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The Indonesian Criminal Law System's Progression in Sexual Assaults Regulation

Article

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Abstract

This article aims to analyze the development of the sexual assault regulation which comes from various sectoral acts in Indonesia. This research is a normative juridical research that uses primary legal materials in the form of laws and regulations and secondary legal materials in the form of legal books and legal articles. The analysis used is descriptive qualitative. The result of this study indicates that the massive cases of sexual assault that occur in private and public spaces have made it a serious crime that has to be handled with appropriate legal instruments. In Indonesia, sexual assault is a form of crime which its perpetrator can be convicted. Prior to the creation of The Sexual Assaults act Number 12 of 2022, the sexual assault regulation is already regulated in various separates acts. It caused disharmony of the regulation which implicates to non-optimal law enforcement. After the establishment of The Sexual Assaults act Number 12 of 2022, currently, Indonesia has a main legal protection in providing the handling, protection, and law enforcement of sexual assault. Since the passage of The Sexual Assaults act Number 12 of 2022, all the various separates acts have been regulated in a way that is more unified in a form of special law (*lex specialis*) which contains material and formal criminal arrangements.

Keywords: *Indonesian criminal law; sexual assaults regulation.*

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INTRODUCTION

As a country that uphold values of protection, modernity, honor, and enforcement of human rights in all aspects of life, carries the responsibility to regulate regarding the prevention and law enforcement of sexual assault through an adequate legal instrument. The importance of accommodating this legal instrument aligns with the concept of legal certainty that ensures public protection against all forms of violence and discrimination.¹

¹ The Guarantee of Human rights protection towards national citizens to be free from all forms of torture and discrimination is a constitutional right that is guaranteed by Article 28G Paragraphs (1) and (2) and also Article 28I paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia.

There are at least two main factors behind the establishment of sexual assault regulation in Indonesia, which are sociological and juridical. Sociologically, sexual assault is portrayed as an iceberg phenomenon that would later develop into a major crime, whether it be in the public or private sector. Whereas juridically, there are many legal issues that needs to be resolved, in terms of the substantive regulation relating to the legal actions of the law enforcement.

Many reasons, ranging from cultural construction to skewed religious belief, contribute to the fact that violence tends to occur more frequently in women, children, and the disabled. In terms of cultural construction, women are frequently relegated to a subordinate position.² Such as women are called *konco wingking* which translates to someone who is left behind and trailing behind her husband, while the is regarded husband as the representative of God.³ Furthermore, the biased interpretation of religion also plays a role in creating unequal relations which potentially leads to violence.⁴

Based on data published by the Ministry of Women Empowerment and Child Protection, the accumulated sexual assault cases whose victims are children and women, in 2020 reached the highest score of 7.191 cases. Subsequently, until the end of November 2022, sexual assault cases calculated by the ministry resulted in 23.293 cases were recorded whics is divided into 3.820 male victims, and 21.201 female victims.⁵ Based on the 2022 annual records of the Women's Commission, in 2021, the number of gender-based violence cases targeting women reached 338.496 cases. It increased 50% compared to the 2020th data records. Aside from women and children, males can also be the victims of sexual assault. Based on the report on Quantitative Barometer Studies of Gender Equality launched by the Indonesia Judicial Research Society (IJRS) and INFID, throughout 2020, the percentage of male victims was 33%, with the domination of sexual harassment cases.⁶

The data above shows that sexual assault is a very serious crime. Sexual assault is a behavior that goes against the social norm and humanity. Consequently, sexual assault is called inhuman behavior, and everyone reserves the right to protect their human rights in normal activities. In the context of the state obligations, the high levels of sexual assault become the state's responsibility in response to the legal needs of the society in order to provide a guarantee of sense of secure to be free from violence. Therefore, to ensure protection from sexual assault, Indonesia legislated a new legal instrument called The Sexual Assaults Act Number 12 of 2022. Though historically, the making of this regulation has come a long way. It started in 2012, where the government arranged

² Hariyanto Hariyanto, "Dehumanisasi Terhadap Perempuan Dalam Praksis Poligami: Dialektika Antara Normativitas Dan Historisitas," *PALASTREN Jurnal Studi Gender* 8, no. 1 (30 Maret 2016): 79–102, <https://doi.org/10.21043/PALASTREN.V8I1.935>.

³ Mufidah Cholil, "Complexities in Dealing with Gender Inequality: Muslim Women and Mosque-Based Social Services in East Java Indonesia," *Journal of Indonesian Islam* 11, no. 2 (5 Desember 2017): 459–488–488, <https://doi.org/10.15642/JIIS.2017.11.2.459-488>.

⁴ Muhammad Iqbal Juliansyahzen, "Otoritarianisme Pemahaman Keagamaan: Melacak Akar Kekerasan Terhadap Perempuan Dalam Rumah Tangga," *Yinyang: Jurnal Studi Islam Gender Dan Anak*, 17 Juni 2021, 49–70, <https://doi.org/10.24090/yinyang.v16i1.3999>; Bani Syarif Maula, "Keniscayaan Pembacaan Ulang Tafsir Agama Untuk Menegaskan Kesetaraan Gender Dalam Kehidupan Keluarga Dan Masyarakat Islam," *Yinyang: Jurnal Studi Islam Gender Dan Anak* 9, no. 1 (15 Januari 2014): 121–32; Ansori Ansori dan Muhammad Iqbal Juliansyahzen, "The Contestation of the Family Law Discourse in the Digital Age: Islam, State, and Gender," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (27 Juni 2022): 244–72, <https://doi.org/10.22373/sjkh.v6i1.9128>.

⁵ Ministry of Women Empowerment and Child Protection, "Publikasi Kekerasan Seksual Terhadap Perempuan dan Anak Tahun 2020," 2021.

⁶ International NGO Forum on Indonesian Development, "Kekerasan Seksual pada Laki-Laki: Diabaikan dan Belum Ditangani Serius" (Jakarta, 2020).

its draft and proposal, and also entered it into the Prolegnas in 2016. Moreover, on its way in 2020, this regulation was revoked from Prolegnas and resubmitted in 2021.⁷

The existence of The Sexual Assaults Act Number 12 of 2022 carries a significant meaning of equitable human rights advancement efforts and also as a concrete form of providing sexual assault protection and enforcement. Prior to the creation of The Sexual Assaults Act Number 12 of 2022, sexual assault is already regulated in various separate acts, so its material substances are very limited.⁸ Those acts basically contain related content about sexual assault, such as the forms of sexual assault, and also criminal constituents of it.

Those several sectoral acts that contain about sexual assault crimes are The Criminal Code, Law Number 21 of 2007 concerning Human Trafficking Eradication Act, the Law Number 23 of 2004 concerning The Abolishment of Domestic Violence, the Law Number 35 of 2014 concerning Child Protection, the Law Number 31 of 2014 concerning Witness and Victim Protection, the Law Number 44 of 2008 concerning Pornography, and also the Law Number 11 of 2008 concerning Electronics Information and Transactions. Various regulations about sexual assault caused regulation inconsistency or disharmony, which implicates to non-optimal law enforcement.

Apart from the material aspect of sexual assault crime which spread on several regulations, before the establishment of The Sexual Assaults act Number 12 of 2022, the formal aspects of sexual assault law enforcement process referred to the Criminal Procedure Code as a general procedural law (*lex generalis*). Several fundamental problems appear when the Criminal Procedure Code is used, specifically concerning about law enforcement that didn't accommodate the victim's interest. As known thus far, the Criminal Procedure Code is considered to paying attention to protecting the perpetrator's right, yet doesn't take into victim's interest, particularly of sexual assault victims.

The example of the Criminal Procedure Code substance that doesn't prioritize the sexual assault victim's interest is about evidences and the evidentiary. Article 183 of Criminal Procedure Code arranged that judges can only impose a sentence on someone, if at least there are already found two legitimate evidences along with the judges' conviction obtained from those evidences.⁹ Based on article 185 paragraph 2 of the Criminal Procedure Code, a statement of one witness is not enough to prove the defendant guilty of the crime he was charged with.

If those regulations above applied to sexual assault cases, especially cases in a private sphere, under certain conditions, victims potentially suffer from a bigger loss. It also does not rule out the possibility that their cases can't be processed due to the difficulty of evidence of course this becomes the basis for consideration in providing different treatment.e regulation and mechanisms. These kinds of conditions are described as having no attention and interest in victim's condition. Why is that happened? In sexual assault law enforcement, a different paradigm of legal approach and cases handling is needed comparing to other crimes.¹⁰ In addition to physical injuries, sexual

⁷ Muhammad Iqbal Juliansyahzen dan Ocktoberrihsyah, "The Contemporary Maqāsid Sharia Perspective on Sexual Violence Provisions in the Indonesian Law Number 12 Year 2022," *Al-Manahij: Jurnal Kajian Hukum Islam*, 25 November 2022, 274, <https://doi.org/10.24090/mnh.v16i2.7018>.

⁸ Prianter Jaya Hairi, "Problem Kekerasan Seksual: Menelaah Arah Kebijakan Pemerintah Dalam Penanggulangannya," *Negara Hukum* 6, no. 1 (2015): 1–16.

⁹ Andi Hamzah, *Hukum Acara Pidana Indonesia*, Cet. Kedua (Jakarta: Sinar Grafika, 2017), 254.

¹⁰ The sexual assault handling concept is similar to the handling of criminal acts if the victim or the perpetrator is children. The legal instrument used when children become a victim or perpetrator is the Children Protection act Number 35 of 2014 and the Juvenile Justice System act Number 11 of 2012.

assault victims will also experience psychological trauma. Thus of course becomes the fundamental consideration in providing different.

After the establishment of The Sexual Assaults act Number 12 of 2022, sexual assault regulation in various sectoral acts shows that there is an integration of arrangements that are sided with the victim's interest. According to legal principle *lex specialis derogat legi generalis*, with the existence of this acts, the previous sectoral acts that contains about sexual assault can be deviated. Compared to other sectoral acts about sexual assault, this The Sexual Assaults act Number 12 of 2022 contains a different substance which makes it *lex specialis*. In general, this act regulates material and formal criminal provisions. From its material perspective, this act arranges forms of the sexual assault, criminal sanctions, rehabilitation, compensation, restitution, and other related crimes. Whilst from its formal perspective, this act arranges the law enforcement process or relating to the criminal procedure law, ranging from case reporting, investigation, prosecution, and examination in court hearings.

The exclusivity of *lex specialis*, inflicts this act to deviate the law enforcement procedure which arranged on the Criminal Procedure Code.¹¹ Based on the analysis above, this research is going to elaborate on the development of sexual assault regulation from various sectoral acts, up to analyze *lex specialis* aspect of the The Sexual Assaults act Number 12 of 2022.

RESEARCH METHODS

The research method used in this research is normative juridical research, which refers to primary legal materials using several acts, and secondary legal materials using books and article. The research is using statute approach, conceptual approach, and historical approach. The analysis used in this research is descriptive qualitative. Through statute approach, this research is done by reviewing or analyzing sexual assault regulations. While through conceptual approach, this research is done by constructing ideal legal concepts that comes from jurists and also from developing legal doctrines about sexual assault.¹²

ANALYSIS AND DISCUSSION

The Regulation of Sexual Violence Before the Establishment of the Sexual Violence Crime Law

1. Criminal Code

In the Criminal Code, arrangements relating to sexual violence are regulated in Book II Chapter XIV on Crimes Against Decency and Book III Chapter VI on Violations of Decency.¹³ Crimes against decency are governed by Book II Chapter XIV of the Criminal Code and are divided into the following categories:

- a. Article 281 and Article 282 regarding sexual crimes in general;
- b. Article 284 concerning adultery that is not a married partner;

¹¹ Refer to Article 20 of the Sexual Assaults Act Number 12 of 2022.

¹² Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi*, Ed. 13. (Jakarta: Kencana, 2013), 133-136.

¹³ Wirjono Prodjodikoro, *Tindak-Tindak Pidana Tertentu di Indonesia* (Bandung: Refika Aditama, 2003).

- c. Article 285 concerning rape of a woman;
- d. Article 286 to Article 288 concerning intercourses; and
- e. Article 289 to Article 296 concerning obscene acts.

The Criminal Code clearly distinguishes between the crimes of adultery, rape, and unlawful sexual conduct. According to Soesilo, intercourse or sexual activity is a battle between the male and female genitalia, which is typically done to allow the male genitalia to enter the female genitalia and secrete semen or sperm.¹⁴ However, adultery is sexual activity committed by a married person, with a person who is not their spouse.¹⁵ In contrast to intercourse and adultery, rape is defined as an act of violence or threat of violence against a woman who is not his wife for sexual intercourse.¹⁶

The Criminal Code still has a very limited definition of sexual assault. One example is the construction of arrangements for rape in Article 285 of the Criminal Code, it indicates that rape occurs when a man's penis has penetrated a woman's vagina. In addition, in practice proving the elements of rape is also difficult due to the complexity of the victim's circumstances, for example due to helplessness, persuasion, or physical or psychological coercion.¹⁷

Another issue with the Criminal Code is that it only makes women the object of rape and cannot be interpreted in any other way, so it cannot be used to define women as the perpetrator or men as the victim. In addition, another weakness related to Article 285 of the Criminal Code is the inability of a woman to resist so that intercourse takes place as referred to in Article 284. If intercourse does not occur, article 289 concerning obscene acts may apply.¹⁸ Conditions like this are certainly detrimental to the victim.

The prohibition of having sexual relations with girls is then regulated in Article 287, paragraph 1 of the Criminal Code. However, this provision seems 'half-hearted' because the Criminal Code determines this act as a complaint offense. This means that perpetrators can only be processed if there are complaints or reports from victims. So that the perpetrator cannot be prosecuted if the victim withdraws the report.¹⁹ These clauses raise problems since the context of law enforcement, which party is authorized to make reports is still abstract, considering that children are the victim here and are in a particularly vulnerable position. Moreover, for example, the victim's parent may engage in sexual assault.

In addition to the articles relating to sexual violence above, the Criminal Code also regulates the prohibition of abortion, which is conceptually part of sexual violence. Articles 346-349 address the crimes of abortion and womb killing. The object of this crime is a womb that is already in the

¹⁴ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Ed. 7. (Bogor: Politeia, 1995), 209.

¹⁵ R. Soesilo, 204.

¹⁶ R. Soesilo.

¹⁷ Eko Nurisman, "Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022," *Jurnal Pembangunan Hukum Indonesia* 4, no. 2 (2022): 170-196, ejournal2.undip.ac.id.

¹⁸ R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, 212.

¹⁹ Ismantoro Dwi Yuwono, *Penerapan Hukum Dalam Kasus Kekerasan Seksual Terhadap Anak* (Yogyakarta: Penerbit Pustaka Yustisia, 2015).

form of a human creature (arms, legs, and head) or is not yet in human form.²⁰ The forms of acts of abortion and homicide in the Criminal Code are classified as follows:²¹

- a. Performed by himself (Article 346)
- b. Performed by other people based on approval (Article 347)
- c. Performed by other people without approval (Article 348)
- d. Performed by people who have certain personal qualities such as a doctor, midwife, or medicine interpreter (Article 349).

2. Law on Human Rights

Law Number 39 of 1999 concerning Human Rights (Law on Human Rights) is the major law that ensures the protection, advancement, and enforcement of human rights in an equitable way. Several provisions relating to sexual assault have been regulated by the Law on Human Rights, including the prohibition of sexual harassment, economic/sexual exploitation, child trafficking, and rape.²² In Article 58 paragraph (1) of the Law on Human Rights it is stated that *“Every child has the right to receive legal protection from all forms of physical or mental violence, neglect, ill-treatment, and sexual abuse while in the care of a parent or guardian, or other parties or those responsible for the upbringing of the child.”*

Article 58 paragraph (2) also confirms that *“If, however parents, guardians, or caregivers of a child commit any kind of physical or mental abuse, neglect, form of treatment, and sexual abuse including rape, and/or murder of a child who should be protected, it must be subject to punishment.”* Then in Article 65, it is stated that *“Every child has the right to obtain protection from sexual exploitation and abuse, kidnapping, child trafficking, as well as from various forms of drug misused, including those involving narcotics, psychotropic medications, and other addictive substances.”* Based on Article 58 and Article 65 of the Law on Human Rights above, it can be seen that the legal construction built into the Law on Human Rights regarding various forms of sexual assault is still restricted to children. The limitation of the address or target of this regulation suggests that there should be a distinct legal instrument that governs sexual assault separately from the Law on Human Rights in order to apply to everyone without exception.

3. Law on Elimination of Domestic Violence

Basically, household affairs are personal aspects that are private in nature, but household affairs can become social problems when they are related to acts of violence.²³ Provisions regarding domestic violence have been specifically regulated in Law Number 23 of 2004 concerning the Elimination of Domestic Violence.

The Law on Elimination of Domestic Violence regulates the scope of the household including the husband, wife, children, and people who have family relations with husbands, wives, and children as well as people who work to help the household and live in the household.²⁴ The forms

²⁰ Adami Chazawi, *Kejahatan Terhadap Tubuh dan Nyawa*, 5 ed. (Jakarta: Raja Grafindo Persada, 2010): 112.

²¹ Adami Chazawi, 112.

²² Refer Article 58 and Article 65 Law Number 39 of 1999 concerning Human Rights.

²³ Moerti Hadiati Soeroso, *Kekerasan Dalam Rumah Tangga Dalam Perspektif Yuridis-Viktimologis*, ed. Tarmizi, Ed. 1. Cet. 2, (Jakarta: Sinar Grafika, 2012), 67-68.

²⁴ Article 2 Law Number 23 of 2004 concerning Elimination of Domestic Violence.

of domestic violence regulated in the Law on Elimination of Domestic Violence include physical violence, psychological violence, sexual violence, and household neglect.²⁵ Related to 'sexual violence' is explained in Article 8 of the Law on Elimination of Domestic Violence which includes:

a. Sexual coercion of members of the household

In this case, it is classified as domestic sexual violence, namely sexual coercion against husbands, wives, children, people who have blood relations, marriage, breastfeeding, parenting, guardianship that applies to the household. In addition, this includes forcing sexual relations against people who work in the household and live permanently.²⁶

b. Forcing people in the household to engage sexual activity with other people

Apart from being the perpetrators of violence, all household members may be charged with sexual assault due to the act of forcing someone in the household to engage in sexual activity with someone outside the family circle or even still within the family. When someone in the household is forced to have sexual relations with another person, it must be done with the intention of acquiring anything material, commercial, or for another reason.

The legal construction built by the Law on Elimination of Domestic Violence emphasizes that sexual assault committed by husband or wife or vice versa, is a complaint offense.²⁷ Based on this, in practice law enforcement officers regularly ask for a marriage certificate or other documentation of husband and wife relationship or relationship within the household. This ultimately prevents victims of domestic violence who do not possess or have marriage certificate from accessing justice.²⁸

Even though the Law on Elimination of Domestic Violence was a very progressive law at the time it was formed, the problem of sexual violence that occurs in the household is becoming increasingly complex.²⁹ So it is necessary to make adjustments to the regulation of domestic sexual violence in accordance with developments in community law.

4. Law on Elimination of Human Trafficking Crimes

Before the formation of Law Number 21 of 2007 concerning Human Trafficking Eradication Act, the prohibition on trafficking in persons had actually been regulated in Article 297 of the Criminal Code, but the regulation was still limited to trafficking in women and immature boys, it had also been regulated in Article 83 of Law Number 23 of 2002 concerning Child Protection.³⁰ However, both of these provisions do not clearly convey the meaning of trafficking in persons,

²⁵ Article 5, Article 7, Article 8, and Article 9 Law Number 23 of 2004 concerning Elimination of Domestic Violence.

²⁶ Nys Arfa, "Analisis Yuridis Terhadap Tindak Pidana Kekerasan Seksual dalam Rumah Tangga Menurut Undang-Undang Nomor 23 Tahun 2004 tentang Kekerasan Dalam," *Jurnal Inovatif Ilmu Hukum* VII, no. II (2014): 51, *online-journal.unja.ac.id*.

²⁷ Article 53 Law Number 23 of 2004 concerning Elimination of Domestic Violence.

²⁸ Eko Nurisman, "Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022", 179.

²⁹ More information. Alfitri, "Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia," *Studia Islamika* 27, no. 2 (3 Agustus 2020): 273–307, <https://doi.org/10.36712/sdi.v27i2.9408>.

³⁰ Article 297 of the Criminal Code has been revoked and declared null and void based on Article 65 of Law Number 21 of 2007 concerning the Human Trafficking Eradication Act.

especially in Article 297 of the Criminal Code, where the prison sentence is determined to be very light, namely a maximum of 6 years.³¹

The Law Number 21 of 2007 recognizes two similar terms, namely ‘Exploitation’ and ‘Sexual Exploitation’. Between these two terms, the Law on Eradication of the Crime of Trafficking in Persons uses the term exploitation more than sexual exploitation. Based on the analysis, basically the two terms have the same regulatory concept, it’s just that it needs to be understood that the term sexual exploitation is part of a form of exploitation.

In the Law on Human Trafficking Eradication Act, Exploitation is an act with or without the consent of the victim that includes, but is not limited to slavery, prostitution, or practices similar to slavery, forced labor or services, physical exploitation, oppression, extortion, reproductive organs, and acts committed sexually or unlawfully.³² While sexual exploitation is defined as any form of use of the victim’s sexual organs or other organs for unlimited profit in all prostitution and obscenity activities.³³ The presence of the word ‘unlimited’ indicates that the scope of sexual exploitation is not defined by its scope.

If reviewed as a whole, the Law on Human Trafficking Eradication Act does not comprehensively regulate matters relating to sexual assault. Even though the Law on Human Trafficking Eradication Act contains provisions for ‘sexual exploitation’, these arrangements are still insufficient in providing protection and law enforcement for sexual assault as a whole. Therefore, in the current development of sexual assault cases, the regulation of sexual exploitation as part of sexual assault needs to be translated into more specific formulations of articles with clearer criminal elements. So that later the regulation of sexual assault will be in harmony with the legal needs of society.

5. Law on Pornography

In Law Number 44 of 2008 concerning Pornography (Pornography Law), provisions regarding sexual assault can be found in Article 4 paragraphs (1) and (2), Article 5, Article 6, Article 7, Article 8, Article 9, and Article 10. Meanwhile, the provisions regarding child pornography are regulated in Articles 11 and 12. The term “sexual assault” is explicitly mentioned only once in the Pornography Law, in Article 4 paragraph 1 letter b. The full text of Article 4 paragraph (1) is as follows:

“It is illegal for anyone to produce, make, copy, distribute, broadcast, import, export, offer, trade, rent, or give away pornography that clearly shows: sexual activity, including deviant sexual activity; sexual assault; masturbation or masturbation; nudity or an impressive display of nudity; genitals; or child pornography.”

In other articles, there are also provisions related to sexual assault, that do not explicitly regulate and mention sexual assault. If one understands the construction built by the Pornography Law relating to sexual assault, it can be understood that the Pornography Law places more emphasis on acts of sexual exploitation of other people or oneself that have the aim of showing and disseminating. In this way, it is important to note that the Pornography Law is not really about making sexual assault a crime in general. Instead, it is about making sure that people don’t do things that are related to pornography through the media.

³¹ General Explanation of Law Number 21 of 2007 concerning the Human Trafficking Eradication Act.

³² Article 1 paragraph 7 Law Number 21 of 2007 concerning the Human Trafficking Eradication Act.

³³ Article 1 paragraph 8 Law Number 21 of 2007 concerning the Human Trafficking Eradication Act.

Even though the Pornography Law contains regulations regarding sexual exploitation, there is a blurring of meaning in the meaning of sexual exploitation. In the Pornography Law, sexual exploitation contains an inappropriate interpretation paradigm because it assumes that sexual exploitation is not an attack on the body and sexuality, but rather content from pornography. The existence of different meanings of sexual exploitation in practice will be likely to result in the criminalization of victims.³⁴

6. Law on Health

Provisions related to sexual assault are specifically regulated in Chapter VI Part Six concerning Reproductive Health, specifically in Articles 72, Articles 75 paragraph (2) letter b, Articles 76 and Articles 77. These articles regulate sexual assault which is limited to the right to reproduction and sexual life that is healthy and free from coercion and/or assault, and arrangements regarding abortions performed by rape victims. Juridically, Articles 72 letter a recognizes the right to a reproductive and sexual life that is healthy, safe and free from coercion and/or assault with a legal partner. However, the Health Law does not explain what is meant by “reproductive rights and sexual life.”³⁵ Then, the prohibition on abortion is also regulated in Articles 75 paragraph (1) which is in harmony with the provisions in Articles 346 to 349 of the Criminal Code. In the Criminal Code, the act of abortion is included in the Crime against Life and is divided into abortion and death of the womb. As a result, anyone who has or assists in having an abortion can be charged under that article.

However, in contrast to the provisions in the Criminal Code, the prohibition of abortion according to Article 75 paragraph (2) letter b of the Health Law can exclude pregnancies resulting from rape, which can cause psychological trauma to the rape victim. Pregnancies that occur in rape victims are unwanted pregnancies and are due to assault. Thus, pregnancy that occurs in rape victims clearly violates a person's reproductive rights which include the time before pregnancy, during pregnancy, childbirth, and after childbirth.³⁶ Article 76 states that abortions for medical reasons and for victims of rape can only be performed before 6 weeks of pregnancy, counting from the first day of the last menstruation, except in cases of medical emergencies. This action can only be carried out after receiving pre-action and post-action counseling carried out by a competent and authorized counselor.

7. Law on Protection of Witness and Victim

Witness and Victims protection act No.13 2006 as amended by Law Number 31 of 2014 materially has regulatory characteristics that are different from other criminal laws. If one examines the Law on Protection of Witnesses and Victims, it does not regulate material criminal law aspects relating to sexual violence, this is due to the *original intent* of the Law on Protection of Witnesses

³⁴ Eko Nurisman, “Risalah Tantangan Penegakan Hukum Tindak Pidana Kekerasan Seksual Pasca Lahirnya Undang-Undang Nomor 12 Tahun 2022”, 181.

³⁵ The right to reproductive health and sexual life was first recognized as part of Human Rights at the Conference on Population and Development in Cairo in 1994. Because it is part of human rights, this right is universal, cannot be ignored, and will always be tied to other main rights. like the right to life. UNFPA, “*Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994*”, 2004, 45.

³⁶ Article 71 Law Number 36 of 2009 concerning Health.

and Victims was to provide guarantees for the protection of witnesses and victims of crime alone. This means that the Law on Protection of Witnesses and Victims does not discuss aspects of the crime, but instead discusses the best form of protection and treatment for witnesses and victims of crime.

The rights of victims of sexual violence have been regulated in Article 5 of the Law on Protection of Witnesses and Victims, including the right to obtain protection and security for themselves and their families, the right to be free from threats of testimony, the right to legal assistance, the right to access information related to a case, the right to compensation for transportation costs, as well as the right to obtain temporary living expenses assistance. Especially for victims of sexual violence, it has been explicitly stated in Article 6 of the Law on Protection of Witnesses and Victims which stipulates that victims of crimes of sexual violence have the right to receive medical assistance as well as psychosocial and psychological rehabilitation assistance.

8. Law on Child Protection

The children protection act Number 23 of 2002 as amended by Law Number 35 of 2014 and Number 17 of 2016³⁷ applies if the victim is an underage child who has not reached the age of 18, including a child still in the womb.³⁸ The accommodates arrangements regarding children who are victims of economic and sexual exploitation and children who are trafficked. Several forms of violence regulated by the Law on Child Protection are sexual violence, such as sexual harassment, intercourse, child trafficking, obscenity, prostitution, and sexual exploitation.³⁹ Based on this classification, the Law on Child Protection does not explain in detail the meaning or elements of each form of sexual violence.

If we trace the regulation of sexual violence in the Law on Child Protection, there are two forms of sexual violence against children that are clearly regulated. *First*, sexual violence with a criminal element in the form of “committing violence or threats of violence to force a child to have intercourse with him or with another person”. *Second*, sexual violence with a criminal element is defined as “committing violence or threats of violence, forcing, tricking, committing a series of lies, or persuading children to commit or allow obscene acts to be carried out.”⁴⁰

Meanwhile, if a child becomes a victim of a crime of sexual violence, the Law on Child Protection has provided special protection in the form of recovering the victim and filing for compensation (restitution) against the victim directly, which is borne by the perpetrator of the crime of sexual violence.⁴¹

³⁷ The Child Protection Law has been amended twice, most recently by Law Number 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection to Become a Law.

³⁸ Article 1 paragraph 1 Law Number 35 of 2014 concerning the Amendment Law Number 23 of 2002 concerning Child Protection.

³⁹ The Law on Child Protection divides the forms of violence into 3 (three), namely physical violence, psychological violence, and sexual violence/crime.

⁴⁰ Jaya Hairi, “Problem Kekerasan Seksual: Menelaah Arah Kebijakan Pemerintah Dalam Penanggulangannya.”

⁴¹ Article 71D Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.

9. Law on Persons with Disabilities

Persons with disabilities are a group of people who are vulnerable to exploitation or discrimination. The arrangements regarding sexual violence in Law Number 8 of 2016 concerning Persons with Disabilities is regulated in several different chapters, including Article 3 letter d, Article 5 section (2) and section (3), Article 6, Article 7, Article 26, Article 39 section (2), and Article 128. Substantially, the Law on Persons with Disabilities focuses on regulating the rights of persons with disabilities who are free from discrimination, various forms of exploitation, and sexual violence.

Article 5 section (2) specifically regulates the rights of women with disabilities to obtain reproductive health rights, to accept or refuse the use of contraceptives, to receive more protection from multiple layers of discrimination, and to get more protection from acts of violence, including sexual violence and exploitation. Apart from women, Article 5 section (3) also specifically regulates the rights of children with disabilities related to sexual violence, namely to get special protection from discrimination, neglect, abuse, exploitation, and sexual violence and crimes.⁴²

Then in Article 6 letter e it is also stated that one of the rights to life of persons with Disabilities is to be free from threats and various forms of exploitation and well as in Article 7 namely the right to be free from harassment related to the condition of their disability. Then in Article 26 it is also emphasized that persons with disabilities have the right to be free from discrimination, neglect, torture, and exploitation, one of which is the right to get protection from all forms of sexual violence.

10. Law on Electronic Information And Transactions

Law Number 11 of 2008 as amended by Law Number 19 of 2016 is not a specific law that regulates crimes of sexual violence, but the Law on Electronic Information And Transactions contains criminal arrangements relating to sexual violence committed in the cyber sphere. Based on this, the Law on Electronic Information And Transactions scope of regulation differs from that of other laws, given that the Law on Electronic Information And Transactions juridical construction includes crimes committed specifically in cyberspace or digital space, including those involving sexual violence.

In the Law on Electronic Information And Transactions, regulations regarding sexual violence are not explicitly stated. The prohibition of acts related to sexual violence is regulated in Article 27 section (1), namely the prohibition of distributing and/or transmitting, and/or making Electronic Information and/or Electronic Documents accessible that have content that violates decency. Such provisions basically do not explicitly regulate aspects of sexual violence crimes, but instead regulate crimes in digital media related to sexual violence.

Article 27 section (1) of the Law on Electronic Information And Transactions does not use the term 'sexual violence', but rather 'violating decency'. In this regard, the Law on Electronic Information And Transactions does not explain what is meant by 'violating decency'. The absence of an explanation for the phrase 'violating decency' requires judges to explore, interpret, and follow legal values and a sense of justice that live in the social life of society.

⁴² This provision is consistent with the substance stated in the *Convention on the Rights of Persons with Disabilities*, which was ratified in Law Number 19 of 2011 concerning Ratification of the *Convention on the Rights of Persons with Disabilities*.

When referring to the provisions in Article 281 of the Criminal Law Code, decency is interpreted as a feeling of shame related to sexual lust, for example, intercourse, touching a woman's breasts, touching a woman's genitals, or kissing.⁴³ In this case, the Criminal Law Code says that decency is a violation of the substance of sexual activity, sexual activity itself, or other sexual matters.⁴⁴

The absence of a firm explanation for the phrase "violating decency" makes judges deciding related cases must explore the meaning of the phrase and relate it to the explanation in the Criminal Law Code. The use of an *a contrario* argument based on the *lex specialis derogat legi generalis* principle for the meaning of the phrase 'violated decency' makes Article 281 of the Criminal Law Code a reference in understanding the phrase 'violated decency' the *lex specialis derogat legi generalis* principle for the meaning of the phrase "violated decency" makes Article 281 of the Criminal Law Code a reference in understanding the phrase "violated decency."

The Regulation of Sexual Violence After the Establishment of the Sexual Violence Crime Law

As an accommodating nation towards the protection of Human Rights, reflected within the bylaws of the Indonesian Constitution of 1945 and all of its derivative legislations guarantees the states present role in the proper realisation of human rights.⁴⁵ The significant amount of sexual violence that has occurred throughout the years within society can be interpreted as the infringement of the constitution and its values. In circumstances as such, the law must be utilised into ensuring that the state will continue to uphold human rights as a result, regulating sexual behaviour is crucial to ensuring that those rights are upheld. Prior to the formation of the Sexual Assault act No.12 (2022) regulating aspects of sexual assault are spread out in various acts and regulations of a more sectoral scope. whether it be the penal and formal aspects which resulted in a disharmony of regulations further affecting the subpar application of the law.

When viewing it through the lenses of the penal code, it is clear that different sexual offences are regulated in different codifications of the law, a few examples being the Penal Code, The Children Protection Act, Health Act, Domestic Violence Act, and the Eradication of Human Trafficking Act. These different regulations created a problem regarding the content and enforcement, due to the fact that these laws come into existence under different background conceptualization, paradigms, and jurisdictions. On the other hand, law enforcement officials frequently handle cases with little to no respect for the rights, wellbeing, or interests of the victims. Throughout this frail period of enforcement of sexual assault protection (prior to the formation of the Sexual Assault act) Victims of sexual assault confront clear challenges in establishing that sexual violence has occurred. The main point of the Sexual Assaults act is to regulate the material and formal aspects. When viewing through the material point of view, Sexual Assault act regulates what constitutes a sexual assault from a legal standpoint. In contrast with the formal point of view, the SA act dictates of court proceeding of a SA case.

The content of the SA act also extends to : the victims' rights, rights of the families of the victims, witnesses, and integrated social services; preventive steps, coordination, and surveillance;

⁴³ Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, 204.

⁴⁴ Hwian Christianto, "Penafsiran Hukum 'Melanggar Kesusilaan' Dalam Undang-Undang Informasi Dan Transaksi Elektronik," *Jurnal Yudisial* 14, no. 1 (30 April 2021): 37–56, <https://doi.org/10.29123/JY.V14I1.423>.

⁴⁵ Hariyanto Hariyanto, *Hak Asasi Manusia dan Hukum Pidana Islam* (Yogyakarta: Mahameru Press, 2017), 43.

societal and familial participation; funding; and international cooperation. The SA act is classified as a “special” act by the definitive regulation of material and formal aspects, which grants it the right to deviate from the rules that apply to most other laws as long as it does not contradict those rules. A by-product of the SA act regards itself a progressive legislation.

1. Forms of Sexual Offences

article 4 section (1) SA Act dictates nine forms of sexual offences:

- a. Non-physical sexual abuse
- b. Physical sexual abuse
- c. Coercion of birth control
- d. Coercion of sterilisation
- e. Coercion of marriage
- f. Sexual torture
- g. Sexual exploitations
- h. Sex slavery; and
- i. Electronic based sexual abuse.

Other than the 9 mentioned sexual offences, Article 4 section (2) SA act also mentions 10 other forms of sexual abuse:

- a. Rape;
- b. perversions;
- c. statutory rape, sexual abuse towards children, and/or child exploitation;
- d. unconsented contact that is sexual by nature;
- e. child pornography and pornography which explicitly depicts violent sexual acts/exploitations;
- f. Forced prostitution;
- g. Human trafficking;
- h. Intramarital rape/Sexual Abuse;
- i. Money laundering with sexual offences as a parent act; and
- j. Other crimes which are stipulated in the provisions of the legislation.

Opposed with the 9 sexual offences as stated in Article 4 section (1), the 10 sexual offences in Article 4 section (2) are only regarded as an extended definition of sexual offences and does not constitute as primary sexual offences in the SA act and broadened the scope of offences that could be committed that could constitute as a sexual offence. When accumulated, the SA act would oversee a total of 19 sexual acts within the scope of sexual offences. However, a closer look at the 10 non-primary offences would show that they have been covered by numerous other laws. A recognition of an expanded definition of sexual offences would be sufficient, proving it ineffective to further categorise the 10 sexual offences as primary offences.

Further analysis of the SA act reveals that there is no substantial regulation regarding any sentencing of the 10 non-primary sexual offences. The SA act's only indication of substantial sentencing only goes as far as the 9 primary sexual offences as stated in article 4 section (1).

Further emphasizing that the 10 sexual offences in article 4 section (2) are only seen as a broadened definition of what constitutes as a sexual offence and not a primary sexual offence.

There is a difficulty with the rules of regulation as they do not provide legal certainty regarding the overlapping acts because of the apparent disparities between primary and non-primary offences.

The SA act exclusive recognition and accommodation of forms of sexual assault in the normative sense serves as a reason to the above-mentioned difficulty. Thus, SA has yet to solve its problems regarding content which overlaps with the other legislations.

2. Proving beyond reasonable doubt

One of the crucial provisions within the SA act is concerns evidential matters and proving beyond reasonable doubt that a sexual offence has occurred. Due to its goals in obtaining facts, proving beyond reasonable doubt plays a very essential part in criminal law procedures.⁴⁶ If with the evidence provided, a defendant is unable to proven guilty then any potential sentencing would then become void.⁴⁷ Thus, in practice investigators, prosecutors and judges would still take testimonies of witnesses from various perspective to connect the dots and piece together the events that has transpired.⁴⁸

There are distinguishing traits in regards to evidential matter when compared to the Criminal Code Procedure. Article 184 of the Criminal Code Procedure, the following are acceptable forms of evidence: (i) witness' testimony; (ii) professional opinion; (iii) letters and documents; (iv) directory and; (v) defendants' testimony. Whereas article 24 section (1) of the SA Act there is additional scope of evidence such as:

- a. Evidences as mentioned in article 184 criminal code procedure;
- b. Other types of evidences include electronic information/document; and
- c. Other evidences which could suggest the occurrence of a sexual offence. The evidence used as proof or as a means to commit crime or relating to sexual offences.

Other than what is stated in Table 1 section 24 article (3) SA act also mentions what constitutes as documental evidence; (i) letter from the prescribed psychiatrist (ii) medical records (ii) forensic examination; and/or bank statements. Regarding the provision for evidence in section 183 of the criminal code of procedure, a valid proof requires a minimum of two evidences and the belief of the judge. Section 185 article (2) stipulates that a testimony from a witness is not enough to deem a defendant to be guilty. In practice this creates a challenge for the victim to prove beyond reasonable doubt that sexual offences has occurred, due to this weakness in the criminal code proceeding, section 25 article (1) of the SA act has given new stipulation surrounding evidential matter that could potentially ease the victims claims, that being a testimony from a witness is in fact sufficient to prosecute a defendant given that they provide anther valid evidence to court

The provision surrounding valid evidence in section 25 article (1) of the SA act creates a similarity with section 55 of the Domestic Violence act, being that a witness' testimony combined

⁴⁶ Andi Hamzah, *Hukum Acara Pidana Indonesia*, Cet. Ke-2 (Jakarta: Sinar Grafika, 2017): 249.

⁴⁷ Niken Savitri, "Pembuktian Dalam Tindak Pidana Kekerasan Seksual Terhadap Anak," *Jurnal Bina Mulia Hukum* 4, no. 2 (2020): 277.

⁴⁸ Academic Manuscript of the Sexual Assaults.

with another valid evidence is sufficient to prosecute. This article formulation is expected to ease victims' burden of proof, especially in private sectors

The SA Act's superiority proved itself by allowing families of the defendant to also provide a testimony under oath, without the consent of the defendant.⁴⁹ In regards to a testimony of a witness could be obtained from the victim and does not go under oath, or any testimony from another party, its evidential power is regulated in section 25 article (3).⁵⁰ another strength of the SA act comes from its stipulation which states that a disabled witness' has the same amount of legal standing as an abled witness.⁵¹ These stipulation shows that the SA Act sympathetic nature towards the victim and its protection of the frail interest of the victim.

3. Victim's rights

Generally, the rights of victims of a crime have been regulated in section 5 and 6 of the Witness and Victims No.31 2014. However, the SA act further emphasized those rights with its own provisions namely in section 66 to 77. The act also accommodates rights of the victims' families. In regards to the substance of the regulation, the SA act is more comprehensive in handling the rights of the victim, including disabled people and underage children. The importance of accommodating these rights within the SA act comes as a direct result of sexual assault being classified as a 'special' type of offences. Sexual assault not only harms the victim's physique but also affects the mental and psychological state of the victim that could prove difficult to recover. Even though the rights of the rights of the victims have been closely regulated in the SA Act.⁵² Based on section 67 of the SA act the victims' rights include: (i) right to be handles thoroughly; (ii) right to protection; and (iii) right to recover. In relation to those rights, the SA act contains similar provisions with the Witness and Victims protection act. This dualism of guaranty does not come as a challenge but rather provides a more detailed outlook on the victims. To counter the weaknesses in the Witness and Victims protection act, the SA act has introduced new rights which shows tendency towards the victims, one of those rights being the right to receive restitution and compensation.⁵³ In previous regulations sexual assault victims are entitled to restitution but does not have the right of compensation. This takes into consideration that compensation are only given to victims of terrorism.⁵⁴

Moreover, the guarantee of protection of HR of the victim economically and spiritually the state also grants protection in the forms of easy access to good education. Problems of victims who are current students is that they often experience trauma and loses the opportunity to receive a good education. Therefor the state guarantees protection of education. In line with the values of human rights and religious values.⁵⁵

In the SA act, regulations regarding rights to restitution and compensation starting from the courtroom up to accompaniment and/or compensation post trial. If the confiscated wealth of the convicted is not sufficient to pay for restitution, then the convicted must receive jail sentence that

⁴⁹ This stipulation is different with section 168 criminal code proceedings (KUHP) that disallows families to testify

⁵⁰ Article (3) the Law Number 12 of 2022

⁵¹ Refer to section 25 section (4) Law Number 12 of 2022.

⁵² Refer to section 65 article (1) Law Number 12 of 2022.

⁵³ Refer to section 68, article 69, section 70 Law Number 12 of 2022.

⁵⁴ Article 7 Law Number 31 of 2014.

⁵⁵ Juliansyahzen dan Ocktoberrinsyah, "The Contemporary Maqāṣid Sharia Perspective on Sexual Violence," 278–81.

is given by the judge which will not exceed the primary sentence period stated in the provisions. In this case, the state will give adequate compensation to the victim. This shows an active role of the state of the wellbeing of sexual assault victims. These provisions regarding restitution and compensation gives legal certainty to the fulfilment of a victims' rights. Not only will it bring retribution, restitution also comes as an effort of recovery for SA victims that has been violated by the perpetrator. The same can be said in the states role in giving compensation, which shows concrete evidence of fulfilling the rights of SA victims, the regulation surrounding restitution and compensation shows progress of the law that gives tendency to the victims.

CONCLUSION

Prior to the formulation of the SA act, regulations regarding SA have been accommodated by various sectoral legislations, a few examples being Penal Code, The Children Protection Act, Health Act, Human rights act, The pornography act, Witness and victims' protection act, disability act Domestic Violence Act, Information and electronic transaction law effectiveness act and the Eradication of Human Trafficking Act. The existence of regulations of various legislations creates an overlap which resulted in the suboptimal enforcement of the law. Due to this the need for a specific law (*lex specialis*) that specifically regulates sexual offences in a comprehensive manner becomes a crucial need. After the formation of the SA act which constitutes as a *lex specialis*, those weaknesses in SA regulations has been resolved, both from a material and formal point of view. The SA act recognizes 19 sexual offences and also regulates the following procedure of a sexual offence case, ie investigation, prosecution, and conviction. Regarding evidential matter the SA act stipulates what constitutes as evidence and broaden the scope of what could be considered as evidence that eases the victim to prove beyond reasonable doubt that sexual offences has been committed by the perpetrator.

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