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## The Implementation Challenges Of The Law Concerning Sexual Violence In Indonesia

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### Abstrak

Undang-undang tentang Tindak Pidana Kekerasan Seksual mulai berlaku pada tanggal 22 April 2022 dan telah dinantikan oleh sebagian besar masyarakat di Indonesia dengan harapan peraturan ini dapat mengurangi atau bahkan memberantas tindak pidana kekerasan seksual, yang meningkat saat ini. Merujuk pada peraturan sebelumnya, kekerasan seksual dilakukan dalam beberapa perbuatan dengan menggunakan istilah penganiayaan. Namun juga tercantum dalam peraturan lain seperti perbuatan kekerasan dalam rumah tangga. Pengertian kekerasan seksual yaitu perbuatan yang memenuhi unsur-unsur pidana yang diatur dalam undang-undang ini dan bentuk-bentuk kekerasan seksual lainnya. Namun, ada yang berpendapat bahwa beberapa pasal dalam undang-undang tersebut mengandung ketentuan yang bertentangan dengan norma agama dan moral masyarakat meskipun ada yang menganggap undang-undang tersebut sebagai bentuk liberalisasi murni di Indonesia. Metode penelitian ini menggunakan metode yuridis normatif dan didukung konseptual dengan menganalisis pandangan atau pendapat ahli hukum dan pendekatan undang-undang untuk mempertahankan argumentasi melalui bahan hukum dan data. Hasil penelitian menunjukkan bahwa undang-undang (UU TPKS) memiliki peran sebagai aturan tambahan dalam hukum pidana Indonesia untuk menyelesaikan kasus-kasus kekerasan seksual di Indonesia, dan sebagai perlindungan hukum bagi korban kekerasan seksual. Sebaliknya, dalam pelaksanaannya dapat terjadi beberapa tantangan, seperti masalah internal dari penegak hukum itu sendiri, kurangnya peraturan pelaksanaan dan munculnya konservatisme masyarakat yang memegang pemahaman patriarki tentang bagaimana masyarakat menganggap kekerasan seksual.

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### Abstract

*Abstract The law concerning the crime of sexual violence came into force on 22 April 2022 as law number 12, the year of 2022 has been waiting by most of the society in Indonesia with the hope that this regulation may reduce or even dispel the crime of sexual violence, which*

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*increased currently. However, some argue that some articles in the act contain a provision that contradicted religious norms and social morals even though some consider this act as a form of pure liberalization in Indonesia. The method of this research uses a normative juridical method and is supported by conceptual by analysing the view or concept of the jurist on and statute approach to defending the argumentation on the legal and data materials. The result shows that the act (UU TPKS) has a role as supplementary rules under Indonesian criminal code to settle the cases of sexual violence in Indonesia, and as legal protection to the victim of sexual violence. On the contrary, several challenge might occur in the implementation, such as internal problems from the legal enforcement itself, lack of implementing regulations and arises of the conservatism society which, holds a patriarchal understanding of how the populace considers sexual violence.*

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## INTRODUCTION

The legalisation of the criminal law concerning sexual violence in 22 April 2022 has become a fresh air for the development of Indonesian Law particularly in the field of Criminal Law Procedures. Refers to the previous regulation, the sexual violence are conducted in several acts such as mentions under the Indonesian Criminal Code in the article 289 until 296 by using a terms of “molestation”<sup>1</sup> But also listed in other regulation such as the act of domestic violence NO. 23 Year of 2004 etc. The definition of sexual violence are mentions in the article 1 Para 1 of this act which is an act that fulfils the criminal elements as regulated in this act and the other form of sexual violence as also mentions in this act as long as determines by this act. According to the feminism perspective, it is considers that sexual violence are triggered by power relations imbalance or gender which constructed by the social structure, culture, economy, politics and religion that is patriarchy.<sup>2</sup>

Further, this article shaped to the scope of sexual violence which are wider than before. If in the previous regulation, the definition of sexual violence is not merely an act of immoral actions about physical impact, but this act much more pay attention to the impact which causes

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<sup>1</sup> Obscenity could be defined as an act carried out by force or threat of violence to force someone to do or allow an action that attacks the honour of decency, as regulated in Article 289 of the Criminal Code, Book II chapter XIV concerning crime of decency. Therefore, referring to this Article, the term of Sexual Violence is a new term introduced by the report of National Commission of Woman in Indonesia which is then divided the types of sexual violence into 19 types as mentions under Article 4 of Sexual Violence Act. The result illustrates a classification and expansion of the meaning in sexual violence if compared to the existing regulation.

<sup>2</sup> Suci Mahabbati, Isna Kartika Sari, (2019). *Analisis Perbandingan Aturan Penghapusan dan Pencegahan Kekerasan seksual menurut KUHP dan RUU Penghapusan Kekerasan seksual,*” Jurnal Islamika, Vol 19 No 1, [83].

by the action whether physically or psychologically of the victim in the period of time.<sup>3</sup> The moral standard of sexual violence refers to the feeling of the victim, even in the wider sense an act of sexual violence not only concern to the particular gender aspect although the victim of sexual crime are dominated by woman however it also proves including men, children, disability even elderly.<sup>4</sup>

According to the annual report of Indonesian National Commission of women the year of 2022 shows that within the year of 2021 as the highest trend where the amount of sexual violence in a decade between 2012 and 2021, with concrete data illustrates of 338.496 cases compares to the number of sexual violence cases in 2019, which was the time before Covid-19 emerges. This year only, the types of violence which become a special attention is sexual violence through digital platform which also known in Indonesia as KBGO happening during the pandemic situation whether for women even disabilities, other than that also occurred sexual violence issues in the realm of Indonesian soldier and police, also in the field of education institution and Islamic boarding school.<sup>5</sup>

Therefore, with reference to the data as mentions above, the national commission of woman in Indonesia together with their network and stakeholders of society uses its mandate to push the legal formation and alteration in the effort to prevent and handling cases of sexual crime which integrated into one regulation of the act on sexual crime, considering there are many problems occurred by the previous process of past regulation which partially regulated the offenses.<sup>6</sup> For ten years, this regulation are fought by the women commission and communities to strive for the human rights fulfilment particularly the rights of women in Indonesia and the

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<sup>3</sup> The victim of sexual violence generally experienced psychological impact such as emotional disruption/disturbance even cognitive disturbance such as the victim's mood getting worse, the changing of victim's behaviour which oriented into negative thing until the disturbance of mind set, therefore the victim might having difficulties in focus and have a lot of daydreaming. Furthermore, the victim also could bear with depression and tried to do extreme orientation to suicide or the simplest such as selfharm. See Pages 137-140 the Journal of Astri Anindya, Yuni Indah Syafira Dewi, Zahida Dwi Oentari, *dalam Dampak psikologis dan upaya penanggulangan kekerasan seksual terhadap perempuan*. Vol 1, No. 3 Agustus 2020 TIN (Terapan Informatika Nusantara)

<sup>4</sup> The IJRS Repost illustrates that sexual violence also potentially happen to a man and also have the same impact as woman, even the worst is the victim of men's sexual crime are underestimated by the society since populace thought that there are no physical impact such as getting pregnant due to the sexual violence, even in 2018 the surveys from Public Space Safety coalition shows that sexual violence experienced by men are dominated until it reaches 60% of the societies stigma are not recognized and acknowledge due to masculinity which hold by their gender. See the report of IJRS in the page <http://ijrs.or.id/kekerasan-seksual-pada-laki-laki-diabaikan-dan-belum-ditangani-serius/>.

<sup>5</sup> Catatan Tahunan Komnas Perempuan (2021), <https://komnasperempuan.go.id/kabar-perempuan-detail/peluncuran-catahu-komnas-perempuan-2022>

<sup>6</sup> *Daftar Inventarisasi Masalah (DIM) Terhadap RUU Tindak Pidana Kekerasan Seksual*, (Tanggapan Komnas Perempuan per 21 Februari 2022 terhadap Naskah Resmi DPR RI 8 Desember 2021, [1-3])

victim of sexual violence as mandated under the constitutional law of Indonesia article 28 of the UUD 1945.

However, even so this regulation are still demanded a lot of improvement, starting from the act redaction until the problem where the executive have not issued implementation regulation of this act although it has been legalised for several month.<sup>7</sup> Furthermore, the most crucial thing is when the article concerning rape and abortion are not mentioned specifically and detailed, even though the main idea resources of this act are departed from the lenient of rape sentence which are satisfy the fairness for the victim.<sup>8</sup> Therefore, this matter is a never end discourse and needs to be discussed. Whether if the regulation have fulfilling the expectation of every parties particularly for the victim? Whether if the act are capable to suppress number of sexual violence even this regulation are live within the conservative and patriarchal culture populace.

## METHOD

The method of this research are using normative legal method, in this article using legal research which is a research done by the legal principles, norms of law, concrete legal regulation and provision and legal system which interlinked with the object of the research.<sup>9</sup> It is also adding some interview result from the experiences of sexual violence victims conducted in offline and online interview with several approach such as statute approach by analysing the resource of international law and Indonesian law. Conceptual approach is done by analysing the view or concept of the jurist on the problem in this discussion and also by using case approach on the legal and data materials.

## DISCUSSION

### Sexual Violence from General Rules Perspective

Generally, the sentence form of criminal law naturally is not intended to serve the interest of the victim as the construction of sexual violence law purposes since the matter which is

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<sup>7</sup> Nadhila Cahya Nurmallasari, Waluyo, (2022) “Efektivitas UU Tindak Pidana Kekerasan Seksual di Indonesia,” *Jurnal Demokrasi dan Ketahanan Nasional*,” Vol 1 No 1, [60]

<sup>8</sup> Whiteboard Journal, Resmi disahkan (mengapa UU TPKS tidak mencantumkan pemerkosaan dan Aborsi, <https://www.whiteboardjournal.com/ideas/human-interest/resmi-disahkan-mengapa-uu-tpks-tidak-mencantumkan-pemerkosaan-dan-aborsi/>

<sup>9</sup> Sudikno Mertokusumo, *Penemuan Hukum*, (Yogyakarta : Liberty, 2004), [29].

concern under the criminal law is to punish the offenders of criminal crime, however it is not serve a personal interest or the victim importance due to the understanding of criminal law as resistance against the state, therefore the interest all about state and society concern.<sup>10</sup> No wonder then, if the previous regulation was capable to accommodate the breach and criminal in the sexuality context which is naturally private in the scope.

Accordingly, the norm in the sexual crime act can be categorized as a unique norm where it derives from critical legal framework against the natural of criminal law in Indonesia, it has a character of speciality so that it is a *lex specialis* principle of the violation which is not recognized yet by the general criminal procedures. In brief, there are four key elements in the construction of the act on sexual crime violation, as follows:<sup>11</sup>

1. The investigator in police department is no longer rejected the denunciation of sexual case
2. Removal of restorative justice in the process of sexual crime procedures
3. The object of evidence can be used as an evidence (one evidence is enough)
4. The implementation of restitution beside the criminal cage to fulfil the rights of the victim

Build upon those elements it can be concluded that there are pattern change on the perspective to deal with the sexual violence crime, in the wider views the norms in the sexual violence act have delivered new criminal law civilization in understanding and processing violation of sexual crime. The scheme of thinking is based on the most important part of adopting victim perspective, the aspect of rehabilitation and protection gaining more attention. Therefore, the context of the enforcement is no longer only to punish the offender but most important are to fulfil the rights of the victim due to the impact of long trauma experienced by the victim in any form as mentions in the act.<sup>12</sup>

However, two of important point which was derived the idea resources of this act is not regulated as details instrument which are concerning abortion and rape, for some reasons and after reviewing some resources writer have found that abortion is conducted in the act No.36

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<sup>10</sup> Fauzy Marasabessy, “*Restitusi bagi korban tindak pidana: sebuah tawaran mekanisme baru*” Jhp.ui.ac.id, [54].

<sup>11</sup> Webinar Tantangan Pelaksanaan Penghapusan Kekerasan Seksual, Universitas sebelas maret, 21 April 2022. <https://www.youtube.com/watch?v=vskqxU5updM&t=4887s>

<sup>12</sup> Tanggapan PGSPA Umsida terkait pengesahan UU TPKS. <https://umsida.ac.id/umsida-beri-tanggapan-terkait-pengesahan-uu-tpks/>

year 2009 on the Health law, specifically an abortion intension as an impact of rape mentions under article 76 letter a.<sup>13</sup> whereas, the rape is actually more comprehensive mentions in the draft bill of Indonesian criminal code certainly mentions in the article 477.<sup>14</sup> Therefore, the process on abortion and rape cases is still will refers to the act Number 36 year 2009 concerning Health Law, while rape case will still using existing criminal code until it is waiting for the draft of criminal code to be legalised.

Some of the matters which is need to be clearly mentions as above discussion, for example in the field of evidence standard as generally mentions under the article 184 of criminal code, where it conducted minimum evidence must fulfil at least two evidence so that a suspect of criminal crime can be caught so that it proceed to the investigation and determination of suspect status.<sup>15</sup> However, the act of sexual violence violation the context of evidence is enough with only one evidence as long as the evidence able to make the judges to be sure and believe in it. For example, digital record of the event of sexual crime unilaterally done by the victim is considers to be enough for the judge curiosity as mentions under article 24 of the act.

Moreover, it also recognizes a restitution as a mandatory decision issued by the judges to the perpetrators who receive a cage punishment in minimum of 4 years sentence. The means of restitution is an obligation for the offenders to compensate the victim as a result of loss of the property or victim's income: a compensation which derived by mental suffers as a result of criminal action, up to reimbursement of medical care and or psychological rehabilitation and also considers compensation of other loss as a result of the crime, as mentions under Article 30 of the act.

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<sup>13</sup> The means of abortion on the act refers to abortion which done by the impact of rape as listed under article 75 paragraph 2 letter b: pregnancy as an impact of rape that can derived psychological trauma on the victim.

<sup>14</sup> By virtue of the article 285 Indonesian criminal code which currently exist, the category of rape is only limited on the understanding where copulate is define by a jurist named R. Soesilo based on the decision which was made by the Dutch court (Arrest Hoge Raad) in 1912 which is contestation between male genitalia and women genitalia which done to have a child". This means that copulate is a situation where male genital get into the women's genital until it ejaculated. However, under the draft criminal code stipulated different standard, according to paragraph 2 also recognizes a rape also occurs in the marital situation, other than that paragraph 3 does not much limited where it only recognize male's genital should get into female's genital but also orally or entering other tools or other object in the vitals area such as anus of others. <http://ijrs.or.id/tertinggal-zaman-pemaknaan-perkosaan-dan-pencabulan-dalam-hukum-di-indonesia/>

<sup>15</sup> Tri Jata Ayu Pramesti, *Arti bukti permulaan yang cukup dalam hukum acara pidana*. hukumonline.com

## The Challenges On The Implementation Of Crime Of Sexual Violation Act In Indonesia

According to Soerjono Soekanto, in order to notice the effectivity of the law may be measures by five indicators, namely:

- a. The factor of the law
- b. The factor of the legal enforcer such as legislator or even the enforcer of the law (APH)
- c. Facilities and infrastructure as a support enforcement of the Law
- d. Factors which derived from philosophical and sociological aspect which is the area situation and society's character where the law is applied
- e. Factor of the custom and culture in the society.<sup>16</sup>

Therefore, the context of the examination of legal effectivities of the act on crime of sexual violence also measures from these series, and will be describe as follows:

1. The factor of the law

It is means that a regulation is systematically enough, synchronized and horizontally forming according to the hierarchy of the law. Most importantly, it is nor contradicted with the existing law. More than that, the charge material of the laws should fulfil the concept of human rights.<sup>17</sup>

Based on this description, it can be considers that the act of sexual violation crime as a derivative regulation from the existing rules. The act have been form based on the theory of legal formation in Indonesia, the process and mechanism of drafting this regulation have gone through the basic phase of juridical, philosophical and sociological base.<sup>18</sup> It is proved from the engagement of multi stakeholders to collect and considers data in forming the draft of the act was firstly preceded by the national commission of women in Indonesia together with gender communities.<sup>19</sup>

Other than that, the context of sexual crime which mentions could be outline from the criminal code as listed in the chapter XVII regarding molestation, especially under article 286-289 of criminal code. Furthermore, sexual violence also regulated under the

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<sup>16</sup> Soerjono Soekanto, *Penegakan Hukum* (Bandung: Bina Cipta, 1983), [80]

<sup>17</sup> Jimly Asshiddiqie, M. Ali Safaat, *Teori Hans Kelsen tentang Hukum*, Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, [8]

<sup>18</sup> Telly Sumbu, *Pengantar Hukum Indonesia*, (Depok:Rajawali Pers, 2018), [36]

<sup>19</sup> Buku catatan tahunan KOMNAS PEREMPUAN (annual report of National woman commission of Indonesia)

act No. 23 year of 2004 concerning domestic violence within the scope of coercion which happen in the marital scope in form of physical abuse, physical abuse, economical abuse until sexual violence. Several categories of the domestic violence becoming elaboration from the physical abuse which previously known only as persecution. With implementation n regulation of Government Regulation Number 4 Year of 2006 concerning organizing and cooperation for the domestic violence victim recovery<sup>20</sup> the other regulations that accommodate physical and sexual violence contains under the provision of criminal law on human trafficking the law number 21 year of 2007 particularly for women who are very closed in experiencing sexual violence triggered by their gender identity.<sup>21</sup> And for a child are regulated by the law number 23 year of 2002 jo law number 35 year of 2014 on the legal protection of a child and also completed with mechanism and legal procedures that are different compare to other regulations, one of which is law number 11 year of 2012 concerning trial system of a child in Indonesia that acknowledge the concept of restorative justice such as implementation of diversion.

According to the regulation above, by the legalisation of the act concerning sexual violation crime as the effort to integrated the basic norms which previously partially conducted and also as an improvement from the process and procedures mechanism on how to deal with sexual violence crime. Therefore, from the hierarchy and systematic consideration the act of sexual violence are appropriate and follows the law form procedures. By viewing through the date of the act legalisation in 09 may 2022 means that the act of sexual violence crime can be applied and able to become legal umbrella for the enforcer to implement the regulations to the cases which occurs currently. As cited from Kompas.com the ministry of women and children empowerment ensure that the act of sexual violence can already be used without further waiting for the implementation regulation by the executive.<sup>22</sup>

However, this is where the problem is actually raises, the implementation regulation should be made by the executive without intervention from the legislative institution as it is has a function to provide mechanism and description of the details on

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<sup>20</sup> UU PKDRT, antara terobosan hukum dan fakta pelaksanaannya. <https://Ditjenpp.kemenkumham.go.id>.

<sup>21</sup> Heni Susanti, *Perlindungan Hukum Terhadap Perempuan Korban Perdagangan Orang yang mengalami kekerasan dan pelecehan seksual*, Pg. 54. <https://core.ac.uk/download/pdf/328167818.pdf>

<sup>22</sup> <https://nasional.kompas.com/read/2022/08/10/12115261/meski-aturan-turunan-belum-terbit-kementerian-pppa-tegaskan-uu-tpks-sudah>



matters that is considers not clear in the act of sexual violence crime, it also contains legal materials on matters which has not been poured in the regulation, whether the implementation regulation may be form through government regulation or presidential regulation.<sup>23</sup> Till recently this writing is made, the act of sexual violence crime have not having derivative regulation on some of the articles which is still need explanation and clear definition.

2. Factor of the legal enforcer such as legislator or even the enforcer of the law

The determining factor of the effectiveness of laws and regulations cannot be separated from human resources in the form of law enforcement officials who will implement the regulation. In this case, it is measured based on the binding power of the law for law enforcement officials and the extent to which law enforcement officials have their authority as mandated in the regulation as such to understand their authority without excessive their limitation.<sup>24</sup>

In this case, the act of sexual violence crime instructed that the handling of sexual crime cases must be perform based on certain conditions by virtue of the understanding of law enforcer who have received training, or if there is no such resource the process of sexual crime cases is left to the legal enforcer who has previous experience in handling sexual cases.

However, until recently, the legal enforcer such as police officer has not received the special training on how to deal with sexual crime cases. This arises uncertainty in the realm of handling sexual violence cases. Although there is already a special unit that receives a report or complaint regarding sexual violence namely the unit of women and children services, but often occurred when the complaints are made, the case will be easier and faster to be responded if the victim is accompanied by legal aid or bring recommendation letter or monitors by the woman national commission of Indonesia.<sup>25</sup>

Especially, when the complaints are made out of the working hours, the limited service and quality of the legal enforcer also greatly affect the response and Performa.

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<sup>23</sup>Yuliandri, *Asas-asas pembentukan Peraturan Perundang-undangan yang baik*, (Jakarta: Raja Grafindo Perkasa, 2009, [18]

<sup>25</sup> Result of interview with 10 of the sexual violence survivors (the victim's identities are being hidden as a secret)

Based on the interview results with 10 of the sexual crime survivors, they stated that they are often had to deal with very strange perspectives when they were examined. Of these ten survivors experienced, when they make a complaint they will be examined in the room without assistance from their family or relatives who came along to accompanied them during the complaint. They are examined the examination room and it is often occurred that the one examine them is the opposite sex, in this situation most of the survivor felt depressed and cry due to the officials response. This is inseparable from the official understanding who are still limited as the society stigma, the existence ridiculous statement tend to label the victim as trigger for the sexual violence.

In other cases, the legal enforcer such as judges and prosecutor are expected to implement victim perspective in deciding and handling the sexual violence cases, whilst previously there are many decision of the judges which only prioritized punishment to the offenders.<sup>26</sup> Therefore, regarding the act of sexual violence crime the judges are obliged to also included in the decision concerning restitution and the rights of victim restoration. Even though, an expectation that the victim psychological condition are way far from recover, however this effort is at least becoming a new legal invention which more take sides of the victim.<sup>27</sup>

By siding on the victim's concern is one of the most important constituent in handling sexual violence cases, even in the reality this way of mind set are minimum to be occurred. The existence of the regulation on sexual violence crime and it contains it partiality to the victim, the implementation are still depends on the judges and prosecutor perspective in the trial. For example, in the act of sexual violence crime mentions that one evidence is enough as a legal standing to perform trial and try the perpetrators, this is bound by the judges perspective to oversee one evidence is enough to tried the perpetrator.

The punishment nature in the act of sexual violence crime also recognized minimum sentence, where most of the legal practitioner thought that this minimum standard of punishment are far from the fairness the law wanted to reach. For example as mention in the Article 5 for a light sexual violence that occurs without physical touch will

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<sup>26</sup> Maria Novita Apriyani, (2021) "*Implementasi Restitusi bagi korban Tindak Pidana Kekerasan Seksual,*" *Journal Risalah Hukum*, Vol 17 No 1, [5]

<sup>27</sup> *Ibid*

be sentenced for maximum of 9 month and/or with the amount of compensation of Rp.10.000.000. many legal expert considers this sentence will be a political game in the implementation, due to consideration that most of perpetrators of sexual crime actually done their action mostly have the same pattern where they have the ability to do it for over and over and become their habit. Many of the expert, thought that this is potentially leads to the heavy criminal law violation.<sup>28</sup>

The empirical studies illustrates that many of the sexual violence victim or survivors are experienced anxiety at the time when the offenders are free after fulfilling their sentence, particularly for the child victims or women who has strong relations with offenders. The perpetrators are still having the potential to do it again repeatedly. For the developed states for example such as America, the punishment for the perpetrators is not only concern during the time of penitentiary, but also after they are released they will be examines through monitoring bracelet, a requirement to do report for particular time or by announcing that they are a criminal of sexual violence in the residential area of the perpetrator in purpose to anticipated to the communities for the repetition of the same act. This types of punishment is also recognized in Indonesia however this only recognized as an additional penalty and regulated only for sexual violence to a child through the president regulation number 70 year of 2020 on the procedures of additional penalty for child sexual crime offenders<sup>29</sup>

These example will have a judgement for the judge in making sexual case violation, in means that the judge must have the capability to ensure the safety of the victim whether during the offender sentence or even after they are release. Since, it is proved that not a few of the offender who are still feeling resentment to the victim due to the report and legal process he have experienced.<sup>30</sup>

In other side, the act of sexual violence crime are still focus on the matter of prevention, handling and restitution, however other aspect such as certainty of the victim's safety after the offender fulfilling his sentence are not clearly mentions.

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<sup>28</sup> A consideration from LBH APIK NTB, PKBH UIN Mataram and sexual violence coalition in East Nusa Tenggara.

<sup>29</sup> Desi Amelia, Henny Yuningsih, "Penerapan Pidana Tambahan Pengumuman Identitas Pelaku Kekerasan seksual terhadap Anak," Journal Lex LATA, [726]

<sup>30</sup> Delcea Christian, *Sexual Offenders-Pshycological Approaches, Proceedings of the Interational conference on Legal Medicine from Cluj*, 3<sup>rd</sup> edition Vol.2.

Therefore, in order to satisfy this expectation, the punishment should still refers to other existing regulation and this is could be seen that the act of sexual violence crime are not comprehensively integrated and might still be back to the previous understanding.

### 3. Facilities and infrastructure as a support enforcement of the Law

Regarding this matter means that the existing facility and institutions in handling the sexual case in Indonesia. Indonesia as a developing state actually is still very limited in the facility of legal enforcement, for example polygraph tools which are not every police department will have it. The geographic condition have a strong influence on this particularly for the institution which located in the remote or border area.<sup>31</sup>

One of other example such as one institution which concern in the matter of women empowerment, child protection and family arrangement (DP23AKB) which has the principle to ensure the cases regarding their subject of concern in integrated services. However, this department is also facing many challenges, for example from the basic things such as the matter of funding resource which relay in regional budget. This will depends on how the region oversee a sexual crime as an important matter. This is leads to the limited human resource in the institution such as the restricted number of psychologist which is not proportional with the number of sexual violence victims, causes most of the victim does not receive accompaniment of their psychology restoration as they are actually need. Other than this, the challenges also found in the minim of coordination between BP2AKB with the legal enforcer, and this leads to the slow response and procedures of sexual violence crime.<sup>32</sup>

### 4. The factor of Philosophical and Sociology Condition in the society in understanding sexual violence.

Measuring philosophical and sociology aspect may be seen from the character and situation of the populace at the time when the regulation is legalised. According to the number of cases which increase from the annual report of Woman of national commission in Indonesia the cases even touching the area where most people does not considers about, therefore it is urgently need to present this regulation is as a right step.

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<sup>31</sup> Ririh Mega Safitri, *Badau di Indonesia: Kasus Daerah Perbatasan Indonesia Yang Masih Terlantar Studi Kasus Kecamatan Badau, Kapuas Hulu, Kalimantan Barat*, Jurnal IAIN Bengkulu. [739]

<sup>32</sup><https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-kasus-nwr-korban-kekerasan-seksual-di-mojokerto-yang-mengakhiri-hidupnya-darurat-kekerasan-seksual-bom-waktu-keterbatasan-layanan-pendampingan-korban-di-tengah-lonjakan-pengaduan-kasus-kekerasan-seksual-6-desember-2021>

However, when the nature of Indonesian society is analysed it is shown that there are many problems arises, coming from the victim themselves until the people surround them, such as:

- a. The victim does not realise if they are a victim of sexual violence

The category of sexual violence key point is started from the victim consciousness. Most of the sexual violence victim are take some times or even a long time to finally understanding that they are already become a victim of sexual violence, due to lack of education and other factors, until the violence is occurred repeatedly by then they are realizing it and wanted to do a report. Most of the violence also happen in the public area and involving the gap of power relation, therefore even if the victim are aware of what is happening to them they tend to quite due to some interest or that they are depending some interest with the offenders.<sup>33</sup>

Some studies even shows that most of sexual victim in the conservative countries even had already blamed themselves and even some of them justified and agreed to receive bad treatment from others. The thinking of self-blaming as the result of lifetime situation where they have been living in this norm since they were a child.

Most of the victim's also not capable to receive the stigma and society paradigm that they have to faced, the worry of their family status or if they have to facing their loved ones, what they have experienced are considers as a shame, particularly when it comes to a rape case.

- b. The issue of sexuality is seen purely as a moral issue

Sexuality is not a public consumption, therefore a matter of sexuality is a private area of live which should not be revealed in public, this matter should not be discussed since we have to feel shame and keep it for ourselves. This statement is one of a dangerous thing in the patriarchy society, most of the victims are taught with this principle which was resources from the culture of the society. Therefore, if a sexual violence is occurred then the litigation process is not a solution, since this matter will be talked by common people and will be acknowledge publicly.

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<sup>33</sup> Fuadi Anwar, *Dinamika Psikologis Kekerasan Seksual: Sebuah Studi Fenomenologi*, Journal of Psikoislamika, Vol. 8 No. 2, Tahun 2011. [191-208]

There are many cases when the rape victim are get married with their offender, due to the society moral standard that sexual relation should only be responsible by marriage and this even leads to another violation and even legalised by the moral custom.<sup>34</sup>

- c. The legalisation of regulation on sexual violence crime as perpetuation of liberalism in Indonesia

Some of the populace justified sexual crime by using the religion norm. for example, during the discussion of the sexual violence crime draft many of the religious organisation in Indonesia against this since they thought that this regulation will legalise lesbian, gay, transgender and queer or knowingly as LGBT in Indonesia which is against the religions norm.

The conservative understanding that a wife are oblige to serve their husband no matter their situation is, however if the wife are feeling force to do sexual relation without her concern then it is considers as a sin in the religions eyes. When this matter is counted as rape in the marital situation it is viewing is contrary with the religion's norm.<sup>35</sup>

- d. The stigma in the society

The society's stigma always put the victim in blame, most people thought that sexual violence won't happen if the norm and moral in the society is applied. For example society considers that open clothes/sexy will leads to the desire of opposite sex to do sexual violence, or for some situations where a woman cannot go out of their house in midnight or the public hours in Indonesia is at the hours of 10.00 Pm.

- e. The access of justice are limited for the disability

It is not something new for the positive laws in Indonesia where a civil side recognized that there are discrimination for the disability where they are not considers as a legal subject due to the lack of understanding and unify the performance of disability mental health and legal capacity so that a person is considers to have skill disorder in making a decision, often occurred due to the legal capacity of cognitive disability or psychosocial are abolished by the legal system in

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<sup>34</sup> Asrianto Zainal, *Kejahatan Seksual dan Pelecehan Seksual di Tinjau dari Kebijakan Hukum Pidana*, *Journal of Al-Adl*, Vol.7 No.1. [140]

<sup>35</sup> Purnama Ayu Rizki, Chusnul Mar'iyah, *Advokasi Kebijakan RUU PKS: Analisis Pemberitaan Media Perempuan Magdalene.co dan Konde.co*, *journal of The Journalish:Social and Government*, Vol. 2 No. 2. [44]

Indonesia. For example, as mentions in Civil Code of Indonesia , the disability are not recognized as a legal subject to perform legal action, therefore it is should be done through conservatorship.<sup>36</sup>

In this case, the legal system in Indonesia considers that legal capacity and mental capacity as the same thing, even though Indonesia have ratified the Convention on the Rights of Persons with Disabilities (CRPD) which determines that both of it are different matters.<sup>37</sup> According to Article 12 of CRPD stated that the disability are also performing the same rights to do legal capacity as others which means that they are having a full legal capacity. However, in the practice often found that the testimony and cases handling on sexual violence for disability are ignored and considers invalid even cannot be trial, they often discriminated.

By virtue of Article 44 which explains on how to recognized the ability of disability in front of the law should be attended by the certificate of psychologist or psychiatrist which is completely relay from the medical model and releases the perspective of human rights, often seen that this certificate dropping the disability as a sexual violence victim in the trial procedures.<sup>38</sup> Therefore, the approach from medical should also be leave behind, even this statement might controversial however there should be another approach which not harm the interest of disability, the state might be present through the facilities improvement for disability in the litigation process by and also pay attention to the human resources who have the ability to understanding the disability behaviour or might be also with individual approach by letting someone who can support the disable to perform their rights in front of the law, such as sign language translator, personal assistant etc.<sup>39</sup>

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<sup>36</sup> This is as stated in the translation of Article 447 Indonesian Civil-Code. Where the legal capacity possessed by a disability is considered a disease requires conservatory, so that the nature of the legal act he does is null and void.

<sup>37</sup> Legal capacity is the ability to hold rights and obligations (legal standing) and to exercise these rights and obligations (legal agency), while mental capacity refers to a person's ability to make decision/skills which naturally vary from one person to other person which may be different for certain people. Depending on factors including environmental and social. Explanatory note on legal capacity and force interventions. <https://www.un.org/esa/socdev/enable/rights/ahc8docs/ahc8idc1218ex.doc>

<sup>38</sup> In the medical model, people with disabilities are considered as conditions that are wrong on oneself or one's mind so that often the results of recommendations with the medical model emphasize that people with disabilities are people who suffer from a disease, disability or injury which is need to be healed or treated. Dina Kurniawati, Lalu Parman, Ufran, Pelindungan Hak korban penyandang disabilitas dalam penuntutan perkara pidana, Journal of Community Engagement. VoL. 3 No.4. [1053]

<sup>39</sup> Anwar C., *Teori dan Konstitusi*, Malang: Ins Trans Publishinh, 2008 [49]

## CONCLUSION

Starting from the regulation on sexual violence crime which regulated partially in the previous regulation, it is then derived the urgency to form a new regulation which able to be regulated in a comprehensive way concerning sexual violence with one-way legal system. However, until recently the regulation of sexual violence crime act facing some unfulfilled expectation.

There are several advantages from this act such as by accommodate some part of sexual violence or have a wider sense on sexual violence category, this regulation is a other form of critical legal system by emerging a new norm other than general norm in the criminal law. This can be seen from the five keys of the act on sexual violence crime.

However, this regulation are still facing some challenges in the implementation which can be measured through the theory of legal effectivities one of the most crucial is the ability of the legal enforcer and even the victim to have deep understanding on sexual violence, how to treat the victim and even how far the victim could realize that they are a victim of sexual violence in order for them to perform a report to the authorities. Other than this matter also until today, the government have not issued implementation regulation which is very important to acknowledge some terms on the articles to handle the sexual violence crime.

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