

Criminal Law Policy against Sexual Crime to Create Gender Justice

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Abstract.

The criminal act of sexual violence has not been explicitly regulated in the Criminal Code (KUHP). In its development, National Commission for Women and the Service Provider Forum (FPL) initiated and compiled the Bill on the Elimination of Sexual Violence (RUU PKS). This writing formulates 2 (two) things, namely: criminal and problematic legal policies against criminal acts of sexual violence according to the Criminal Code and its development in the PKS Bill which aims to create gender justice. The approach method used by juridical sociology is a legal research method used in an effort to see and analyze a real rule of law that exists in society. Writing specifications use descriptive analysis, sources and types of data used primary and secondary data. Data collection methods by interview, library research, document study, and use qualitative data analysis methods. The theory used in conducting the analysis is the Pancasila theory of justice, the theory of legal certainty, and the theory of neutralization. The criminal law policy regarding criminal acts of sexual violence according to the Criminal Code regulates adultery, rape, intercourse with underage women, and revocation. However, the development of the PKS Bill on sexual violence was formulated into 9 (nine) types. The problem is in the legal system (substance, structure, and legal culture) which has not been in favor of justice for victims.

Keywords: Policy; Sexual Crime; Gender Justice.

1. Introduction

Indonesia is a rule of law country¹ which has the characteristics of independence from the application of the concept or pattern of the rule of law it adheres to, namely Pancasila. One of the goals of the Indonesian State is to protect the entire Indonesian nation and promote public welfare. Indonesia has Criminal Law which aims to protect the interests of individuals or human rights and society.

In the Criminal Code (KUHP) regulates criminal acts committed by every person (general criminal law) and criminal sanctions imposed for crimes and / or violations.² The Criminal Code regulates material crimes in Indonesia that are general in nature, one of which regulates Crimes against Decency as regulated in CHAPTER XIV regarding criminal acts committed by means of violence or threats of violence related to decency³ contained in Article 284 to Article 294. Complete description of the Article as follows:

- Adultery, Article 284;
- Rape, Article 285;

¹ Article 1 Paragraph 3, the Constitution of the Republic of Indonesia

²Savitri, Niken & Rika Saraswati. (2006). *Perspektif Gender dalam Peradilan, Beberapa Kasus, First Edition*. Jakarta: Convention Watch Universitas Indonesia.p. 9.

³Hamzah, Andi. (2010). *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta.p. 96.

- Intercourse with underage women, Article 286 to Article 288;
- Fornication, Article 289 to Article 294;
- Criminal acts against decency, Article 281 to Article 283.

Along with the times, sexual violence is increasingly occurring with various motives. So that the legal umbrella governing sexual violence is considered to have not fulfilled the times and needs of society.⁴ National Commission for Women and the Service Provider Forum (FPL) initiated and compiled a Draft Law on the Elimination of Sexual Violence (RUU PKS) which is expected to answer people's concerns about legal certainty.⁵

2. Research methods

The approach method used by juridical sociology is a legal research method used in an effort to see and analyze a real rule of law and analyze how a legal rule that exists in society works.⁶ Writing specifications use descriptive analysis⁷, the sources and types of data used are primary and secondary data. Data collection methods by interview, library research, document study, and use qualitative data analysis methods.

3. Results and Discussion

3.1. Criminal Law Policy Concerning Criminal Actions of Sexual Violence

Criminal law policy is an integral part of social policy, law enforcement policy, and criminal policy, which includes rational efforts in tackling crime, to achieve the nation's goals, namely protection of society and welfare of society.⁸ The regulations on sexual violence contained in the Criminal Code do not cover all the needs for legal protection for victims. This can be seen from the rules that only refer to one subject sex only. In addition, there are no regulations that show protection for victims of sexual violence.⁹

The PKS Bill embodies the principles of Pancasila, especially the second and fifth principles. In the Constitution, the protection of human rights is about non-discrimination. The existence of the PKS Bill is intended to create a sense of security and freedom in all forms of violence.

The following is the author describes sexual violence according to the Criminal Code and its development according to the PKS Bill:

⁴Yantzi, Mark. (2009). *Kekerasan Seksual & Pemulihan: Pemulihan bagi Korban, Pelaku, & Masyarakat, First Edition*. Jakarta: Gunung Mulia. p. 6.

⁵ Heroepoetri, Arimbi & Nur Amalia. (2016). *Pengintegrasian Hak Asasi Perempuan & Perspektif Gender*. Jakarta: Yayasan Lembaga Bantuan Hukum Indonesia.p.51.

⁶ Soemitro, Ronny Hanitjo. (2010). *Metodologi Penelitian Hukum & Jurimetri*. Jakarta: Ghalia Indonesia.p.34

⁷ Hadi, Sutrisno. (2007). *Metode Research*, ed. I, Yogyakarta: Publishing foundation of the Faculty of Psychology UGM.p.19.

⁸Mulyadi, Lilik. (2008). *Bunga Rapai Hukum Pidana Perspektif Teoritis & Praktik*. Bandung: PT. Alumni.p. 389.

⁹Arief, Barda Nawawi. (2010). *Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*. Jakarta: Prenada Media Group.p. 29

3.1.1. Elements and Crimes of Forms of Sexual Violence

The provisions in the Criminal Code regarding sexual violence are very limited. Broadly speaking, the only forms of sexual violence are rape and sexual immorality. Even the available arrangements have not fully guaranteed the protection of the rights of victims, such as the formulation of articles that stipulate that one of the elements is a threat, so that victims who are in a power relationship that are not equal to the perpetrator or are in a condition unable to give real consent, are not protected by the provisions.¹⁰

In addition, the provisions regarding rape are difficult to apply if the rape is carried out not through the penis (male) to the vagina (female). This happens because, although the crime of rape in the Criminal Code is regulated in Article 285 to Article 288 of the Criminal Code, the word "rape" only exists in Article 285 of the Criminal Code, while other articles use the word "intercourse." The word "intercourse" according to R. Soesilo, refers to the Arrest Hooge Raad February 5, 1912, which is a complaint between male and female genitalia that is carried out to have children. So the male genitalia must enter the female genitalia so that it releases semen. If these conditions are not fulfilled, then the action turns into obscene act. The use of the offense for obscene acts in the case of rape, apart from obscuring the context of the criminal act of rape that occurred,

Through the Draft Law (RUU) on the Elimination of Sexual Violence, the absence of a specific formulation regarding the definition of sexual violence in the Criminal Code can be improved. Types of sexual violence that are not regulated in the Criminal Code, such as sexual harassment, sexual exploitation, forced prostitution, sexual slavery, and sexual torture will be accommodated and the punishment formulated in the Bill on the Elimination of Sexual Violence.

The Bill on the Elimination of Sexual Violence regulates the definition, elements and punishment of forms of sexual violence so as to guarantee legal certainty and protection for victims. Of the 15 types of sexual violence, the definition of each type of sexual violence is regulated in 9 Articles, where each Article regulates the elements of an act which is categorized as a criminal act.

3.1.2. Types of Sexual Violence

The types of sexual violence contained in the Criminal Code are very limited and do not comprehensively explain the types of sexual violence.¹¹ The types of sexual violence that are implicitly described in the Criminal Code include rape, forced intercourse with underage women, and sexual immorality. Whereas in the PKS Bill in more detail, it describes the types included in sexual violence, including:¹²

- **Rape** is an assault in the form of forced sexual intercourse by using the penis to the victim's vagina, anus or mouth.

¹⁰Saputro, Langgeng. (2018). "Dampak Kekerasan Seksual Terhadap Anak di Kelurahan Sempaja Kecamatan Samarinda Utara (Studi Kasus "Yayasan Kharisma Pertiwi" Rumah Perlindungan Pemulihan Psikososial Panti Asuhan Kasih Bunda Utari)", *eJournal Sosiatri-Sosiologi*, Vol. 6 No.4, p. 17.

¹¹Martha, Aroma Elmina. (2003). *Perempuan Kekerasan & Hukum*. Yogyakarta: UII Press.p. 36.

¹² Academic Paper on the Bill on the Elimination of Sexual Violence

- Sexual harassment namely sexual acts through physical or non-physical touch with the target of the sexual organs or sexuality of the victim.
- Sexual Exploitation namely the abuse of unequal power, or abuse of trust, for the purpose of sexual gratification, as well as to obtain benefits in the form of money, social, political and other. The practice of sexual exploitation that is often encountered is using women's poverty so that they enter into prostitution or pornography.
- Trafficking of Women for Sexual Purposes is the act of recruiting, transporting, accommodating, sending, transferring, or receiving someone with threats of violence, use of force, kidnapping, confinement, forgery, fraud, abuse of power over a vulnerable position, bondage of debt or giving payment or benefits to victims directly or others who controls it, for the purpose of prostitution or other sexual exploitation.
- Forced Prostitution is a situation where women experience tricks, threats or violence to become sex workers.
- Sexual Slavery is a situation where the perpetrator feels that he is the owner of the victim's body so that he has the right to do anything, including obtaining sexual satisfaction through rape or other forms of sexual violence.
- Forced Marriage, including Hanging Divorce is a type of sexual violence because forced sexual relations are an inseparable part of the marriage which the woman does not want.
- Forced Abortion, namely abortion due to pressure, threats, or coercion from other parties.
- Coercion of contraception and sterilization ie installation of contraceptives and / or carrying out sterilization without the full consent of the woman because she does not receive complete information or is considered legally incompetent to be able to give consent.
- Sexual Torture that is, a special action that attacks women's organs and sexuality, which is done on purpose, causing great pain or suffering, whether physical, spiritual or sexual.

3.1.3. Prevention

The Bill on the Elimination of Sexual Violence regulates the roles and duties of State Institutions, Government and Local Governments to carry out prevention of sexual violence. This regulation is not contained in the KUHP, and cannot be regulated by the KUHP because this content is not a criminal act. Considering that prevention of sexual violence is an important thing, this prevention must be regulated in laws and regulations outside the Criminal Code, namely the Bill on the Elimination of Sexual Violence.

3.1.4. Protection and Rights of Witnesses and Victims, and Recovery of Victims

This bill regulates the roles and duties of service provider institutions in the protection and recovery of victims, things that are not regulated by the Criminal Code, because the Criminal Code does not regulate provisions other than criminal.

This bill also complements the roles and duties of the Witness and Victim Protection Agency to provide protection for witnesses and victims of sexual violence.

The description of sexual violence that the author has reviewed, can draw the conclusion that the perpetrator who commits sexual violence is in line with the Neutralization Theory, that is, someone who fails to apologize for his / her actions so that he is led into a lifestyle that deviates from norms. The criminal process took place subtly which was carried out by the perpetrator as an excuse to justify his actions.

3.2. Problems in the Development of Criminal Actions of Sexual Violence

Problematic development of sexual violence according to the Criminal Code and in its development according to the PKS Bill:¹³

3.2.1. Legal Substance:

Material Law

- Sexual violence in the Crimes against immoral chapter does not protect individual citizens; The Criminal Code regulates sexual violence in Chapter XIV Crimes against Decency which is defined as "public courtesy with sexual desires". Therefore, morality places more emphasis on protecting the people's sense of morality than on protecting citizens from crimes against their bodies. In fact, the criminal act of rape and sexual immorality are part of crimes against the integrity of the body and sexuality of victims, most of whom are women and children.
- The forms and definitions of sexual violence are limited. The crime of rape in the Criminal Code is regulated in Article 285 to Article 288 of the Criminal Code. However, the word rape is only in Article 285 of the Criminal Code while other articles use the word "intercourse". According to R. Soesilo, intercourse is a complaint between male and female genitalia which is carried out to have children. So the male genitalia must enter the female genitalia so that it releases semen. If these conditions are not fulfilled, the action will turn into obscene embryo.
- Limited criminal; In the Criminal Code, criminal penalties can be divided into 2 (two), namely the main and additional crimes. In fact, cases of sexual violence require more specific punishment than those stipulated in the Criminal Code.

There are only 2 sexual violence in the Criminal Code, rape and sexual abuse. Then, limited punishment, a limited definition, for example rape, which means penetration of the penis into the vagina. Meanwhile, in the cases encountered, penetration can be done through the anus, mouth, and using tools.

The form of rape that occurs over the years slips into the criminal process because there is an assumption that when it occurs over the years and repeatedly it cannot be classified as sexual violence. This is an example of the current narrow regulations governing sexual violence.

¹³ Seminar, Examining the Controversy of the Bill on the Elimination of Sexual Violence, University of Surabaya, 22 November 2019.

Formal Substances:

The Criminal Justice System starts from Investigation, Investigation, Prosecution, Court, Correctional Institution. KUHAP regulations only regulate the protection of suspects or defendants, but there is no protection for victims.

- Does not regulate assistance obligations to victims.
- There are no guidelines for examining victims of sexual violence.
- There are no regulations regarding the rights of victims to information.

3.2.2. Legal Structure

The legal structure concerns law enforcement institutions, institutional authorities and personnel (law enforcement officials). In cases of sexual violence that occur at this time, while being processed through litigation. Often cases that are brought to the Police are denied the basis of the relationship between the victim and the perpetrator who is considered not a criminal act because it is based on consensual feelings.

3.2.3. Legal Culture

Rape culture is pervasive and embedded in the way of thinking, speaking and acting in everyday life. UN Wmoen defines it as Rape culture is the social environment that allows sexual viability to be normalized and justified, fueled by the persistent gender inequalities and attitudes about gender and sexuality. This cultural form of rape, such as blaming victims who are considered to want or be responsible for sexual violence that befell them, underestimating sexual violence by perceiving boys' behavior as sexually explicit jokes, tolerating sexual harassment, presenting random gender-based violence in film and television.

This cycle of fear is inherited continuously. In addition, this culture causes the existing social structures in society to no longer function, the community loses sensitivity to violations that harm the rights of victims.

4. Conclusion

The criminal law policy regarding criminal acts of sexual violence according to the Criminal Code (KUHP) is contained in Chapter XIV concerning crimes against decency which regulates adultery, rape, intercourse with underage women, and revocation. However, its development in the Draft Law on the Elimination of Sexual Violence (RUU PKS) which aims to create gender justice for sexual violence is formulated into 9 (nine) types, namely: sexual harassment, sexual exploitation, forced contraception, forced abortion, rape, forced marriage, coercion prostitution, sexual slavery, and sexual abuse.

5. References

Journal:

- [1] Saputro, Langgeng. (2018). "Dampak Kekerasan Seksual Terhadap Anak di Kelurahan Sempaja Kecamatan Samarinda Utara (Studi Kasus "Yayasan Kharisma Pertiwi" Rumah Perlindungan Pemulihan Psikososial Panti Asuhan Kasih Bunda Utari)", *eJournal Sosiatri-Sosiologi*, Vol. 6 No.4, p. 17.

Books:

- [1] Arief, Barda Nawawi. (2010). *Kebijakan Hukum Pidana Perkembangan Penyusunan Konsep KUHP Baru*. Jakarta: Prenada Media Group
- [2] Hadi, Sutrisno. (2007). *Metode Research*, ed. I, Yogyakarta: Publishing foundation of the Faculty of Psychology UGM
- [3] Hamzah, Andi. (2010). *Asas-Asas Hukum Pidana*. Jakarta: Rineka Cipta
- [4] Heroepoetri, Arimbi & Nur Amalia. (2016). *Pengintegrasian Hak Asasi Perempuan & Perspektif Gender*. Jakarta: Yayasan Lembaga Bantuan Hukum Indonesia
- [5] Martha, Aroma Elmina. (2003). *Perempuan Kekerasan & Hukum*. Yogyakarta: UII Press
- [6] Mulyadi, Lilik. (2008). *Bunga Rapai Hukum Pidana Perspektif Teoritis & Praktik*. Bandung: PT. Alumni
- [7] Savitri, Niken & Rika Saraswati. (2006). *Perspektif Gender dalam Peradilan, Beberapa Kasus, First Edition*. Jakarta: Convention Watch Universitas Indonesia
- [8] Soemitro, Ronny Hanitjo. (2010). *Metodologi Penelitian Hukum & Jurimetri*. Jakarta: Ghalia Indonesia
- [9] Yantzi, Mark. (2009). *Kekerasan Seksual & Pemulihan: Pemulihan bagi Korban, Pelaku, & Masyarakat, First Edition*. Jakarta: Gunung Mulia

Regulations:

- [1] Constitution of the Republic of Indonesia 1945
- [2] Act No. 8 of 1981 concerning the Criminal Procedure Code
- [3] Act No. 1 of 1946 concerning the Criminal Code
- [4] The Draft Law on the Elimination of Sexual Violence