



## Problems in the Regulation of Non-Physical Sexual Harassment in Indonesia and Its Implications

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### **Abstract**

Rape Culture that is formed in society indirectly corners the victim and normalizes the actions of the perpetrator. In a Rape Culture pyramid, it is explained that normalizing relatively small acts of sexual violence such as sexual jokes, sexist acts, to acts such as sexual harassment if it continues to be normalized, it is feared that it will lead to the normalization of much worse sexual violence such as rape, sexual abuse, and so on. The nation's struggle to prevent acts that are included in sexual violence has finally paid off marked by the passing of Law Number 12 of 2022 concerning the Crime of Sexual Violence. Law No. 12 of 2022 also formulates "sexual harassment" as one of the criminal offenses along with its criminal sanctions. The concerns of the community, especially women who are often victims of sexual harassment, especially non-physical sexual harassment, now have a legal umbrella to protect victims and ensnare the perpetrators. However, the article containing sexual harassment is still found to have shortcomings in the form of elements in the article that can potentially criminalize innocent people, therefore there is a need for guidelines that can explain how to apply this article for law enforcement officials. Another problem is that there is no minimum punishment which has the potential to cause disparity in judges' decisions. In addition, non-physical sexual harassment sanctions that are oriented towards punishment and/or imposition of fines on perpetrators have the potential to cause prison overcapacity and do not touch the root causes of sexual violence in society in the form of Rape Culture.

**Keywords:** *Sexual Harassment; Rape Culture; Law Number 12 Year 2022 on Sexual Violence Crime*

### **Introduction**

Sexual violence that occurs in Indonesia is like an iceberg phenomenon. The iceberg phenomenon is named as a metaphor that refers to where the number of sexual violence cases that appear on the surface is only a portion when compared to the actual number that occurs. This is because overall cases

of sexual violence cannot be seen because they have not surfaced. Many victims are afraid to report because of the mindset in society that tends to blame the victim. Rape culture, which is the basis for normalizing sexual violence that occurs, supports cases of sexual violence that are difficult to reveal, especially if there is an unequal power relationship between the perpetrator and the victim, for example, for example the perpetrator is a superior, lecturer, or person with power, then the victim is a subordinate, student, or even someone who has no position. Sexual violence is inseparable from what is called "Rape Culture".

The term Rape Culture has long been popularized by the second wave of feminists since the 1970s in America. This term refers to a phenomenon that shows society normalizes the existence of an act of sexual violence. In the discussion carried out related to Rape Culture, it was found that there is a link between rape myths and rape culture itself, this is based on the fact that not a few people believe in the myths of sexual violence, such as the assumption that if the victim does not fight back, it means that the victim wants the sexual violence to occur (Kimberly Peterson, 2019). The link with Rape Culture is that people who understand the silence of the victim is a sign of consent, then the victim will be deemed to have agreed to the sexual violence and all the blame will be placed on the victim. The existence of Rape Culture is a phenomenon that makes victims afraid to seek help and on the other hand indirectly normalizes the actions of the perpetrators.

The struggle of the Indonesian people in seeking protection for victims of sexual violence has now borne fruit. This was marked by the passing of a law intended as a legal umbrella for sexual violence in Indonesia in the form of Law Number 12 of 2022 on the Crime of Sexual Violence on April 12, 2022. Elizabeth Gozali, a criminal law lecturer at the Catholic University of Santo Thomas, said that the Sexual Violence Law is an important piece of legislation that prioritizes the rights of victims, as other legislation only focuses on criminalizing sexual violence cases (Aisyah Llewellyn, 2022). The Law on the Crime of Sexual Violence outlines several types of sexual violence, one of which is sexual harassment, for which the term "sexual harassment" was previously unknown in national legislation. Prior to the enactment of the Sexual Violence Law, articles from the Criminal Code were used.

Cases related to sexual harassment at that time often used the article of Sexual Abuse to ensnare the perpetrators of physical sexual harassment, but non-physical harassment has not been fully charged with the articles in the Criminal Code. The passing of the Law on Sexual Violence is expected to protect the public from the criminal act of sexual harassment, both physical and non-physical, which previously experienced obstacles related to the formulation of the offense. In the Law on Sexual Violence, non-physical sexual harassment is regulated in Article 5, namely "every person who commits 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 his/her sexuality and/or morality, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (nine) months and/or a maximum fine of Rp10,000,000.00 (ten million rupiah)".

The formulation of the offense in Article 5 has the potential to cause problems in its application, such as the element "with the intention of degrading dignity" is quite complicated to prove so there is concern that there will be criminalization of people who actually do not intend this. This could happen when someone intends to praise another person, even if the context is sexual, but the person being praised does not accept it because they feel they are being harassed. Another problem is that if all problems of non-physical sexual harassment are applied to criminal sanctions, it will lead to the overcapacity of prisons, moreover there is no minimum penalty governing this criminal offense, so it is possible that there will be disparity in decisions that cause injustice. Therefore, the question arises as to what are the implications of the problems that exist in the regulation of non-physical sexual harassment in Indonesia?

### **Research Methods**

This research is juridical-normative research using a statutory approach by examining statutory rules in the form of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence. Normative legal research begins with the existence of vagueness that occurs regarding the meaning of the norm, as well as regarding emptiness, or the existence of a conflict between norms (Peter Mahmud Marzuki, 2001). This research is a normative juridical with a literature approach, namely by studying journals, books, legislation and other documents related to this research. Normative law is directly related to the practice of law which involves two main aspects, namely the formation of law and the application of law.

This approach views law as synonymous with written norms made and promulgated by official institutions or officials (Poglabba. C, 2017). There are 3 (three) legal materials in the form of: primary, secondary, and tertiary legal materials. Primary legal materials are legal materials in the form of laws and regulations and documents containing legal provisions (Murdoch University, 2022). Secondary legal materials are legal materials that contain law such as books, journals, and legal discussion comments (Murdoch University, 2022). Tertiary legal materials in the form of encyclopedias and dictionaries that support the topic of the problem (Murdoch University, 2022).

The legal material analysis technique used is content analysis (content analysis technique). Analysis is any systematic procedure that is encouraged to examine the content of the information obtained (Cheng, 2018). This analysis focuses on all the secondary data obtained, after obtaining the necessary data, this paper analyzes the data logically, systematically and juridically. Logical means that the data collected is analyzed in accordance with the principles of deductive logic, namely drawing conclusions from a general problem to the concrete problems faced (Lisdiyono, 2017). Systematic means analyzing data with one another that are interconnected and dependent. Furthermore, the data were analyzed juridically, namely starting from the existing regulations and related to the positive law that is currently in effect (Kruyen, 2017).

### **Result and Discussion**

Sexual harassment cases are problems that are expected to be resolved because they occur a lot in Indonesia, sexual harassment can occur to anyone regardless of age or gender. Based on the findings in Komnas Perempuan's Annual Report, violence against women reached 299,911 cases in 2020. Of the 8,234 cases that have been recorded, there are 181 cases of sexual harassment experienced by women (Komnas Perempuan, 2021). In addition, based on a survey conducted by the Safe Public Space Coalition (KRPA) on November 25-December 10, 2018, it was found that 1 in 10 men had experienced sexual harassment in public spaces, then with a higher number there were 3 out of 5 women who experienced sexual harassment in public spaces (Fitria Chusna Farisa, 2022). It is inevitable that in Indonesia there is still a Rape Culture, which is the reason why victims of sexual harassment are often blamed for being "inviting". Non-physical harassment that is often experienced by women often occurs on the street, whether it is on a quiet street or on a busy street. Street harassment can be defined as a form of sexual harassment perpetrated by strangers in public areas, with the majority of cases involving men as perpetrators and women as victims (Kari A. Walton & Cory L. Pedersen, 2021). Non-physical sexual harassment on the street can take the form of: whistling, winking, sexualized expressions, body gestures, and more. Non-physical sexual harassment is often understood as "catcalling", the definition of catcalling refers to actions such as: leering, winking, whistling, name calling, body gesticulation, and others that are not limited to verbal harassment. Such street harassment takes a toll on the victim mentally and emotionally, with even more consequences.

Catcalls are often understood differently by perpetrators and victims. Perpetrators often feel that catcalls are a sign of praise, because they contain expressions or gestures of interest in the victim's appearance. But the victims of catcalls do not feel this way, because what they experience is harassment and is a scary thing even though the catcalls they experience are positive expressions. Based on survey data conducted by Colleen O'Leary in her research entitled "Catcalling As A "Double Edged Sword": Midwestern Women, Their Experiences, And The Implications Of Men's Catcalling Behaviors" in the discussion related to catcalling experiences experienced by women, it was found that some survey participants clearly identified catcalling as a negative experience, and some identified catcalling as an experience that was not entirely negative, with the following data (Colleen O'Leary, 2016):

- a. A large number of survey participants mentioned that comments about women's bodies are rude and offensive. However, according to other participants, if the perpetrator compliments in a certain way, it is received more positively;
- b. Some participants felt that it was okay for strangers to look at their body parts as long as they did not make any comments;
- c. 12 out of 13 participants emphasized that comments made by strangers are very unpleasant, it is different if the comments are made by the closest person then it will be more acceptable because it is felt to have a different connotation;
- d. Some participants revealed that catcalling made them feel as objects;
- e. Catcalling can be seen as harassment if the victim feels uncomfortable or threatened;
- f. Some participants argued that catcalling can be considered as harassment if the perpetrator continuously says words to the victim;
- g. In giving compliments, 11 out of 13 participants felt that voicing compliments was perceived as harassment because it was perceived as bothering women for no reason.

Article 5 of the Law on Sexual Violence stipulates that "every person who commits non-physical sexual acts directed against the body, sexual desires, and/or reproductive organs with the intention of degrading a person's dignity based on his/her sexuality and/or morality, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (nine) months and/or a maximum fine of Rp10,000,000.00 (ten million rupiah)". The element "with the intent to degrade the dignity of a person" is quite tricky in its proof, because what the perpetrator intends can be different from what the victim understands. This element can be a vulnerable cause of criminalization or even make it difficult to criminalize because of the element "with the intention of degrading the dignity of a person". If we look at it from two sides:

- a. If this element is attached to what the victim feels, then it can be vulnerable to criminalization. Based on the reasons outlined earlier, non-physical sexual harassment will always be perceived negatively and make the victim feel anxious or frightened even though the perpetrator intends in the case of verbal harassment to express praise with the intention of flattering the victim.
- b. If this element is attached to what the perpetrator intended, then there will also be confusion in criminalizing it if it is not known exactly what the intention of the non-physical harassment was. If the intention of the perpetrator is an expression of flattery without the intention of degrading dignity, then the perpetrator should not be guilty. However, this will lead to injustice because the victim may not necessarily feel that their dignity is being undermined.

However, in terms of the type of offense, non-physical sexual harassment is a complaint offense, which means that this criminal offense can only be processed if the victim makes a report/complaint. This indirectly implies that the victim can make a complaint report if they feel that their dignity has been degraded by the perpetrator. So there is no need to ascertain the motive and mode of the perpetrator of non-physical sexual harassment in advance in making a complaint report to law enforcement officials.

The tendency of society to corner victims of sexual harassment, especially women, who are considered to have to behave well and look good.

So it is not uncommon for women who find themselves as victims of non-physical sexual harassment, often instead of getting support, they are blamed for the way they dress, their behavior, and even things that are outside of themselves, such as being blamed for coming home at night or being blamed for passing through deserted roads so that they become easy targets for perpetrators of sexual harassment. Prioritizing what is felt by the victim is actually in line with the guarantee of a sense of security and tranquility and protection against the threat of fear that has been regulated in Article 30 of Law Number 39 of 1999 concerning Human Rights. However, it is feared that there will be criminalization of people who actually do not have such intentions, especially since the criminal threats for perpetrators of non-physical sexual harassment are oriented towards imprisonment and/or fines without the option of rehabilitation.

Punishment of perpetrators of sexual harassment must pay attention to the objectives to be achieved so that punishment is not only the basis for justifying a retaliation for harmful actions and violating norms. Punishment of perpetrators of sexual harassment is intended so that people have a fear of committing sexual harassment. Punishment is given not because people make crimes but so that people do not make crimes (Ayu Efridadewi, 2020). However, punishment aimed at creating a deterrent effect for the perpetrators of criminal acts becomes a problem when there is prison over-capacity. The prison, which is expected to be a place to be able to foster and re-socialize prisoners, is not in accordance with its function.

As a result of this overcapacity, it has an impact on the poor health conditions and psychological atmosphere of prisoners and detainees, the ease of conflicts between prisoners, the guidance becomes not optimal and does not run well. Prisons that are supposed to be a place of guidance, on the contrary, bring riots between prisoners because of minimal human resources and also inadequate facilities. Various policies have been taken to overcome the problem of overcapacity, including through building rehabilitation to the construction of new buildings with the aim of increasing the capacity of prisons. However, the policy is not significantly able to overcome the problem of overcapacity considering the addition of prisoners who are still far more due to the high level of criminality in the community (A. Muhammad Abdillah, n.d.). The concept of conventional criminal justice, which only focuses on the punishment and punishment of criminals, has not touched the interests of victims and/or the community who are harmed by criminal acts committed by criminals.

The purpose of criminal law is to punish someone who has committed a criminal offense, in order to uphold legal order, in order to protect society (Roy Sanjaya, n.d.). According to Ted Honderrich, criminal sanctions can be an economic deterrent if they fulfill the following elements: (Prasetyo, 2013)

- a. The punishment is a real deterrent;
- b. The punishment does not cause a more dangerous or detrimental situation to arise than what would have happened if the punishment was not imposed; and
- c. There is no other punishment that can effectively prevent with less harm or loss.

Criminal law must be seen as the *ultimum remedium* because criminal law sanctions are heavier and harsher than sanctions in other fields of law, and often bring side effects. By applying the *ultimum remedium* principle, this is also a way to avoid the problem of prison over capacity in Indonesia. By prioritizing the imposition of imprisonment without clear guidelines or criteria regarding what actions contain weaknesses because the sanction approach used in efforts to overcome a crime is limited and directed at the punishment of the perpetrator. When referring to the Article of the Law on Sexual



Violence, it is possible that the understanding of policy makers regarding criminal sanctions is still heavily influenced by the old view that emphasizes that everyone who has committed a crime must be rewarded with appropriate punishment. Actually, the principle of criminal law as the *ultimum remedium* has been accommodated in the Draft Law on the Elimination of Sexual Violence.

Although the use of the *ultimum remedium* principle in providing criminal sanctions for perpetrators of non-physical sexual abuse is a good thing in dealing with prison overcapacity, it is better if non-physical sexual abuse also contains imprisonment with qualifications such as, the act does not cause someone to experience mental shock, or if the non-physical sexual abuse is also not carried out by parents; family; someone who has power; and so on.

Non-physical abuse is often underestimated, even though it can have dangerous consequences as well, for example verbal sexual abuse often results in wounds that are difficult to heal, trauma that lasts for years (Uly Siregar, n.d.). The wounds caused by verbal abuse are invisible to the eye and cannot be healed with medication so it is not uncommon for victims to need therapy and assistance for, because of its nature which intersects with psychological violence, especially if the verbal abuse is often thrown over a long period of time, causing deeper wounds.

The lack of public knowledge regarding the dangers of non-physical sexual harassment behavior has led to the normalization of such acts plus the environment in a society that also seems to teach. Therefore, there is a need for education related to sexual harassment, as well as for the perpetrators of sexual harassment, there is a need for rehabilitation. In addition to criminal convictions, perpetrators of sexual harassment can also be subject to actions in the form of rehabilitation.

According to Willy Aditya, both victims and perpetrators of sexual violence need to be rehabilitated because they may actually have a trauma of violence in the past that encourages them to commit crimes. This rehabilitation is intended so that the perpetrator no longer commits crimes after the trauma is treated. Unlike Veni Siregar, who said that not all perpetrators of sexual violence have trauma as victims of violence in the past so there is no need for rehabilitation provisions.

In addition to the above issues, there should be a minimum and maximum criminal sanction in the formulation of the sanctions because it will not rule out the possibility that if sexual harassment is regulated, its implementation will be like other laws. This means that the imposition of punishment is likely to be much less than that demanded by the public prosecutor because there is no minimum limit. In addition, it is possible that an act whose impact is much more severe than other acts, the perpetrator can be prosecuted much lighter.

## **Conclusion**

The absence of an explanation of the article on non-physical sexual harassment contained in Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence can cause problems in its application. In proving the element "with the intention of degrading a person's dignity" in Article 5, it is feared that there will be criminalization of innocent people. Moreover, this article's sanctions are oriented towards punishing a person and/or imposing a fine, which should have another option in the form of rehabilitation. Since non-physical sexual harassment often occurs due to habits formed due to the existence of Rape Culture in society, what is actually needed is not to revolve around providing a deterrent effect by criminalizing and/or imposing fines on someone but also providing understanding and direction so that Rape Culture does not continue to develop in society. Regarding the length of punishment, there are still shortcomings because it does not regulate the minimum punishment, which is feared that in the imposition of verdicts, there will be imbalances between one verdict and another.

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