



The Effectiveness of Imprisonment as a Criminal Sanction for Non-Physical Sexual Harassment

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Abstract

This paper aims to analyze the effectiveness of imposing prison sanctions on non-physical sexual harassment crimes. The problem to be discussed is related to non-fiction sexual harassment which is not explained in Article 5 of the Sexual violence law (TPKS Law). In addition, there are problems regarding the provision of imprisonment for non-physical sexual harassment crimes where it causes overcrowding in prisons/detention centers. To answer the purpose of this paper, normative legal research is used using a statutory and conceptual approach. The results of the study revealed that the non-physical sexual harassment referred to in Article 5 of the TPKS Law is an act in the form of whistling, exclaiming, giving sexual comments that are carried out repeatedly and sexual intention with the aim of degrading a person's dignity. In addition, the provision of prison sanctions for sexual harassment crimes causes an excess of capacity in prisons or detention centers so that the provision of prison sanctions is deemed less effective. Hence, there is a need for new efforts to resolve non-physical sexual harassment.

Keywords: *Non-Physical Sexual Harassment; Effectiveness; Sexual Violence Bill*

Introduction

Every Indonesian citizen's human right must be protected by law, as Indonesia is a state of law. One of these is the right to a sense of security and peace and to be shielded from the threat of fear posed by any action (Hutabarat et al., 2022). This has been regulated in Article 30 and Article 35 of Law Number 39 of 1999 concerning Human Rights (hereinafter referred to as the Human Rights Law).

Article 30 of the Human Rights Law states that:

"Everyone has the right to a sense of security and peace and protection against the threat of fear to do or not do something."

Moreover, as specified in Article 35 of the Human Rights Law that:

"Everyone has the right to live in a peaceful, safe, and peaceful society and state order that respects, protects and fully implements human rights and basic human obligations as regulated in this law."

One of the human rights to a sense of security is a sense of security in a crime, especially a crime of sexual harassment. According to the academic text of the Draft Law on the Elimination of Sexual Violence by KOMNAS Perempuan, sexual harassment is considered as "a sexual act through physical or non-physical touch with the target of the sexual organs or sexuality of the victim". An important element of sexual harassment is the unwillingness or rejection of the victim from all forms of sexual attention so that these acts are not desired by the recipient of the act. The measurement of fairness in sexual harassment can be seen if the behavior leads to acts of sexual harassment, resulting in feelings of offence, shame or fear (Kementerian Tenaga Kerja dan Transmigrasi & ILO, 2011).

Sexual harassment that occurs is also not only physical, such as being touched, but also non-physical sexual harassment, such as whistling, commenting on the body or making comments that contain sexual content and flirting. The laws and regulations in positive law in Indonesia that regulate sexual harassment, namely:

a) Criminal Code (KUHP)

KUHP (hereinafter referred to as the Criminal Code) regulates crimes against decency, one of which is sexual harassment. Nevertheless, there is no phrase "sexual harassment" in the Criminal Code, which means the Criminal Code defines sexual harassment as an obscene act. Obscenity itself is contained in Articles 289, 292, 293, 294, 295, and 298 of the Criminal Code. But then again, there are still no laws governing non-physical sexual harassment in the Criminal Code.

b) Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as ITE Law)

In the ITE Law, there are articles that implicitly regulate the crime of sexual harassment, namely those whose actions are regulated in Article 27 of the ITE Law and the threat of such acts is regulated in Article 45 paragraph (1) of the ITE Law.

c) Law Number 13 of 2003 on Employment (hereinafter referred to as the Employment Law)

Indonesia has laws and regulations that regulate the issue of sexual harassment in the workplace in general. However, there are no provisions that specifically regulate the forms of sexual harassment, sanctions or ways to deal with sexual harassment that occurs in the workplace. The Employment Law itself only provides protection for workers as regulated in Article 86 paragraph (1) of the Employment Law.

The three laws and regulations regulate the crime of sexual harassment with various criminal threats. Recently, the legislative body has also passed a new regulation that regulates the crime of sexual violence. One of the crimes of sexual violence that has just been criminalized and ratified into Law Number 12 of 2022 concerning the Crime of Sexual Violence (hereinafter referred to as the TPKS Law) is a crime of non-physical sexual harassment or can be called "catcalling".

Catcalling, or what is commonly considered a non sexual harassment, is an act that can lead to victims felt discomfort, such as saying pornographic/sexual, seductive, or flirtatious phrases. In addition to saying those words of a sexual intention out loud, it can also come in the form of whistles made by strangers, disturbing comments, or simply being seen by strangers (Dewi, 2019). The victim of catcalling will experience discomfort, distress, embarrassment, and fear as a result. According to a New Jersey-

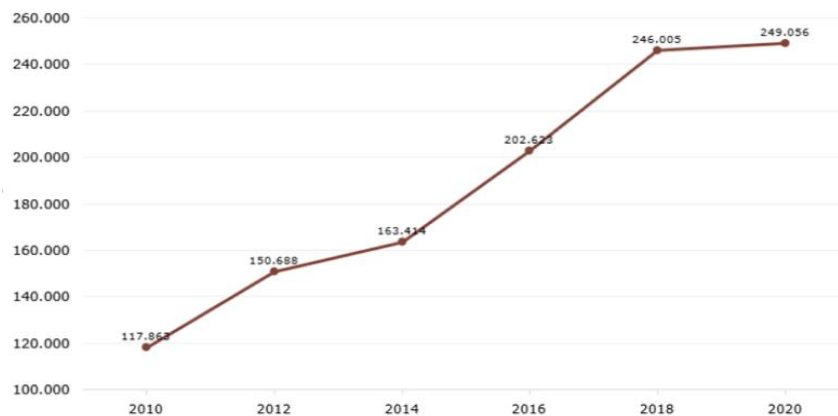
based psychological study, catcalling can cause victims to make unconscious self-evaluations, such as self-objectification (Saraswati, 2016).

Non-physical sexual harassment in several countries, such as France, Argentina, Portugal, Belgium, and Peru, has also taken this fictional sexual harassment problem seriously because for the people of these countries, non-physical sexual harassment has a major impact on human social life and the psychology of the victim. These countries not only apply criminal sanctions but also impose fines for perpetrators of non-physical sexual harassment (Dewi, 2019). One of the countries that also regulates sexual harassment is France. Sexual harassment in France is regulated in Article 222-33 of the French Criminal Code which states that:

“Sexual harassment means imposing on someone, in a repeated way, words or actions that have a sexual connotation and that either undermines his/her dignity by reason of their degrading or humiliating nature, or create an intimidating, hostile or offensive situation.”

Various effects suffered by victims of non-physical sexual harassment, which frequently affects women, cause mental health issues and fear of the surroundings. Mental health can be compromised when the victim or woman is subjected to comments about her physique or body parts that are not meant as compliments but rather as a harassment (Aleng, 2020). Still, many people believe that the act of non-physical sexual harassment is nothing more than a minor offense. Even so, many of these same people are unaware of the fact that one of the consequences of non-physical sexual harassment is that it can result in a victim's level of self-esteem or personality decreasing. Because a lack of self-confidence can reduce one's ability to express themselves, the severity of a decline in one's self-esteem can contribute to the development of the cause of depression (Perempuan, 2021). Due to the sheer complexity of the effects that are brought about by non-physical sexual harassment, the legislative body of Indonesia has recently enacted a new regulation, known as the TPKS Law, which regulates this type of sexual harassment that does not involve physical contact.

Article 5 of the TPKS Law defines non-physical sexual harassment as conduct directed at the body, sexual desire, or reproductive organs with the intent to demean the victim. Notwithstanding, the article fails to explain how the acts that constitute non-physical sexual harassment will lead to confusion regarding the acts that constitute non-physical sexual harassment. In addition, the author will examine the effectiveness of imposing prison sentences for non-physical sexual harassment in order to prevent prison or detention center overcrowding.



Source: (WPB, 2021)

Figure 1. the number of prisoners in Indonesia in 2010-2020

According to the World Prison Brief (hereinafter referred to as WPB), the number of prisoners in Indonesia has continued to increase in the last decade. WPB noted that the number of prisoners in Indonesia had reached 249 thousand people in 2020, while the national prison capacity was only around 132.000. Based on these data, Indonesia occupies the eighth position in the world with 266.000 prisoners, behind Turkey and Thailand.

Prison is a form of punishment that denies inmates their right to freedom, which results in suffering. It is thought that the harsh conditions and little opportunity for interaction in prison will alter human nature, causing inmates to behave worse, develop into worse individuals, and eventually repeat or commit more serious crimes. Based on the issue above, this study aims to analyze the effectiveness of imposing prison sanctions on non-physical sexual harassment crimes.

Research Methods

The type of research used in this research is normative legal research. In this study, the author focuses on the legislation on sexual harassment, especially on non-physical sexual harassment which is contained in Article 5 of the Sexual Violence Bill (TPKS Bill). The type of approach used is a statutory approach and a conceptual approach. The legal materials used in this legal research are primary legal materials, namely Article 5 of the TPKS Bill. In addition to primary legal materials, the author also uses secondary legal materials.

The author also performs the method of interpretation or interpretation. The interpretation used by the author is systematic interpretation and grammatical interpretation. The writer uses a systematic interpretation because the writer wants to research about sexual harassment. The author interprets the existing laws and regulations in Indonesia regarding non-physical sexual harassment, namely in the TPKS Bill to find answers to the problems that will be investigated by the author. The author also uses a grammatical interpretation. Grammatical interpretation is interpreting the words in the law in accordance with the rules of language and legal rules of grammar so that the author uses a grammatical interpretation because the author wants to interpret the word "non-physical sexual harassment" to create certainty regarding the limits of the word non-physical sexual harassment in Article 5 of the TPKS Bill.

Results and Discussion

Non-Physical Sexual Harassment Actions as defined in the Sexual Violence Bill (TPKS Bill)

Harassment of a sexually suggestive is defined as unwanted sexual behavior, which can include making sexual advances or requests, as well as other physical or non-physical behaviors that are sexually suggestive (Dwiyanti, 2017). Sexual harassment can also be interpreted as an action that is not expected by the victim so that it has a negative impact, such as embarrassment, humiliation, offense, to anger. There are 5 forms of sexual harassment, namely: (Utami, 2016)

- a. Physical harassment, what is meant by physical harassment is in the form of unwanted physical touch and the act leads to sexual acts.
- b. Verbal harassment, what is meant by verbal harassment is in the form of unwanted remarks or comments that are sexually charged.
- c. Non-verbal/gesture harassment is an act in the form of body language that has a sexual tone, stares at the body full of lust, and others.
- d. Visual harassment, in the form of showing the spectacle of pornography in the form of photos, posters, pictures, and others.

- e. Psychological or emotional harassment is in the form of requests and invitations that are carried out continuously and the act is unwanted of a sexual nature.

The form of harassment is not only physical, but many show harassment in various forms, one of the forms that victims often get is non-physical sexual harassment.

As specified in Article 5 of the TPKS Bill, which reads:

"Every person who performs non-physical sexual acts aimed at the body, sexual desires, and or reproductive organs with the intention of degrading a person's dignity based on their sexuality and/or decency, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (9) nine) months and/or a maximum fine of Rp. 10.000.000,00 (ten million rupiah)."

According to the article, the target of non-physical sexual harassment is the body, sexual desire, and/or reproductive organs, with the intention of demeanor and dignity. Regrettably, the article does not specify what types of conduct constitute non-physical sexual harassment, so it remains unclear what the TPKS Bill means by non-physical sexual harassment.

Catcalling is a form of sexual harassment that does not involve the use of physical force. The act of whistling, shouting, or making sexual comments to passersby in public spaces is the closest understanding to the word catcalling in Indonesia; however, since the victims here do not get respect and are not appreciated by the perpetrator, the perpetrator commits a crime. Still now, there has been no basis of the word catcalling in Indonesia; but even so, the closest understanding is as follows: This is done in order to obtain mental and emotional power as well as complete control from the victim (Suryandaru, 2007).

Non-physical sexual harassment according to the Oxford Dictionary is defined as whistles, calls and comments of a sexual nature from a man to a woman who passes in front of him. According to Chhun in (Hidayat & Setyanto, 2020), non-physical sexual harassment, also known as "catcalling," is defined as the use of vulgar language, non-physical expressions, and non-physical expressions that take place in public settings. It's possible that for some people in Indonesia, whistling becomes something that's considered to be normal (Pusparisa, 2019). Whistling, on the other hand, has the potential to cause an opponent or the subject of a conversation to feel uncomfortable. As a result, whistles have the potential to be construed as an act of sexual harassment, and the person who engages in such conduct may be subject to criminal prosecution (bemfip, 2021).

This non-physical sexual harassment is not only in the form of sexist comments such as "hey beautiful" or "hey sexy", but also several other forms, such as:

- a. Saying explicit sexist words, such as big boobs or butt.
- b. Glance, which is when a man glances at a woman with lustful eyes.
- c. Whistling, which is when a man whistles from his mouth and is usually intended to insult the shape of a woman's body which he considers sexy.
- d. Showing vulgar gestures, for example biting the bottom lip, a sign that the man is in heat
- e. Make a kiss sound right in front of the victim's face.
- f. Stalking or preventing them from reaching their destination.
- g. Holding any part of the body, from clothes to restricted areas, such as thighs, breasts, buttocks, and others. (Kompas, 2020)

The act of non-physical sexual harassment or catcalling is not only limited to a call, even a whistle, but there is a limit to the act of non-physical sexual harassment or catcalling which really has the

potential for a criminal act and needs special arrangements such as sexual comments, commenting on body shape, trying to seduce women with promising words to sexual and showing vital organs that are carried out continuously. This is an act that really interferes with a person's human rights which is an act of decency that is always considered normal for the community.

Based on this description, the researcher concludes that the form of non-physical sexual harassment is an act in the form of: *whistling, exclaiming, giving sexual comments that are repeated and sexual intention which demean a person's dignity*. Non-physical sexual harassment occurs often on roads, markets, public transportation, and even in malls. The danger of non-physical sexual harassment is more likely to trigger from a psychological point of view of the victim and affect the victim's emotions, such as there is fear in the victim, more likely to feel uncomfortable, do not get security when outside the home, feelings of shame as a result of non-physical sexual harassment.

The Effectiveness of Imprisonment Sanctions on Non-Physical Sexual Harassment Crimes

The majority of sentences handed down by judges in Indonesia include some form of prison sentences as one of the conditions of release. Criminals are taught that going to prison will make them think twice about their behavior. Criminals who exhibited a poor moral character and a lust for immorality were the ones who were sent to prison (Marpaung, 2009). Imprisonment is a crime in the form of limiting the freedom of movement of a convict, which is carried out by closing the person in a correctional institution by requiring that person to obey all the rules and regulations that apply in the correctional institution associated with a disciplinary action for those who violate these regulations (Setiady, 2010).

Imprisonment is a punishment by eliminating freedom which causes suffering for prisoners. The act of eliminating various rights of prisoners as human beings, namely the right to interact freely, the right to security, the right to biological needs, and the right to education and work (Aryana, 2015). The harsh conditions of prison life and the limited opportunities for interaction will inevitably alter a person's characteristic, and it is assumed that they will behave even more badly as a result.

In Indonesia, coaching is the main function of imprisonment. The reorientation of the coaching function for prisoners is shown by the transformation of the prison into a correctional valley. Based on Article 1 point 3 of Law Number 12 of 1995 concerning Corrections, it is stated that correctional institutions are places to carry out coaching for prisoners and correctional students. However, this idea of coaching is not in line with the actual conditions of the correctional institution. Excess capacity in prisons often causes conflicts within prisons.

Correctional institutions are often a school of crime for inmates. This is because the inmates have learned to commit crimes while in prison. Labeling or labeling prisoners also causes them to commit crimes again to meet their daily needs because of the labeling that makes it difficult for prisoners to get jobs again which will eventually commit crimes again and become inmates again. Based on this, there is a need for a review of the system and the effectiveness of imprisonment for problems in anticipating the presence of excess inmates in prisons or remand centers.

According to the World Prison Brief (hereinafter referred to as WPB), the number of prisoners in Indonesia has continued to increase in the last decade. WPB noted that the number of prisoners in Indonesia had reached 249 thousand people in 2020, while the national prison capacity was only around 132.000. Based on these data, Indonesia occupies the eighth position in the world with a total of 266.000 prisoners, behind Turkey and Thailand

Based on the problem of excess capacity due to the availability of prisons, it will focus on answering alternatives to imprisonment, namely making developments on alternative imprisonment

sanctions with the same goal so that what is designed is not looking for criminal alternatives but the types of prison sanctions that must be developed. It certainly cannot be separated that the alternative is still based on the same goal as the prison sentence, namely developing more effective rehabilitation measures to reduce crime.

Non-physical sexual harassment which is currently a problem is regulated in Article 5 of the TPKS Law. Article 5 of the TPKS Law states that:

“Every person who commits a non-physical sexual act aimed at the body, sexual desire, and/or reproductive organs with the intention of degrading a person's dignity based on their sexuality and/or decency, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (nine) months and/or a maximum fine of Rp. 10.000.000,00 (ten million rupiah).”

Based on the article, it is explained that if someone who commits non-physical sexual harassment is threatened with a maximum imprisonment of 9 months and/or a maximum fine of Rp. 10.000.000 (ten million rupiah). The problem raised by the author is the threat of imprisonment for a maximum of 9 months.

Giving the threat of imprisonment is considered less effective because it will cause excess capacity in prisons or detention centers. In addition, not a few inmates who previously committed minor theft crimes, after serving a sentence in a correctional institution can commit an even greater crime. This is because the inmates have learned to commit crimes while in the correctional institution or can also be called a correctional institution which often becomes a school of crime for inmates.

Giving labels by the community to prisoners is one of the factors that makes inmates lose trust and find it difficult to return to society which over time will commit crimes again to meet their needs. Based on this, the threat of imprisonment for the perpetrators of the crime of non-physical sexual harassment is considered less effective and will be a cause for further problems. So to overcome the non-physical sexual harassment, a new effort is needed to overcome the problem of the crime of non-physical sexual harassment.

One of the efforts to minimize the imposition of imprisonment is to seek special rehabilitation for the perpetrators of the crime of non-physical sexual harassment. The special rehabilitation is an effort made to change the mindset, perspective, and sexual behavior of the convict and prevent the brutality of sexual violence by the convict which includes the provision of educational, medical, psychological, psychiatric, and/or social services by the State. The special rehabilitation is carried out as a form of treatment or therapy for the perpetrators of the non-physical sexual harassment. The fines that have been set previously can provide a deterrent effect for the perpetrators of the non-physical sexual harassment. So that apart from being specially rehabilitated as a repressive measure, the perpetrators are also subject to fines.

As according to Sutherland and Cressey, the benefits, advantages and sense of justice regarding the application of fines are:

- a. Payment of fines is easy to implement and can be revised if there is an error, viewed with other types of punishment;
- b. Fines are a type of punishment that benefits the government, because the government does not spend a lot of money, if it is accompanied by subsidiary losses;
- c. The penalty of fines does not bring or does not result in disgrace to one's reputation or honor;
- d. The fine will be an income for the region or city. (Bakhri, 2002)

The settlement of criminal cases, especially in the case of non-physical sexual harassment crimes with special rehabilitation and fines, will reduce the capacity in correctional institutions. By not being imprisoned, the perpetrator can live life as it should without any negative stigma attached to the perpetrator.

Conclusion

Based on the findings and discussion above, it can be concluded that:

1. *Non-physical sexual harassment as referred in Article 5 of the Law on Sexual Violence Crimes (TPKS Law) is:* acts in the form of whistling, exclaiming, giving sexual comments that are repeated and sexual intention which demean a person's dignity. Oftentimes, non-physical sexual harassment occurs on roads, markets, public transportation, and even in malls. Whistling has become commonplace for some Indonesians. However, since such behavior can make an opponent or victim feel really uncomfortable, the whistle may turn into a case of sexual harassment, and the offender may undoubtedly face legal action.
2. Giving criminal threats in the form of imprisonment is considered to be less effective in resolving the issue of non-physical sexual harassment as it can lead to overcrowding or excess capacity in prisons or detention centers, in addition to defining that frequently occurs in the community that can lead to violent offenders committing the act again. Therefore, there is a need for a new concept in terms of punishment, namely by carrying out special rehabilitation that is done as a form of punishment. It is necessary to impose fines as a form of punishment for those who commit the crime of non-physical sexual harassment in addition to special rehabilitation.

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