



Legal protection of the victims of sexual violence crime based on perspective of Indonesian positive criminal law

Muhammad Azil Maskur, Eta Yuni Lestari, Nurofik, Rifqi Ariq Nadhif

Universitas Negeri Semarang, Indonesia

Abstract

The phenomenon of sexual violence cases is one of the serious social problems that the Indonesian Government must address. The reason is that cases of sexual violence are still common in the community, even in the campus environment, a campus that should be a safe place to study can become a place for sexual violence to occur. The handling of sexual violence cases every year always gets more attention from various circles of society. The majority of victims of sexual violence are women and children. In Indonesia, regulations governing sexual violence are regulated in various laws. The purpose of this study is to find out how the legal protection of victims of criminal acts of sexual violence is based on the perspective of Indonesia's positive criminal law. The result of the study indicates that the legal protection of victims of sexual violence based on the perspective of positive Indonesian criminal law is carried out by the existence of various legal rules to deal with sexual violence both in the Criminal Code and various other laws. Among them are Law on Child Protection, Law on the Elimination of Violence, Law on Eradication of the Crime of Human Trafficking, Law on Electronic Information and Transactions, Regulation of Minister of Education and Culture No. 31 of 2021 on the Handling and Prevention of Sexual Violence Cases (PPKS) and Electronic Transactions, and Law no. 12 of 2022 on the Sexual Violence Crime (UU TPKS).

Keywords: criminal law, legal protection, sexual violence, victims

Introduction

Criminal act is an act prohibited by law and those who violates the prohibited acts will receive threats or punishments in the form of certain offenses. Criminal acts can also be stated to be acts prohibited by law and are threatened with sanctions, which is in the form of crime, as the prohibition focuses on the act itself, which is circumstances or incidents caused by individual behavior, while criminal threats focus on the perpetrator. Prohibition and criminal threats are closely related to each other as there is a close and inseparable relation between the incident and the person who caused it (Moeljatno, 2015: 59) ^[1]. One type of criminal act that currently requires resolution is sexual harassment.

Sexual harassment is a social problem that is now being addressed in the midst of Indonesia's population density, with a population of 237.6 million people, Indonesia is a country with the fourth largest population in the world after China, India and the United States. In addition, the Indonesian people also have complex problems, both in terms of economy, politics and social (Henny Saida Flora & Maidin Gultom, 2021: 44) ^[8]. The causes of sexual violence against women, among others, are caused by the relation between certain groups and other groups, this causes victims of sexual violence for being afraid and reluctant to report sexual violence they deal with. Due to the unequal power and victim-blaming culture that many victims of sexual violence have experienced, women have been subjected to abuse by the authorities (Elindawati R, 2021: 181-193) ^[9]. The results of other studies indicate that victims of sexual violence are sometimes prone to condemnation so they often feel reluctant to report (Soejoeti & Susanti, 2020: 67-83) ^[14].

Violence is behavior that is contrary to the law, ranging from threatening actions or those that have led to real actions resulting in physical damage, objects, or can also cause the death of a person or loss of life. In the case of sexual violence, it is not only physical violence, but also indirectly attacks the victim's mentality. The mental impact that the victim suffers as a result of sexual violence is not easy to remove compared to the physical violence that has also been gone through, it takes a long time for the victim to fully recover from the incident she suffered from (Rosania Paradias & Eko Soponyono, 2022: 62) ^[13]. Sexual violence is an inhumane act so the state must be present to provide legal protection (Women, 2013) ^[11].

Harassment often occurs in daily life, in the context of family, class, community, workplace, or peer groups. Shabby persons are often easy targets of general harassment. All women find the increasing problem of violence against women have been deeply troubling. The value system that views women as fragile and inferior to men is largely to blame for the violence and harassment that often befalls women. Many people still believe that women are objects that can be manipulated, exploited, and enslaved by men. From the past to this date, violence in general has always been a reality and often occurs in society (Riyan Alpian, 2022: 70) ^[12]. According to other research findings, women are still considered fragile and inferior to men, and because of that, they are marginalized and subordinated. They are also considered as second-class citizens who must be controlled, abused, and enslaved by men (Perempuan, S.T., 2013: 39-49) ^[11]. The discussion about sexual violence is very important as it is based on an approach or style that continues to change without being oriented on community protection strategies and the needs of victims.

Based on data of National Commission on Women (Komnas Perempuan) in its Annual Records (CATAHU) 2022, 2021 is the year with the largest number of cases of gender-based violence (KBG) for 10 years, cases of violence against women (2012-2021), increased for 50% from the total in 2020 of 338,496 incidents. This figure exceeds the KBG data before the COVID-19 pandemic outbreak in 2019.

Problem

Indonesian law has not fully provided protection for victims and strict legal sanctions for violators. Only a small percentage of cases of sexual violence lead to punishment. Due to negative stigma that exists in society towards victims of sexual violence, they are afraid to report the violence that they suffered to the police (Rosania Paradiáz & Eko Soponyono, 2022: 63) ^[13]. Thus most victims do not report cases of violence to the police. The government must maintain and pay attention to the rights of victims of sexual violence through the legal system and certain social services, as it is an important factor that must be taken into account both in criminal law and social policy, as well as in state power judicial institutions (Rosania Paradiáz & Eko Soponyono, 2022: 64) ^[13]. Based on the description of the problem, this study discusses how the legal protection efforts for victims of criminal acts of sexual violence are based on the perspective of Indonesia's positive criminal law.

Result and Discussion

a. Sexual Violence

According to the Criminal Act of Sexual Violence Crime involving sexual violence include physical and non-physical groping, forced sterilization, forced marriage, forced contraception, sexual torture, sexual exploitation, sexual acts, and electronic-based sexual violence. Other violent crimes that violate decency against victims include rape, obscene acts, sexual relationship with children, obscene acts against children, and/or sexual exploitation of children. Pornography featuring children or pornography featuring violence and sexual exploitation are other examples. In addition to the psychological damage undergone by victims of sexual violence and abuse, stress can also affect brain development and function. The second one is physical impact. Violence, particularly violence against minors, contributes significantly to the spread of sexually transmitted diseases (STDs). In addition, internal bleeding and damage can occur in the person. Damage to internal organs can occur in extreme circumstances.

In certain cases, it even causes death. The third is social impact on the victim. Social isolation of victims of sexual violence and abuse must be avoided as they definitely need encouragement and emotional support to stand up and move forward living their lives again. Better access to pornography online, with sites that are intentionally provided and served to everyone and everywhere, is one of the main factors contributing to the increasing incidence of sexual violence (<https://law.ui.ac.id/v3/bahaya-dampak-kejahatan-seksual/> diakses pada 11 November 2022).

The weight of evidence that seems to be the victim's "duty" to indicate the validity of the reported cases adds to the difficulties that victims and their companions deal with for victims of sexual violence. Frequently, when reporting an incident to the authorities, the victim is required to seek the identity and complete information of the perpetrator in order

to offer references to legal provisions that the authorities can use to proceed with the case.

b. Legal protection

According to Satjipto Rahardjo, the purpose of legal protection is to defend human rights that have been violated by others and to give the public access to all legal privileges. Meanwhile, according to Philipus M. Hadjon, legal protection is an act of defending or assisting legal subjects through the use of legal instruments (Philipus M. Hadjon, 2011: 10) ^[3]. Preventive legal protection and repressive legal protection are two main types of legal protection contained in criminal law as regulations intended to regulate social formations. From the point of view of criminal law, legal protection is essentially a component of criminal policy. Criminal policy and types of legal protection are intertwined. Criminal law cannot be implemented by organizations that have the power to enforce it in society (Muchsin, 2003: 23) ^[2]. Another point of view, according to Muchsin, legal protection is something that protects individuals by enforcing the application of applicable rules and regulations with sanctions.

There are two categories of legal protection, as follows:

a. Preventive Legal Protection

It is a legal protection provided by the government with the intention of preventing violations before they occur. It is reflected in rules and regulations to prevent violations and provide cues or restrictions when performing tasks.

b. Repressive Legal Protection

It is a repressive legal protection which is the last line of protection, in the form of sanctions such as fines, imprisonment, and additional penalties imposed in the event of a dispute or violation.

c. Legal Protection for Victims of Sexual Violence Based on the Criminal Code (KUHP)

In the Criminal Code (KUHP), legal protection for victims of sexual violence is regulated in articles 289-296 of the Criminal Code. According to one of article 289, anyone who uses violence or threatens to use violence to force someone to commit an obscene act or support such an act is threatened with years of punishment and acts that attack respect for decency with a maximum imprisonment of nine years. According to Article 289 of the Criminal Code, a person can be sentenced to a maximum imprisonment of nine years if he uses violence or threatens to use violence to force someone to commit or permit immoral acts. And based on Article 290 of the Criminal Code states that a maximum imprisonment of seven years for:

1. Anyone who engages in obscene behavior with another person while that person is asleep or helpless.
2. Anyone who commits an immoral act with someone even though he/she knows, or should know, that the other party has not reached fifteen years old yet, or if his/her age is unclear, it is not a proper time yet for the other party to get married.
3. Anyone who claims to be less than fifteen years of age, or if his/her age is unclear, that it is not the proper time for him/her to get marry, engage in, or permit engagement in, obscene acts, or engage in sexual activity with another person outside of marriage.

d. Law No. 35 of 2014 on Child Protection

Child sexual abuse occurs when an older adult or teenager take an advantage of a young child for sexual stimulation. Having sex with a child, having physical contact with a child's genitals (other than during a medical examination), observing a child's genitals without making physical contact, pressuring or coaxing a child to engage in sexual activity (whatever the outcome), exposing children to pornography, and giving them indecent exposure to the genitals is all prohibited (Arini Fauziah Al haq dkk, 2015: 32) ^[6]. In addition to physical sexual acts, the following behaviors also constitute sexual violence against minors:

- a. Touching a child's body sexually, regardless of whether the child is wearing clothes or not.
- b. Any kind of sexual attachment, including putting objects or body parts into the child's mouth.
- c. Pushing or forcing a child to perform sexual acts.
- d. Deliberately engaging in sexual behavior in front of children, or failing to protect and anticipate children from the sexual activities of others.
- e. Create, publish and show films or photos containing children acting or posing inappropriately.
- f. Showing children, pictures, images, photos, or videos depicting sex. (<https://www.parenting.co.id/balita/kenali+kekerasan+sksual+pada+anak> diakses pada 14 Agustus 2022)

Sexual violence against children has been regulated in Law no. 35 of 2014, which also addresses child protection. Everyone is prohibited from directing, committing, or taking part in acts of violence against children, according to Article 76C. Everyone is prohibited from using force or violence that threatens, coerces, misleads, or convinces children to engage in or permit participation in obscene activities, according to Article 76E. Article 76I further states that everyone is prohibited from using, permitting, carrying out, commanding, or taking part in the sexual or economic exploitation of children. Criminal threats are threatened with a maximum sentence of 3 years, 6 months imprisonment, and a maximum fine of Rp. 72,000,000.00 (seventy two million).

e. Law No. 23 of 2004 on the Eradication of Domestic Violence

According to the general explanation of Law Number 23 of 2004 on the Eradication of Domestic Violence, the wholeness and harmony of a happy, safe, quiet, and peaceful household is the dream of everyone in the household. Therefore, everyone in the household must work together for this to happen, especially in terms of behavior and self-control. The topic of domestic sexual violence is one of the actual topics covered by the law on putting an end to domestic violence (Marital rape) (Arfa, 2014: 42) ^[5] "Everyone is prohibited from committing domestic violence, whether in the form of physical violence, psychological violence, sexual violence, or domestic neglect," it is Article 5 of Law Number 23 of 2004 on the Eradication of Domestic Violence. Article 8 of Law Number 23 of 2004 states that the sexual violence referred to is as follows:

- a. The act of forced sexual intercourse with those member of the household;

- b. Forced sexual intercourse against one member in his/her household with another person for commercial purposes and/or for other reasons.

The following is the article of the Law on the Eradication of Domestic Violence which regulates the rules for criminalizing criminal acts of domestic violence:

- a. According to Article 46, any person who is proven to have committed sexual violence as referred to in Article 8 letter a is threatened with a maximum imprisonment of 12 (twelve) years and a maximum fine of Rp. 36,000,000.00 (thirty six million rupiahs).
- b. According to Article 47, whoever forces another person to have sexual intercourse as referred to in Article 8 letter b shall be punished with a minimum imprisonment of 4 years and a maximum of 15 years, as well as a minimum fine of 12,000,000 (twelve million rupiahs) or a maximum fine of 300,000,000 rupiah (three hundred million rupiahs).
- c. According to Article 48, there is no chance for the victim to fully recover if the acts referred in Articles 46 and 47 result in injuries. It is most likely to experience mental disorders for at least 4 (four) consecutive weeks or 1 (one) non-consecutive year, miscarriage or death of the fetus in the womb, or result in non-functioning of reproductive organs, shall be punished with a minimum imprisonment of 5 years and a maximum of 20 years or a minimum fine of 25,000,000,000.00 (twenty five million rupiahs) and a maximum fine of Rp. 500,000,000.00 (five hundred millions).

f. Law No. 21 of 2007 on the Eradication of the Crime of Human Trafficking

The 1945 Constitution of the Republic of Indonesia states in Article 28A: "Every person shall have the right to live and to defend his/her life and existence", and the Indonesian Government has ratified Law No. 21 of 2007 on the Eradication of the Crime of Human Trafficking with the consideration that every People as creatures of God Almighty have human rights in accordance with their glory and dignity" (Brian Septiadi Daud & Eko Sopyono, 2019: 353) ^[7]. Victims of the crime of human trafficking are also victims of sexual violence. It can be said because victims of the crime of human trafficking, especially women and children, are very vulnerable to sexual violence and sexual exploitation. Based on Article 2 of Law Number 21 of 2007 on the Eradication of the Crime of Human Trafficking, it is stated that any person who recruits, transports, accommodates, sends, transfers, or accepts someone with threats of violence, use of force, abduction, imprisonment, forgery, fraud, abuse of power or position of vulnerability, debt bondage, or the provision of payments or benefits despite obtaining permission from a person who controls another person, for the purpose of committing a crime, guilty, for the purpose of exploiting that person in the territory of the Republic of Indonesia, shall be punished with a fine of at least Rp. 120,000,000.00 (one hundred and twenty million rupiah) and a maximum of Rp. 600,000,000.00 and a minimum imprisonment of 3 (three) years and a maximum of 15 (fifteen) years (six hundred million rupiah).

g. Law No. 19 of 2016 on Electronic Information and Transactions

This current technology is developing very fast that there is also an increase in media crime. It is because thieves can easily access various mass media materials available today. The prevalence of cybercrime can drive many criminals to commit crimes, including fraud and sexual harassment. It is worth mentioning that Widodo defines cyber crime as all actions carried out by people, organizations, or legal entities using computers to commit crimes. The types of cyber crime that often occur are illegal access, illegal content, data forgery, cyber espionage, cyber sabotage and extortion, offense against intellectual property, and infringements of privacy (Yuni Fitriani, "Roida Pakpaham, 2020: 22-23)"^[15]. Cyber porn is one of the cyber crimes that certainly needs to get attention because it can result in big losses. In this case, women are the cause of high level of sexual violence. Basically, sexual harassment can happen to anyone in any economic class, race, and gender. In this regard when sexual harassment can be considered as an issue of power rather than an issue of assault, a legal approach is applied. Sexual harassment includes one of the classifications of sexual violence (Maulidatul Munawaroh, 2022: 57)^[10]. Everyone intentionally and without rights distributes, transmits, or in other ways makes accessible electronic information and/or documents containing offensive material, according to Law Number 19 of 2016 on Electronic Information and Transactions paragraph 1 article 27.

Meanwhile in Article 45 paragraph 1 it has been stipulated that any person who knowingly and without rights distributes, transmits, or has access to information or electronic documents or violates public morality as referred to in Article 27 paragraph 1 shall be subject to a maximum criminal penalty for violating Article 27. Paragraph 1 is 6 (six) years imprisonment and/or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiahs).

h. Regulation of Minister of Education and Culture No. 30 of 2021 on the Prevention and Handling of Sexual Violence (PPKS)

Sexual Violence in Higher Education is regulated in Regulation of Minister of Education and Culture Number 30 of 2021 on the Prevention and Handling of Sexual Violence. The recent media spotlight on cases of sexual violence on campus is nothing new. It is due to the focus on how the institution handles cases of sexual violence that occur on campus. According to Regulation of Minister of Education and Culture No. 30 of 2021, victims of sexual violence in universities are entitled to legal protection. The following concepts are used in the prevention and handling of cases of sexual violence, according to the Ministry of Education and Culture:

- a. best interest of the Victim;
- b. gender justice and equality;
- c. equal rights and accessibility for persons with disabilities;
- d. accountability;
- e. independent;
- f. prudence;
- g. consistency; and
- h. non-recurring guarantee.

Other rules regarding sexual violence are also regulated in the Regulation of the Minister of Education and Culture,

which is students, educators, educational staff in the implementation of the tridharma. In article 5, sexual violence means as follows:

- a. sending messages that insult or harass the gender, body type, or outward appearance of the victim;
- b. intentionally exposing the genitals without the consent of the victim;
- c. submitting comments to victims that involve sexual flattery, jokes, and/or whistles;
- d. looking at the Victim sexually and/or uncomfortably;
- e. sending messages, jokes, pictures, photos, audio, and/or videos that are sexually suggestive to the victim, even though there is a refusal request from the victim;
- f. without the victim's consent, take, record, and/or distribute images, audio, video, or other types of recordings that are sexually suggestive from the victim;
- g. without the victim's consent, uploading a picture of the victim's body or sensitive personal data;
- h. without the victim's consent, divulging details about the victim's personal physical or sexuality;
- i. snooping or intentionally observing Victims when they are engaged in private activities and/or in private spaces;
- j. threatening, promising, or persuading the victim to engage in a transaction or sexual activity unauthorized by the victim;
- k. giving sexual punishments or sanctions;
- l. without the victim's consent, touching, rubbing, touching, holding, hugging, kissing, and/or manipulating body parts on the victim's body;
- m. undressing the victim without the victim's consent;
- n. forcing the Victim to perform sexual transactions or activities;
- o. practicing the culture of the Student, Educator, and Educational Staff community with the nuances of Sexual Violence;
- p. attempted rape, but no penetration;
- q. committing rape, including penetration with objects or body parts other than the genitals;
- r. forcing or deceiving the Victim to have an abortion;
- s. forcing or deceiving the Victim to become pregnant;
- t. allowing the occurrence of Sexual Violence intentionally; and/or
- u. committing other acts of sexual violence.

In article 10 of the Regulation of the Minister of Education and Culture No. 31 of 2021 also explains that universities are required to handle sexual violence through:

- a. accompaniment;
- b. protection;
- c. imposition of administrative sanctions; and
- d. victim recovery.

Law No. 12 of 2022 on the Criminal Act of Sexual Violence

Legal protection for victims of sexual harassment has been regulated in more detail in the Law of Sexual Violence (UU TPKS). It should be appreciated because of the measures taken by the Indonesian House of Representatives (DPR) to ratify the TPKS Law on Tuesday, April 12, 2022. Obviously, this good step cannot be separated from the hard work of many parties during the last 10 years. Finally, Indonesia has a policy that regulates various crimes of sexual violence and guarantees the rights of victims. The

shortcomings that existed in the previous regulations were partly regulated in the TPKS Law. Here are some important points in the TPKS Law that need attention.

First, the case cannot be rejected by the police. According to Article 41 of the TPKS Law, the police receive a security report in a special service room which ensures the safety and anonymity of the victim in the event that a direct report is made through the police service. Thus that reports submitted by victims of sexual violence will be received and served directly by the police. Second, there is no restorative justice approach. Article 23 explains that cases of sexual violence that have been reported by victims cannot be resolved outside the judicial process or non-litigation, except for child perpetrators as stipulated in the law. The purpose of the absence of restorative justice approach in resolving sexual violence cases is to avoid settling cases with money which is very detrimental to the victim. This means that the handling of sexual harassment cases will be more assertive. Third, the obligation of restitution. Restitution is compensation for the victim which will later be charged to the perpetrator. In more detail, it is regulated in Article 30 paragraph 1, which states that victims of criminal acts of sexual violence are entitled to restitution and recovery services. Fourth, recognition and guarantee of the rights of victims of sexual harassment. Since the act of sexual harassment occurred, the victim has the right to treatment, protection and healing, in accordance with Article 66. Unless otherwise stipulated in the Law other than this, victims with disabilities have the right to access and adequate accommodation to enable them to exercise their legal rights in accordance with the provisions of laws and regulations. Fifth, the convenience of victims in reporting cases of criminal acts of sexual harassment. According to Article 39, victims and people who know, witness, or see an act that constitutes a criminal act of sexual violence are obligated to notify the UPTD PPA, the technical implementing unit in the social sector, community-based service provider institutions, and/or the police, both where the victim is located and where the crime was committed. After reporting, the victim gets short protection within a maximum of once in 24 hours.

Conclusion

Legislation governing sexual violence is regulated in several laws. Among others, which is in the Criminal Code, Law no. 35 of 2014 on Child Protection, Law no. 23 of 2004 on the Eradication of Domestic Violence, Law no. 21 of 2007 on the Eradication of the Crime of Human Trafficking, Law no. 19 of 2016 on Electronic Information and Transactions, Regulation of Minister of Education and Culture No. 31 of 2021 on the Handling and Prevention of Sexual Violence Cases (PPKS) and Electronic No. 31 of 2021 on Handling and Prevention of Sexual Violence Cases (PPKS) and Electronic Transactions, and Law no. 12 of 2022 on the Crime of Sexual Violence (RUU TPKS).

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