

Law Does Not Work for Women

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Abstract

Broadly speaking, this paper aims to examine how Indonesian law views rape and sexual crimes against women, how victims (women and girls) are projected in the law, and how criminal law affects the female victims seeking justice. Are there any laws adequate in providing protection for victims of sexual crimes? The main law referred to in Indonesian rape cases is the Penal Code (KUHP), created by the Dutch during their occupation of Indonesia. This legal reference has become a “holy book” for law enforcers, particularly policemen and prosecutors. However, because the Penal Code was created during the colonial period, today it is obsolete and does not offer much protection for victims of sexual crime. From a woman’s perspective, the law might be biased because it was formulated from a male point of view. Indeed, despite efforts by legal development programs to improve management of the judiciary, serious problems remain. The law relating to rape along with the procedural law shows how sex crimes are projected to justice. When the interpretation of law is removed from the context of human victims and perpetuated by institutions, access to justice for victims of sexual assault is difficult to obtain. The law which essentially has multiple interpretations is standardized into a single meaning and freezes. When the law freezes, few interpreters will be sensitive, principled, and courageous enough to exercise the necessary discretion to bring justice to victims.

Keywords: Rape, Sexual Crime, Victim, Criminal Law, Justice.

Isolated Law

The main law referred to in Indonesian rape cases is the Penal Code (KUHP), created by the Dutch during their occupation of Indonesia. This legal reference has become a “holy book” for law enforcers, particularly policemen and prosecutors. However, because the Penal Code was created during the colonial period, today it is obsolete and does not offer much protection for victims of sexual crime. From a woman’s perspective, the law might be biased because it was formulated from a male point of view. While new laws continuously emerge both inside and outside the Indonesian legal system to guarantee justice for women, they seem to be overlooked by law enforcers. Laws related to rape, sexual violence and offenses created after the Penal Code, such as the Law on Elimination of Domestic Violence no. 23/2004, the Child Protection Act No. 23/2002, and the Law on Combating the Crime of Trafficking in Persons No. 21/2007, do not automatically take priority over the Penal Code. The criminal offenses set out in the Penal Code are so complex, there may be fear that adding statements on the removal of the Penal Code to every new law will lead to a legal vacuum with no guidelines. Thus, the Penal Code remains a superior law.

There are a number of international legal instruments, including conventions, declarations, and treaties, that are important in relation to the issue of justice for women (Merry, 2006). However, Indonesian law enforcers do not seem to prioritize following the global discussion. Generally, they believe that international law has no clear sanctions and is not easily operated in the concrete practice of law when, in fact, ratifying any given legal instrument makes it binding for both the state and its citizens. When carefully studied and understood by the law enforcers, international law could be an asset in legal interpretation, particularly of the Penal Code and its procedure code: Criminal Procedure Code (KUHAP). For the international legal instruments are made in international forums, based on experience of various countries, the legal instrument has been tested in various cases of sexual crimes against women in many countries, and the formulation has been a long debate in the hearing world forums (Merry, 2006). Another difficulty faced by victims of sexual crime is the paradigmatic problem of determining on what basis legal scholars should interpret the law. This

problem is influenced by the way the origins of this problem lie in how law is taught by law schools. For example, in many law schools in ex-colonial countries, such as those in the southern and eastern regions of Africa, legal scholars find it difficult to abandon methods of teaching law passed down from their colonizers. Western laws, such as the Roman-Dutch law, or British common law, dominate the teaching and research on the law (Hellum & Stewart, 1998: 23). Although law schools were founded to oppose colonialism, many current curricula are based on colonial paradigms. Native customary law is covered minimally in the curriculum, and is sometimes even an optional subject. Customary law is often taught from the perspective of legal centralism based on court decisions and interpretations of legislation. Such an approach indicates acceptance of the assumption that Western law is highly integrated in the life experience and embodied in the interests of white people and the Western middle class that is widely representative of the male population (Hallum & Stewart, 1998:24).

Such circumstances are also common in Indonesia. In general, law scholars make a discourse on the law by only focusing on the notion of law as rules, norms and principles. They seem to isolate laws from social reality. They assume that there is no difference between what is formulated in law and the behavior of institutions and people in dealing with rules, even though there is usually a gap between the written law (law as it should be) and the reality and practice of law in society. Law enforcers assume that legal justice is identical with social justice, when in reality they often collide (Shaplan, 2006). The gap between the law as a text and the law in practice is very apparent. Law as text is open to multiple interpretations. Anyone can interpret the law based on views and beliefs related to their individual interests. When the law is still a text, then, it does not mean anything, and in this interpretation, the law can be "rung." The law is not in a vacuum, but is in the constellation of interests of those who interpret the law: judges, prosecutors, police, advocates, governments, and citizens of the wider community.

In interpreting laws, the humanity of rape victims (primarily women and children) are often abandoned and neglected. Law enforcers argue at length about the legal procedures and the sort order of legal logic, but not the humanity of the victims. They choose to argue about whether

the evidence of rape is met by procedural law, such as the discovery of sperm, wound in a position of “umpteen hours,” the availability of witnesses, and so on. Rape is interpreted narrowly in limited legal terms. However, it is very difficult for many victims to meet these criteria, considering the impact to the future of rape victims will be socially and culturally affected. Many victims cover up the evidence of rape out of fear of sanctions from the perpetrator that actually make them cornered, which is why many cases of rape are reported or discovered too late. In these cases, criteria set by the procedural law become impossible to meet. To elaborate, in many rape cases, there are no available witness statements, making it difficult to support the victim’s claims. Furthermore, many victims choose to clean themselves immediately following the rape incident, causing the *Visum et repertum* to not show any evidence of rape. When there is limited evidence present at trial, the victim most likely loses the formal legal procedure. Another important factor that often harms the victim is the lack of gender sensitivity on the part of law enforcement agencies. Not many judges (or other law enforcers) take the initiative to make a breakthrough by overriding the formal legal requirements in the trial, except for those who truly understand the issues of gender equality and have the perspective of the victim. In this case, we may see that ‘legal justice’ is very difficult to be bridged in order to be close to social justice. Although it is important to fulfill evidence requirements and have material truth, we should not overlook justice for the victims. We should practice law for the sake of humanity, and not law for the sake of law.

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Law Shield against Sexual Abuse

Rape is a crime because it is sexual violence, and now we will examine how the substance of our criminal law deals with this. The rules in the

Indonesian Penal Code are not familiar with the term “violence against women.” In the 1993 version of the Penal Code, the term “violence” is not used. However, there are articles in the Penal Code that at least allow women who are victims of violence, including sexual violence, to report their cases to the police. These articles, “crimes against decency” (Chapter XIV, Section 281-297), “misdemeanors relating to morals” (Chapter VI book III, Section 532-535), “maltreatment” (Chapter XX, Section 351-356), “crimes against life” (Chapter XIX Section 338-340), “crimes against personal liberty” (Chapter XVIII, Section 328, 330 and 332), and “extortion and blackmail” (Chapter XXIII, Section 368). However, in this article the discussion will be limited to “crimes against decency,” because this is the most relevant to be discussed relating to rape experienced by women.

Penal Code Relating to Rape (Crimes Against Decency)

Including rape in articles on crimes against decency signifies that rape is considered a crime against ethics, while in reality rape is also a life-threatening crime against people. There are many examples of victims being harmed during rape. In addition to the individual cases, there are also mass rapes, such as the Tragedy of May in Jakarta (Divisi Data Tim Relawan, 1998), Aceh incident (Kamaruzzaman, 1998: 1) and Timor Leste (Fokupers, 1998: 1) when the area was used as a military operating area in the past. It is evident that the incident resulted in the death of many victims. Conceivably, if achieving justice is constrained by the evidence requirement of what has been experienced by female victims of rape individually, the victims of mass rape in armed conflict or social riots might find it more difficult to achieve. Although in theory, if we could point out that the state should be responsible for the incident (since it can be regarded as state violence) in practice there is no guarantee that the victim will get justice. The following are sample articles defining “rape” in our Penal Code: Article 285: “Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, be punished by a maximum imprisonment of twelve years.”

This article poses a few problems. First, the punishment of perpetrators is very light compared to the pain experienced by victims. Rape victims

are often interpreted by many victims as the death or destruction of the future. In practice in rape trials, the maximum penalty is rarely applied. Second, the definition of rape in this article excludes rape that occurs inside marriage (marital rape). However, the fact of the matter is, many forms of violence experienced by women are prevalent in the home and conducted by members of the family, especially the husband. Third, this article implies that a wife cannot sue her husband if he forces her to have sex. This reinforces unequal power relations between husband and wife. Article 286: "Any person who out of marriage has carnal knowledge of a woman of whom he knows that she is unconscious or helpless, shall be punished by a maximum imprisonment of nine years." Article 287: "Any person who out of marriage has carnal knowledge of a woman whom he knows or reasonably should presume that she has not yet reached the age of fifteen years or, if it is not obvious from her age, that she is not yet marriageable, shall be punished by a maximum imprisonment of nine years." Article 288 (1): "Any person who in marriage has carnal knowledge of a woman of whom he knows or reasonable should presume that she is not yet marriageable, shall, if the set results in bodily harm, be punished by a maximum imprisonment of four years."

Articles 286 and 287 assign the same punishment (nine years) to rape perpetrators who target women who are unconscious, helpless or underage. Underage girls are considered equal to unconscious or helpless women. However, Article 288 (1) gives a lighter punishment (four years) to rape perpetrators against underage girls that cause injuries. Contrast that with the rape of adult women (not unconscious and injured), which carries a maximum punishment of 12 years (Article 285). The difference is actually peculiar, because the articles can be interpreted as asserting: "the younger the underage female victims who have suffered injuries from rape, the lighter the punishment for perpetrators." This article obviously does not protect younger girls from rape. Article 294: "Any person who commits any obscene act with his underage child, step-child or foster-child, his pupil, a minor entrusted to his care, education or vigilance or his underage servant or subordinate, shall be punished by a maximum imprisonment of seven years." Article 294 above, compared to Article 285, also shows

peculiarities. Rape committed against adult women is threatened with a lighter punishment than fornication committed against girls under age. In fact, the consequences of fornication with minors are not lesser than those of rape.

Based on the experience of female victims of rape and obscenity, the definition of fornication and rape is problematic because of the two are difficult to distinguish in practice. In cases of rape, many people dismiss what women experience as “not rape”, while, others call it rape. In terms of law, the definition of rape is sexual violence accompanied by the penetration of the penis into the vagina. Based on research, however, 27% of perpetrators have erectile dysfunction and 5% suffer from premature ejaculation, meaning the penetration of the penis may not occur. According to the law then, even if a victim was subjected to similar consequences and felt as if she was raped, as long as there was no penetration, she would not be considered a rape victim (Pangkahila in Tresnaningtyas Gulardi, 1998:1). The contrast between Article 294 and Article 285 suggests: if you want to commit obscenity, choose victims who are underage girls, related to you or under your responsibility, because the punishment is lighter than when performed on adult women. Again, these articles show that criminal law does not protect women, especially girls, from acts of rape.

Child Protection Act

In the case of rape victims who are children, we have a Child Protection Act No. 23/2002. This Act gives better protection to children from sexual crimes. Article 13 of the Act stipulates that every child is entitled to protection from sexual exploitation, cruelty, violence, and persecution. (1) Every child, while under the care of parents, guardians, or any other party responsible for the care, is entitled to protection from: (a). discrimination; (b). exploitation, both economic and sexual; (c). neglect; (d). cruelty, violence, and abuse; (e). injustice, and (f). other abuses. (2) If any parent, guardian or caregiver, carries out any act referred to in paragraph (1), the perpetrator is sentenced to a heavy penalty. Meanwhile, Article 17 of the Act stipulates that any children who are victims or perpetrators of sexual violence or who are dealing with the legal have right to anonymity. In this Act, the perpetrators of

sexual violence or rape receive a sentence of imprisonment of 15 years and a minimum of three years. The difference with the Penal Code is that in this Act there is a higher penalty of 15 years or a fine of three hundred million rupiah and the minimum penalty is three years or a fine of sixty million rupiah. This provision applies to cases of rape by deception.

Article 81: (1) Any person who intentionally commits violence or threatens violence to force a child to do sexual intercourse with him or with another person, shall be punished with imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a fine of not more than Rp 300,000,000.00 (three hundred million rupiahs) and a minimum fine of Rp 60,000,000.00 (sixty million rupiahs). (2) The penal provision referred to in paragraph (1) shall also apply to any person who intentionally commit deception, a series of lies, or persuade the child to do sexual intercourse with him or with anyone else. Similarly, Article 82 of the Act assigns criminal threats of obscene acts against children that involve violence or deception a maximum of 15 years or a fine of three hundred million rupiah, and a minimum of three years with a fine of sixty million. Article 82: Any person who intentionally commit violence or threat of violence, force, deception, a series of lies, or persuading a child to commit or tolerate obscene acts, shall be punished with imprisonment of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp 300,000,000.00 (three hundred million rupiahs) and a minimum fine of Rp 60,000,000.00 (sixty million rupiahs). The Child Protection Act provides stiffer penalties acts of sexual violence against children. The criminal threat against the perpetrators is higher, and there is minimum sentence compared with that in the Penal Code. But the question is how the law is implemented in practice, given that the procedural law of the Act implementation is from the Criminal Procedure Code (KUHAP), which lays out a number of conditions of rape that are usually not easily met. A further question to ask, in the issuance of this Act: do child victims of sexual violence have access to justice or, in general, can the sexual violence against children be reduced?

Conclusion: Interpreting the Penal Code

The Penal Code has roots in the historical French Revolution, where the people managed to free themselves from tyrants who punished anyone who dared to fight them. The French people then formulated laws so that they could be protected from arbitrary decisions. Therefore, the spirit of the criminal law in France is to protect the “perpetrator” so that can be no false arrest, as stipulated in the adage: “It is better to release 10 criminals than punish one wrong person.” In historical context, this adage is appropriate because if there is a mistake in punishing, especially the death penalty, the life of victims cannot be restored. These types of laws were brought from Europe, from France to Holland, to Indonesia, and to East Timor when it became part of

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Indonesia. There are three main factors that explain why the Penal Code and Criminal Procedure Code in Indonesia are understood as “fossilized” like a holy book by law enforcers in the field. The first is related to the legal paradigm developed in the practice of law. The law enforcers are doctrine and principles in Dutch criminal law. My experience over decades of teaching at the School of Police and several years in the training of prosecutors indicated that the rigidity on understanding the meaning of criminal law is a paradigmatic problem. They say that the criminal law is the only reference in the black letter interpretation because it refers to the continental legal system (the Netherlands). Formal procedural law is much overlooked. Furthermore, when asked about the position of jurisprudence, is it regarded as an important source of law as well? In general, they found that jurisprudence should be noted, and also should not. This is astonishing because in the practice of law in the Netherlands itself, from which the criminal law originated, jurisprudence is regarded as an important source of law.

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including making jurisprudence an alternative source of law, victims lose access to justice. Second, the reluctance of law enforcers in the field to give another interpretation and breaks through the legal texts and more concerned with the victims, due to the need to maintain the status quo in the form of rank or even sanctions imposed by a superior because they do not comprehend the criminal law. In general, that is the view of my students as law enforcers. Bureaucratic stagnation and fear of change also contribute to a sterile interpretation of the law. Yet it is expected to be a shield against sexual violence by those seeking justice. Third, law enforcers who need to update their knowledge of new legal instruments are constrained by excessive workloads, lack of facilitation for performance in trials, and a poor case management system. This results in a trial schedule that is not clear and can be canceled at any time when, for example, prosecutors forget to bring a prisoner, or the judge is called for a sudden meeting by his superior, etc. (Irianto & Nurcahyo, 2004). Indeed, despite efforts by legal development programs to improve management of the judiciary, serious problems remain. The law relating to rape along with the procedural law shows how sex crimes are projected to justice. When the interpretation of law is removed from the context of human victims and perpetuated by institutions, access to justice for victims of sexual assault is difficult to obtain. The law which essentially has multiple interpretations is standardized into a single meaning and freezes. When the law freezes, few interpreters will be sensitive, principled, and courageous enough to exercise the necessary discretion to bring justice to victims.

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