] Article material giving rise to various interpretations is called *fleaux destructeurs de la loi* or defects that damage the law. The vagueness of the rules of law due to vague terminology, double-meaning terms and *evaluative* terms is precisely a sign of the abandonment of the construction of legalism. (Peter Mahmud Marzuki, 2021, p. 283) ^[18]

Based on the explanation of the problem above, it is interesting to examine more deeply the regulation of Ministerial Regulation Number 30 of 2021. This is interesting to study with several considerations, including that Ministerial Regulation Number 30 of 2021 is still

controversial in the community, even though legally this regulation has been enacted. For this reason, this paper aims to examine in more depth the concept of *sexual consent* in Ministerial Regulation Number 30 of 2021 from the aspect of protecting victims' rights.

Research Method

In general, legal research can be divided into two types, namely normative legal research and sociological legal research. (Jonaedi Efendi, 2018, p.33) ^[11] In this research, the type of research used is normative legal research. Normative legal research is also called doctrinal legal research, which is a study by tracing, examining library materials in the form of laws and regulations.

As a normative legal research, this research uses 2 approaches, namely a *statute approach*, and a *conceptual approach*. Data analysis is a process of systematically and consistently describing the symptoms and problems studied. The research data collected is analysed qualitatively, meaning that it does not use numbers but uses the strength of theories and concepts. In normative legal research, this research data is analysed with a certain pattern that is prescriptive analysis. Prescriptive analysis is closely related to the ideal concept of a law or something that should be. (Peter Mahmud Marzuki, 2017, p.41) ^[17]

Result and discussion

Data on Sexual Violence Cases

National Commission on Violence against Women noted that at least 35 (thirty-five) women become victims of sexual violence every day. In 3 hours, there are at least 2 women experiencing sexual violence. The age of victims is found between 13-18 years old and in the age of 25-40 years old. Sexual violence is more difficult to uncover and deal with than other forms of violence because it is often associated with the concept of morality and norms that exist in society. (Komnas Perempuan, 2019, p.2) ^[12]

The Data and Information Centre of the Indonesian National Commission for Child Protection 2010-2014 revealed that there were more than 21 million cases of child rights violations spread across 34 provinces and in 179 districts/cities, with the details of the cases being 4258% cases of sexual crimes against children, the rest were cases of physical violence and child neglect. The data also narrates the increase in sexual violence each year, namely in 2010, there were 2,046 cases (42% of sexual crimes against children). Then in 2011, there were 2,462 cases (58% of sexual crimes), 2012 there were 2,637 cases (62% of sexual crimes), in 2013 there were 3,339 cases (62% of sexual crimes), 2014 (January-April) there were 600 cases with 876 victims, of which 137 cases were child perpetrators. (Komnas Perempuan, 2019, p.2) ^[12]

Crime of Sexual Violence in the Ministerial Regulation Number 30 of 2021

Sexual violence or often also identified with sexual *harassment*, namely the provision of sexual attention either verbally in writing or in physical form, against women, where it is beyond the wishes of the woman concerned but must be accepted as normal. (Bagong Suyanto, 2016, p.248) ^[2] According to Mella, sexual violence is covered by various acts, such as rape, sexual slavery, or forced prostitution, forced pregnancy, forced sterilisation and other serious sexual violence categorised as crimes against humanity with

fulfilled elements under the article. (Mella Fitriyatul Hilmi, 2019, p.22) ^[15] Sexual violence or harassment is any assault of a sexual nature whether intercourse has occurred, regardless of the relationship between the perpetrator and the victim. Sexual violence can vary widely in the form of attempted rape, rape, *sadism* in sexual relationships, coercion of other unwelcome sexual activities, or degrading harm or injury to the victim. (Marcheyla Sumera, 2013, p.46-57) ^[14]

The concept of sexual consent regulated in Ministerial Regulation Number 30 of 2021 can be found in certain detailed articles. First, it can be seen in Article 5 paragraph (2) which states that sexual violence as referred to in Article 5 paragraph (1) includes:

- a. Delivering speech that discriminates or harasses the Victim's physical appearance, body condition, and/or gender identity;
- b. Intentionally exposing his/her genitals without the victim's consent
- c. Conveying remarks containing sexualized advances, jokes, and/or whistles to the Victim
- d. Staring at the Victim with sexual overtones and/or discomfort
- e. Sending messages, jokes, pictures, photos, audio and/or video with sexual overtones to the Victim even though it has been prohibited by the victim
- f. Taking, recording, and/or circulating photos and/or audio and/or visual recordings of the Victim with sexual overtones without the Victim's consent
- g. Uploading photos of the Victim's body and/or personal information with sexual content without the Victim's consent
- h. Disseminating information related to the body and/or personal information of the Victim with sexual nuances without the consent of the Victim
- i. Peeking or intentionally looking at the Victim who is conducting activities in private and/or in a private space
- j. Persuading, promising, offering or threatening the victim to engage in sexual transactions or activities that the victim does not consent
- k. Giving punishment or sanctions that have sexual nuances
- l. Touching, rubbing, fingering, holding, hugging, kissing and rubbing parts of his/her body on the victim's body without the consent of the Victim
- m. Undressing the Victim without the Victim's consent
- n. Forcing the Victim to engage in sexual transactions or activities
- o. Practicing the culture of the Student, Educator, and Education Personnel community that has the nuances of sexual violence
- p. Attempting rape, but penetration does not occur
- q. Committing rape including penetration with objects or body parts other than the genitals
- r. Forcing or tricking the Victim to have an abortion
- s. Forcing or tricking the Victim to become pregnant
- t. Intentionally allowing Sexual Violence to occur; and/or
- u. Committing other acts of Sexual Violence.

Article 5 paragraph (2) letters b, f, g, h, j, l, and m suggest the concept of consent in the act, this provision only limits sexual violence when there is no victim's consent. This means, if the victim agrees, then the act can be criminalized, if the victim does not agree by reporting to the authorities,

then the perpetrator can be punished with administrative sanctions because it meets the requirements of the crime of sexual violence in the regulation of Ministerial Regulation Number 30 of 2021.

The concept of sexual consent as contained in the articles above, shows that the concept of victim consent in cases of sexual violence leads to feminism. (Euis Sunarti, 2021, p.62) ^[6] Where if the victim is in a sexual relationship, it can be ascertained that the sexual relationship was carried out based on violence and the perpetrator is considered to have fulfilled the conditions for imposing a crime. This perspective was developed in Europe (Anglo-Saxon), because the basis of their legal epistemology is not tied to religious and divine values (theocentric) but instead is based solely on an anthropocentric scientific paradigm, based solely on culture and humanity.

(Wahyu Iryana, 2021, p.17) ^[22] If humans and culture recognise it (even if it is not fully recognised according to religion). Then sexual relations and relationships can be recognised and justified. Therefore, the attempt to develop the concept of sexual consent is solely to measure the presence or absence of sexual violence committed by the perpetrator against the victim.

Regarding administrative sanctions that can be imposed on perpetrators who have been proven to have committed sexual violence, which are in the form of administrative sanctions in the form of light, medium, and heavy in accordance with the crime of sexual harassment committed by the perpetrator, in this case the Law has not provided limits or benchmarks for the three forms of administrative sanctions to be sentenced in accordance with the crime committed.

So that raises a question mark, what benchmarks are used to determine these three forms of sanctions.

The Concept of Victim Protection in Ministerial Regulation Number 30 of 2021

The issuance of the Regulation of the Minister of Education, Culture, Research and Technology Number 30 of 2021 concerning Prevention and Handling of Sexual Violence in the University Environment has a strong correlation with the rampant cases of sexual violence that occur on campus. The existence of this regulation is directly associated with at least two foundations, firstly the implementation of sexual violence enforcement and secondly the real impact on the implementation of campus and university for the better. (Mundakir, 2022, p.96) ^[16] This is understood in the regulation's preamble.

The preamble of Ministerial Regulation Number 30 of 2021 states at least three bases for the establishment of this regulation, (mentioned in Ministerial Regulation Number 30 of 2021) namely:

- a. Every citizen is entitled to protection from all forms of violence including sexual violence in accordance with Pancasila and the 1945 Constitution of the Republic of Indonesia
- b. The increase in sexual violence that occurs in the realm of the community, including universities, directly or indirectly has an impact on the less than optimal implementation of the Tridharma of Higher Education, and reduces the quality of higher education.
- c. In order to prevent and handle sexual violence in the university environment, it is necessary to have a regulation that guarantees legal certainty in terms of

preventing and handling sexual violence in higher education.

The three foundations contain juridical, sociological and philosophical foundations. The juridical foundation concerns the constitutional mandate to maintain the fulfilment and implementation of education for the better, as well as the mandate to avoid any violence in the campus environment. The sociological foundation is that cases of sexual violence in the scope of the university have emerged and there are no special rules in handling the case. Meanwhile, the philosophical foundation shows that the purpose of learning and university is to carry out the Tridharma of University and for this purpose, all activities that can hinder it, including sexual violence, must be regulated in the form of Ministerial Regulation.

A regulation is formed not only based on juridical, sociological, and philosophical foundations as recognized by many experts, including Mahfud MD, Jimly Asshiddiqie, and Peter Mahmud Marzuki. (Mahfud MD, 2012, p.124, Jimly Asshiddiqie, 2010, p.2010, Peter Mahmud Marzuki, 2020, p.22) ^[13, 10, 19] In addition, according to the author, one point that is still left out and needs to be included is a theological foundation based on religious norms and values adopted by the society. This becomes important when people in a country have religious beliefs that are adhered to and recognized directly in the constitution and ideology as it applies in Indonesia.

The three foundations above should be in line with the concept of the formation of laws and regulations. Mahfud MD, Jimly Asshiddiqie, Peter Mahmud Marzuki, and several other experts also mentioned that the above three foundations must be present in the formation of a regulation. Meanwhile, the normative foundation or what can be called the theological foundation is ruled out. The ideology of PANCASILA (five principles of the Indonesian state) and the Indonesian constitution (1945 Constitution) recognize, respect and establish the existence of religious norms that live in society. The consequence of ignoring the religious norms mentioned in the ideology and constitution directly affects the formulations in the material in Ministerial Regulation Number 30 of 2021. One of the effects is the emergence of the phrase "victim's consent" as regulated in Article 5 paragraph (2) letters b, f, g, h, l, and letter m of Ministerial Regulation Number 30 of 2021, which identifies the form of victim protection.

In this regard, the concept of *sexual consent* in Ministerial Regulation Number 30 of 2021 is juridically capable of providing protection of rights to victims. Because the regulation is intended with the main basis is the protection of victims. All types of sexual behaviour and actions that are accepted by someone without consent, the perpetrator can be punished as an effort to fulfil the rights of the victim. The regulation of victims' rights here has been explicitly stipulated in Article 3 of the Minister of Education and Culture Regulation Number 30 of 2021 that the prevention and handling of sexual violence is carried out with the principle of the best interests of the victim. In this aspect, the regulation of Ministerial Regulation Number 30 of 2021 is expected to be able to fulfil the rights of victims.

Conclusion

Sexual violence encompasses the general meaning of all acts committed by a person against another person that are

sexualised, whether verbal, visual, active, or in the form of the use of *gestures* that indicate sexuality. Sexual *consent* in the context of sexual intercourse is a condition of whether the sexual intercourse is based on consent, intimidation or not, so it is called a criminal offence of sexual violence.

Sexual violence and the concept of victim protection have a strong relationship, in the sense that Ministerial Regulation Number 30 of 2021 stipulates that sexual consent from the victim is an important point to determine whether the perpetrator will be punished. The perpetrator cannot be convicted if there is consent from the victim, otherwise if there is no consent from the victim, the perpetrator can be sentenced.

The administrative sanctions in the form of light, medium and heavy sanctions that can be imposed on perpetrators who are proven to have committed sexual violence in the scope of university do not provide limitations on the three forms of sanctions. In this case, the imposition of administrative sanctions is recommended by the task force and decided by the leadership of the university institution, be it the Rector at the University or Institute, the chairman at the College, the Director at the Polytechnic, Academic, and Community Academic.

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