

Juridical Analysis of Law No. 12 of 2022 Concerning the Crime of Sexual Violence in the Perspective of Victim Protection

Triantono¹, Ani Purwanti², Muhammad Marizal³, Nur Rochaeti⁴
{triantono19@gmail.com¹, ani_purwanti81@yahoo.com², mmarizal.1303@gmail.com³,
etikfh@live.undip.ac.id⁴}

Universitas Tidar, Indonesia^{1,2}
Universitas Diponegoro, Indonesia^{1,3}

Abstract. Sexual violence is a complex reality that immensely affects the integrity of human dignity for victims. Victims of sexual violence, mostly women and girls, show that there is a gender discriminatory construction issue in society that affects the problem of legal protection both in abstracto and in concreto. There are 3 (three) problems in this paper, such as: First, what is the current condition of protection for victims of sexual violence? Second, what is the current form of the policy on sexual violence protection in Indonesia? Third, how is the criminal law policy to protect victims of sexual violence based on Pancasila justice? This research is juridical-normative through a literature study using legal materials, and then the descriptive analysis is completed to answer the problems. Based on the results of the discussion, it is concluded that the legal protection of victims of sexual violence is indeed hampered by factors of legal substance, structure, and culture. The current form of policy to protect victims of sexual violence is not nonetheless comprehensive and responsive to victims. The Act on the Crime of Sexual Violence (UU TPKS) as part of the reform of criminal law policies has maintained a progressive basis in terms of protection, undertaking, and recovery of victims. There are indeed substantive issues that have the potential to reduce the strengthening of protection for victims of sexual violence such as the absence of norms regarding rape, forced abortion and integration with other laws as a consequence of the existence of bridge articles.

Keywords: Criminal Law Policy, Victim Protection, Sexual Violence

1 Introduction

Philosophically, the right of citizens to obtain protection from violence and to be free from torture or treatment that degrades human dignity has been guaranteed in the 1945 Constitution of the Republic of Indonesia. The form of acts of violence and degrading treatment of human dignity is sexual violence which is paradoxical to the values of divinity, humanity, and justice.

The report of the National Commission on Violence Against Women (Komnas Perempuan), indeed shows alarming numbers. In 2018, 6,903 cases of sexual violence were reported to this institution, of which 3,915 were committed in the public sphere and 2,988 in the domestic sphere or in personal relationships [1]. Cumulatively from 2011 to 2019, there were a total of 46,698 cases of sexual violence reported to numerous victim services in Indonesia [2]. These cases include rape, sexual assault, sexual harassment, incest, adultery,

sexual exploitation, and forced abortion. In 2020, Komnas Perempuan reported as well an increase in cyber sexual cases from 97 to 281 cases [3]. These figures are believed to be the “tip of the iceberg”, where factual cases go unreported much more [4].

The Academic Alliance for the Advocacy of the Anti-Sexual Violence Bill (2020) found that 84.2% of the 2,227 respondents, both themselves and family members or close friends, had experienced several types of sexual violence, and were less expected to report these cases. The high number of unreported cases is often attributed to the victim's lack of confidence in the Indonesian criminal justice system; 88.4% of respondents reported that the protection offered to victims of sexual violence in the Indonesian legal system was inadequate. Moreover, 98.5% of respondents emphasized the need for urgent legal reforms to protect victims of sexual violence through a special bill [4].

Sexual violence is a violation of human rights, a crime against human dignity, and the main form of discrimination against women. Numerous types and forms of sexual violence, and the majority of victims are women and girls [3]. The high number of victims of violence against women indicates that there are severe problems regarding power relations and gender roles in the structure of a patriarchal society. In such conditions, women who experience sexual violence are vulnerable subjects both in position and function in society. This causes sexual violence to become a repeated cycle and has the worst impact on women. Physical, mental, health, economic, and social suffering to politics are the effects of sexual violence [2]. The impact of sexual violence immensely as well affects the lives of victims. The impact is massive when the victim is part of a society that is economically, socially, and politically marginalized, or those who have special needs, such as children, and persons with disabilities [2]. This can damage the entire integrity of the victim's life, causing the victim to feel unable to continue her life.

As an endeavour to strengthen the protection of victims of sexual violence, on April 12, 2022, the Draft Law (RUU) on the Crime of Sexual Violence (TPKS) was passed into law [2]. The TPKS Law is an exceptional procurement that is expected to provide a material and formal basis at the same time thus it can guarantee legal certainty and fulfil the community's sense of justice. There are 5 (five) objectives of the establishment of this Law, they are: 1) preventing all forms of sexual violence; 2) dealing with, protecting, and recovering victims; 3) enacting law enforcement and rehabilitate perpetrators; 4) conceiving an environment without sexual violence; and 5) ensuring non-repetition of sexual violence. The Act on the Crime of Sexual Violence (UU TPKS) is expected to maintain a progressive strengthening of victim protection to the regulation of criminal acts. Nevertheless, there are indeed elusive annotations that risk having consequences in implementation. The existence of a bridge article (bridging), not regulating rape and forced abortion challenges integration with the RKUHP.

There are 3 (three) focus issues in this research, they are: First, what is the current condition of protection for victims of sexual violence in Indonesia? How is the criminal law policy to protect victims of sexual violence based on Pancasila justice? This research is juridical-normative through a literature study using legal materials, and then the descriptive analysis is conducted to answer the issues.

1.1 The Current Condition of Protection for Victims of Sexual Violence in Indonesia

The World Health Organization (WHO) stipulates limitations that violence (violence) is the use of physical force and power, threats, or actions against oneself, an individual or a group of people or society that results in or is expected to result in bruising/trauma; death; psychological loss; developmental disorders or deprivation of rights. Briefly, the definition of sexual violence is defined as “*nonconsensual conduct of a sexual nature*” [5] atau “*physical*

sexual acts without the consent of the other person or when the other person is unable to give consent.” [5]. From the framework made by WHO there are keywords in defining sexual violence, they are: [6]

1. *Sexual act*
2. *Non-consensual/unwanted*
3. *Against a person's sexuality*
4. *Coercion*
5. *In any relationship*
6. *Home and work*

Mansoor Fakih presents a framework for thinking that violence is related to social roles and functions between men and women as well. Along with these social roles, there is a close relationship between violence and discrimination, particularly gender [7]. This difference in gender roles gives birth to gender injustice, one of which is gender-based violence, in which women become targets of violence due to the fact of the gender roles and values attached to them [7].

Victims of sexual violence are subjects who are directly harmed both physically, psychologically, mentally, and socially. The worst condition of victims of sexual violence leads to the loss of the integrity of the human dignity of the victims themselves. The complex problem of protecting victims of sexual violence can be analyzed through Friedman's legal system theory which states that there are three elements that make up the legal system, namely legal substance, legal structure; and legal culture [8].

Normatively substantively Law no. 23 of 2004 concerning the Elimination of Domestic Violence (UUPKDRT); Law No. 23 of 2002 which has been amended by Law no. 35 of 2014 concerning Child Protection, and Law no. 21 of 2007 concerning the Eradication of the Crime of Trafficking in Persons explicitly contains sexual violence. All three have limitations due to the reason that they only refer to their respective scopes indeed, such as households, children (0-18 years), and human trafficking. In the meantime, the current Criminal Code (KUHP) is no longer adequate in light of the fact that it does not explicitly regulate the development and complexity of sexual violence that is currently taking place. The meaning and interpretation of rape only accommodate acts of forced sexual intercourse in the form of penetration of the penis into the vagina and with evidence of physical violence as a result of the penetration [9].

Protection of victims of sexual violence can refer to the provisions of Law no. 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims. In the law there is a right of restitution for victims, data from the 2018 LPSK annual report there were 41 victims of sexual violence who received restitution. In 2019 there were 125, in 2020 there were 194 respondents who were victims of sexual violence. The rights of victims of sexual violence have begun to be understood and fought for by victims, but the number of requests for restitution is as much as the fulfilment of procedural rights which continues to increase every year [10]. In the context of victims of sexual violence, what is regulated in Article 2 paragraph (2) is only in terms of sexual violence against children. These conditions can lead to doubts in implementation if the victim is an adult.

Moreover, the problem of substance, the protection of victims of sexual violence is as well hampered by problems with the structure of law enforcement and culture. In legal service institutions, there is already a Women and Children Service Unit (UPPA) for handling sexual violence. The availability and quality of this unit are not adequate at all levels of law enforcement and have not been supported by an adequate victim-handling perspective [11]. As a result, the attitude towards the case does not show empathy for the victim and even tends to

blame the victim, judge the victim, and make the victim victimized. In numerous cases, the strong influence of patriarchal culture/perspective has an impact on the community's role which is not optimal as well in maintaining support (support system) to female victims [11].

Aspects of the structure, the Police, the Prosecutor's Office as well as the Court, have not fully implemented the undertaking of sexual violence cases with a perspective that does not have a victim's perspective. The approach taken is only limited to undertaking against the perpetrators. Limited access, capacity and power worsen the situation of protecting victims of sexual violence in law enforcement structures. Numerous cases of sexual violence have ended peacefully and were married to criminals which had a pernicious impact on the victims [12]. Cases that were adjourned resulted in indecisive action against the perpetrators and in the end, they reiterated their actions.

According to Rochaety, structurally the barriers to the protection of victims of violence are due to the understanding of the community and law enforcement officers that they are not yet gender-sensitive, and there is indeed a tendency not to take sides with women as victims [13]. Moreover, cases related to violence against women are only approached through a physical approach as well, hence they are unable to capture non-physical aspects such as psychological, socio-cultural, economic and political [13].

Moreover, based on the records of assistance, revictimization is often experienced as well by victims who struggle to seek rights and justice. Research Reports on Experiences of Women Victims of Violence in Accessing Services conducted by LRC-KJHAM, and Service Provider Forum (FPL) law enforcement officers indeed often blame victims; doubting and denying the victim's statement; regard sexual violence as consensual; Informal compensation from the perpetrator is always used as a basis for lightening the sentence of the perpetrator, in order to stop the case, indeed. Some of the victims interviewed said that they were traumatized after being examined in court as well [14]. Moreover, the findings from MAPPI FH UI show that the sexual history or stigma of the victim is used by judges in lessening or deciding the acquittal of defendants in sexual violence cases indeed. This ensued in the verdict [15].

Legal culture is the values, attitudes, and behaviour of community members in legal life. Legal culture does not work independently but is closely related to numerous functions, firstly the legal system is not well organized, there are openings and inadequate quality, as well as the existence of colonial legislation indeed. Second, legal culture is related to influences from sectors outside the law as well, such as the negative effects of economic development, as well as the influence of the weakening of respect (harassment) for the law which results in public distrust of law enforcement. Third, legal culture is influenced by the globalization of the lives of nations in the world [15]. Cultural perspectives that have not been responsive to victims of sexual violence coupled with a legal vacuum have had an impact on the cycle of sexual violence that harms victims.

Based on the explanation above, shows that the protection of victims of sexual violence is a problematic complexity. This is a combination of gender-biased social construction conditions that affect the community's perspective, the physical and psychological dynamics of victims, and ineffective access to legal protection. This is a strong impetus for the renewal of the criminal policy on sexual violence to prioritize the protection of victims.

1.2 Problematic Annotations on Law No. 12 of 2022 concerning the Crime of Sexual Violence

Substantially this Law regulates the prevention of all forms of sexual violence; undertaking, protecting, and restoring the rights of victims; coordination between the government and local governments; and international cooperation thus the prevention and

treatment of victims of sexual violence can be executed effectively. Moreover, community involvement in the prevention and recovery of victims is regulated in order to create environmental conditions that are free from sexual violence as well. This has referred to the development and paradigm of modern criminal law that is universally implemented.

The orientation of punishment is not solely on retaliation but combines corrective justice, restorative justice, and rehabilitative justice. Corrective justice is concerned with taking action and punishing perpetrators, restorative justice emphasizes the recovery of victims while rehabilitative justice is aimed at both victims and perpetrators [16].

Article 4 paragraph (1) of the TPKS Law stipulates the formulation of criminal acts of sexual violence into 9 types of sexual violence, particularly: non-physical sexual harassment; physical sexual harassment; forced contraception; forced sterilization; forced marriage; sexual abuse; sexual exploitation; sexual slavery; and electronic-based sexual violence.

No definition has been specifically made to define sexual violence. These understandings have been directly intended for the preparation of *bestanddeel delict* (elements of offence) in every form of sexual violence. According to the author, apart from being efficient in construction, it as well makes it easier for law enforcement officers to qualify for an act of sexual violence. Hence, it closes the possibility of ambiguity and retention between the formulation of the offence and the understanding of the general stipulations. That is why Article 1 point 1 it is only stated that:

“Sexual Violence Crimes are all acts that fulfil the elements of a criminal act as regulated in this Law and other acts of sexual violence as regulated in the Law as long as it is stipulated in this Law”

Moreover, what is interesting about this TPKS Law is that there is a bridging article that allows the types of sexual violence in other laws to be subject to the stipulations of the particular procedural law regulated in the TPKS Law, including the rape offence in the Criminal Code. Article 4 paragraph (2) states that:

Moreover, to the Crime of Sexual Violence, as referred to in paragraph (1), the Crime of Sexual Violence as well includes:

- a. Rape
- b. Lascivious act
- c. Sexual intercourse with children, salacious acts against children, and/or sexual exploitation of children
- d. An act of violating decency that is contrary to the will of the victim
- e. Pornography involving children or pornography that explicitly contains sexual violence and exploitation
- f. Forced prostitution
- g. The crime of trafficking in persons intended for sexual exploitation
- h. Sexual violence in the household
- i. The crime of money laundering which original crime was a crime of sexual violence; and
- j. Other criminal acts that are explicitly stated as sexual violence crimes as regulated in the provisions of the legislation.

The existence of Article 4 paragraph (2) is crucial in accommodating all types and forms of sexual violence. The inclusion of this provision has an impact on the compliance of laws other than TPKS which regulate sexual violence in the provisions of the procedural law contained in the TPKS Law and overrides the Criminal Procedure Code. Counselling experience shows that the protection of victims is in a risky circumstance in the phases of reporting, investigation, prosecution, and trial examination [17].

Moreover, in order to strengthen the protection of victims of sexual violence, the rights of victims are as well regulated in this TPKS Law. The rights of victims as referred to in Article 67 include the right to protection, therapy, and recovery. These three rights are then described comprehensively in the following articles. In short, in the TPKS Law, there is a commitment to maintain victim protection through the comprehensive inclusion of victims' rights.

The TPKS Law has a specific procedural law character that facilitates and protects victims from the stages of reporting, investigation, prosecution, and trial examination to the execution of court decisions. In the TPKS Law, the protection and recovery of victims are fulfilled simultaneously with the legal process. In fact, to ensure the protection of victims, Article 23 of the TPKS Law explicitly states that TPKS cannot be settled outside the court process, except for child perpetrators. This accommodates the fact that there are many TPKS cases that just pass when the perpetrators have received compensation, despite the fact that this could have been done due to the reason of the imbalance in power relations and in light of the fact that the perpetrators came from wealthy circles.

The existence of a bridging article brings a big challenge to harmonization and integration. Article on rape in the Criminal Code and RKUHP, affirming that forced abortion in the RKUHP is sexual violence, integrating physical sexual harassment with sexual exploitation in the RKUHP, integrating with the revision of the ITE Law, and integrating with the RKUHAP. This integration is of course material in nature where the elements of the offence in question must be in the same breath as the elements of the offence as stipulated in the TPKS Law which guarantees the strengthening of the protection of victims of sexual violence.

In general, numerous developments in this Law, they are:

- a. There are other criminal acts that are explicitly stated as Sexual Violence Crimes as regulated in the stipulates of other laws and regulations, moreover the types of sexual crimes as regulated in this Law as well.
- b. There is a comprehensive arrangement starting from the phase of an investigation, prosecution, and examination in court with the principles of human rights and victim protection
- c. There is an obligation of the state in fulfilling the rights of victims to Handling, Protection, and Recovery. Moreover, there are restitution and compensation rights
- d. It is not possible to settle cases of sexual violence outside the judicial process, except for child perpetrators.

Moreover, the existing developments, there are indeed gaps related to the substance that has the potential to weaken the protection of victims of sexual violence in the future.

The absence of understanding or elements of the rape article in the TPKS Law is a particular issue. Nevertheless, historically, one of the basic ideas for drafting the TPKS Bill (the Draft Law on the Elimination of Sexual Violence at that time) emanated from the fact that many rapes occurred. The reason is Article 4 paragraph (2) along with its legal doctrine and then rape is not regulated in the TPKS Law, thus it is treacherous to cause multi-interpretation issues. It must be ensured that the norms regarding rape and other sexual violence implied in other laws must be “in the same breath” as the basic idea of enacting the TPKS Law.

It should be emphasized that the difference between the TPKS Law and the Criminal Code in viewing rape is that when rape is included in the TPKS Law, it becomes a crime against humanity. Nonetheless, in the vent that rape becomes the norm of the Criminal Code, it will become a general offence of decency. Article 285 of the Criminal Code is included in CHAPTER XIV concerning crimes against decency. Moral offences are offences related to (issues) decency [18]. According to Barda Nawawi Arief, this brief definition does not indeed describe the scope of a decency criminal offence, given that the definition and boundaries of

decency are quite broad and distinct according to the views and values prevailing in society [19].

Referring to the opinion of Barda Nawawi Arief, it can be concluded that the limits of the scope of a decency criminal offence are not clearly visible. The ambiguity of the boundaries and scope of the decency criminal offence stems from the fact that the issue of decency is an issue related to the values that live in society, hence how far the limits of the scope of the decency criminal offence are susceptible on how diverse people's views are in viewing the issue.

Based on the resolution of sexual violence only on the enforcement of decency in the community, it is feared that it will have an impact on justice disparities. The demeanor experienced by victims and perpetrators of violence in one circumstance and in another is expected to be different, depending on the social conditions of the community. Moral values that are philosophical will indeed be expected to be interpreted in diverse ways. Along with a patriarchal social structure, it is possible that the recovery of victims will be curbed and there is the possibility of reiteration of violence.

Apart from rape, there are records as well related to forced abortion which has been identified from the start as a type of sexual violence. It is indeed more fatal that forced abortion is not a type of violence regulated as well in the bridging article (Article 4 paragraph 2). The biggest possibility is to accommodate this norm in the RKUHP.

The article on restitution, moreover promising victim protection, has the potential to cause problems as well on the occasion of there being no guarantee of the payment of restitution for perpetrators who are unable to pay restitution. The concept of compensation used in Article 35 which is used in order to replace restitution against victims originating from a victim trust fund is not interpreted as a bailout that must be replaced by the perpetrator by labouring or other actions. As a result, the impression appears that the state through compensation indeed facilitates the payment of restitution for crimes committed by perpetrators of sexual violence.

Philosophically, endeavours to revise the criminal law policy for the protection of victims of sexual violence is part of implementing the values of Pancasila, particularly the second principle of "Just and civilized humanity", dignity as a creature of God Almighty", "Recognizing equality, equality of rights and human compulsions of every human being, without discriminating against ethnicity, descent, religion, belief, gender, social position, skin colour and so on" and "Upholding The high human values of protection for victims as well intend to fulfil the sense of justice as stated in the 5th Pancasila, which reads, "Social justice for all Indonesian people". In this case, the orientation of reforming the criminal law on violence is in the context of strengthening the protection of victims of sexual violence based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

Based on the juridical aspect, in spite of the fact that substantially there has been a TPKS Law that has been ratified and bestows a progressive spirit of victim protection, in reference to the analysis in the previous sub-chapter, there are punitive annotations that have the potential to reduce the strengthening of protection for victims of sexual violence indeed. Along with reference to this reason, it is necessary to do the following things: First, guarantee the strengthening of the formulation of rape in the RKUHP. Article 4 paragraph (2) of the TPKS Bill states that rape is a type of sexual violence in other laws. The formulation of rape norms in the RKUHP must be in line with the UUTPK which includes elements of coercion to reach power relations and psychological violence as well, not only penile-vaginal penetration and can not only occur outside of marriage, and placing it is not part of a crime of decency. Rape should be defined as a type of sexual violence as well.

Second, there is an assurance of regulation of forced abortion in the RKUHP as a sexual violence offence. UUTPKS does not include forced abortion as sexual violence or sexual violence in other laws. There is a norm reformulation in the RKUHP (Article 469 paragraph (2)), which can confirm that the act of forced abortion is a form of sexual violence so that the victim of forced abortion becomes the subject of the TPKS Bill.

Third, integrating the regulation of physical sexual harassment with sexual exploitation in the RKUHP. This needs to be accomplished considering the closeness in the regulation of the act in UUTPKS nonetheless has a different criminal threat. Fourth, integration of online-based sexual violence with the revision of the abolition of Article 27 paragraph (1) of the ITE Law in light of the fact that it is only oriented to content, not consent. The publicize of personal contact must be agreed upon on consent/approval, on the occasion it is not done on the basis of consent/approval then the person has affirmed as a victim, not a perpetrator.

Fifth, the RKUHAP must stipulate that the prior examining judge assesses the feasibility of evidence as an attestation for a criminal case as an improvement in the UUTPKS which does not separate evidence and attestation. Article 24 paragraph (1) letter c UUTPKS introduces a rule which states that evidence can be used as attestation as well. Along with the function of the prior examination, the judge assesses the feasibility of the evidence in the case, thus the tenacity of the evidence can be assured.

Sixth, the RKUHAP must encompass statements as well from witnesses with disabilities attaining the same evidentiary strength and an expert assessment mechanism for intellectual disabilities as regulated in Article 25 paragraph (4) of the TPKS Law. The RKUHAP must be guaranteed to no longer be formulated with stigmatizing articles as in Article 171 of the Criminal Procedure Code.

2 Conclusion

Based on the description of the analysis, the author concludes as follows:

1. The protection of victims of sexual violence up to now has issues in terms of substance, structure, and culture indeed. This has an impact on inadequate legal protection and justice for victims of sexual violence.
2. The form of the current policy on the protection of victims of sexual violence substantively has normative diversification and is limited to sexual violence that occurs in the household, sexual violence against children, and sexual violence in trafficking in persons indeed. Normatively, the Criminal Code has not accommodated the development of types of sexual violence. This condition has not maintained comprehensive protection for victim protection which includes undertaking, protection, and recovery.
3. The criminal law policy for the protection of victims of sexual violence in reference to Pancasila justice has been pursued over the Policy Formulation for the Reform of the Criminal Law for the Protection of Sexual Violence in Law Number 12 of 2022 concerning the Crime of Sexual Violence (UU TPKS). This law has 4 important and comprehensive objectives, they are prevention, undertaking, law enforcement and recovery. The results of the analysis show that in general the substance in the Law has progressively over protection for victims of sexual violence through the protection, therapy, and recovery of victims. There are indeed substantive issues that have the potential to reduce the strengthening of protection for victims of sexual violence such as the absence of norms regarding rape, forced abortion and synchronization with other laws

as a consequence of the existence of bridging articles. A legal reform concept is needed regarding this matter thus there is no reduction in the purpose of protecting victims of sexual violence.

3 Suggestion

Based on the conclusions above, there are the following suggestions:

1. The existence of the TPKS Law must be followed by the preparation of the structure and culture hence it becomes a comprehensive system that has the ability to maintain
2. Substantially there needs to be a guarantee of strengthening the formulation of rape in the RKUHP thus it is "in the same breath" as the UUTPKS. In the RKUHP, the article on rape must be emphasized as a form of sexual violence as well.
3. Assurance of affirmation in the RKUHP that forced abortion is sexual violence hence victims of forced abortion become the subject of the TPKS Bill.
4. Integration of regulations regarding physical sexual harassment with sexual exploitation in the RKUHP and integration with the Revised ITE Law Article 27 paragraph (1) of the ITE Law which is oriented towards non-consensual content must be adjusted in the revision.
5. Substantive integration in the RKUHP relates to the non-separation of evidence and evidence in response to Article 24 paragraph (1) letter c of the TPKS Law and refers to witnesses with disabilities.

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