

Protection of Women Against Rape Crime from The Perspective of Positive Law and Hindu Law

Anak Agung Sagung Laksmi Dewi¹, I Nyoman Gede Sugiarta²

^{1,2}Faculty of Law, Universitas Warmadewa, Denpasar, Bali, Indonesia

laksmiidewi29@gmail.com, nyomansugiarta14@gmail.com

Abstract

There are many forms of crime that occur on our beloved Earth. The crime of rape is a crime of depriving women of honor and virginity. Although rape crime has been regulated normatively in the Criminal Code, in reality, the protection of rape victims remains inadequate. From the perspective of Hindu Law, committing rape is a great sin. In Sad Atatayi, rape is called Dratikrama. As such, the authors formulated the following research questions to be explored further: How is the regulation of rape delict from the perspective of criminal law and Hindu law? What is the sanction for rape crime in criminal law and Hindu law? This research is normative research. The results of this research are: the regulation of rape delict against women is contained in Article 285-289 of the Criminal Code and in the Hindu Law Compendium (Manawa Dharmasastra). Sanctions for rape against women in criminal law still vary, depending on the provisions that are violated in the Criminal Code and Hindu Law. It depends on the type of crime, whether it is an aggravated crime or an ordinary crime.

Keywords

Rape; sanction; crime; Hindu law



I. Introduction

Crime prevention in criminal law is handled systematically through the criminal justice system. The system provides various ways of handling crimes that occur. Recently, however, the increase in rape crime has been in the spotlight and the subject of public discussion, focusing on the increase in the quality of the crime and also the variety and boldness of the modus operandi of rape crime. In fact, rape crime nowadays often involves the mistreatment and murder of its victims. Development is a systematic and continuous effort made to realize something that is aspired. Development is a change towards improvement. Changes towards improvement require the mobilization of all human resources and reason to realize what is aspired. In addition, development is also very dependent on the availability of natural resource wealth. The availability of natural resources is one of the keys to economic growth in an area. (Shah, M. et al. 2020). The advancement of technology worldwide will allow the entry of foreign culture into the indigenous culture of a particular community. Without a doubt, it will bring both positive and negative impacts and influences on the culture of the community. The positive influence is seen in people's way of thinking that shifts from conservative to democratic whereas the negative influence is seen in the degradation of the rules of values (norms), morals, and ethics. A human is a social being created by God Almighty as a conscious being (Muhammad Tholchan Hasan, 2011: 50).

Rape is a crime of depriving or harming women's treasures: honor and virginity. Although rape crime is regulated in the provisions of Indonesian criminal law as applicable

positive law, rape cases remain rampant, provoking a debate on why these cases keep occurring. Without a doubt, it indicates that the protection for victims of rape is still inadequate. Investigation of the victim should be conducted with great care to determine if a rape crime occurred (Suparman Marzuki, 2011: 22).

Crime in the form of rape is not new. It is a conventional crime that occurs frequently in society. Its occurrence even keeps increasing every year. It is as if the perpetrators of rape crimes are undeterred or unafraid of the sanction they will receive as stated in Article 285 of the Criminal Code. Matters concerning rape crime are also regulated by a specific law, namely Law No. 35 of 2014 on Amendments to Law No. 23 of 2002 on Child Protection (Law No. 35 of 2014) and Law No. 23 of 2004 on the Eradication of Domestic Violence (Law No. 23 of 2004). In Law No. 35 of 2014, the prohibition to commit rape and its sanction are contained in Article 76D jo. Article 81. Furthermore, Law No. 23 of 2004 categorizes rape crime as sexual violence as regulated in the provisions of Article 8, and in Article 46 of the Criminal Code, the criminal sanction is firmly stated.

Hindu law also views rape as a great sin. In Sad Atatayi, rape is called Dratikrama. Sloka 153 of the Sarasamuscaya states that one should not commit rape as it can shorten lifespan. Manawa Dharmasastra III.63 states that by having sex outside of marriage/rape, disregarding the pawiwahan ceremony and Vedas, committing a despicable act, and ignoring the advice of revered individuals, the great, wealthy, and influential families will fall apart. Rape is a great sin and thus, the imposed sanction must be severe as well (Wiratmadja, 1987: 25).

Based on the introduction, this study investigates the following issues:

1. How is the legal protection of women against rape from the perspective of Criminal Law and Hindu Law and;
2. What is the sanction for rape crime from the perspective of Criminal Law and Hindu Law?

II. Research Method

This study used the method of normative legal research, with legislation, related regulations, literature, and legal materials from the library as sources. This study distinguished the data obtained directly from the field and the data from the literature. The data from the field is primary legal material (or basic data) while those obtained from literature is a secondary material (Soekanto & Sri Mamudji, 2013: 27).

The legal material used in this research is the primary data source. Primary legal material is the material used as the legal basis in this research. Legal material used in this research consists of legislation. Sources of legal materials were collected using the card system collection technique. The collected legal material is grouped systematically according to the problems investigated. The purpose of grouping is to classify legal material with a good analysis. Then, every legal material that had been analyzed, either primary or secondary, was processed qualitatively.

III. Result and Discussion

3.1 Legal Protection of Women against Rape in the Study of Criminal Law and Hindu Law

The word “rape” has several meanings, including force, gallant, strong, and mighty. To rape is to bring someone under control by violence, to use coercion, or commit a violation by violence. Rape itself can be interpreted as the process of committing rape by violence. As such, rape in the Great Dictionary of the Indonesian Language has elements of a man using violence to force a woman to have sex with him. Experts have varying definitions of rape. Soetandyo Wignjosoebroto stated that “rape is an attempt to vent sexual desire by a man to a woman in a way that violates morals and legal rules.” Rape is an act of forcing (or using any means without a woman’s consent) a woman who is not married to him to have sex with him, using violence or threats of violence to make the woman submit and willing to have sex, whether it is through vagina, anus, or mouth of the woman (Soetandyo Wignjosoebroto, 1989: 231). Many cases of rape are resolved privately between the families of the involved parties. For example, the families get the victim of rape to marry the perpetrator, or the victim’s family quietly accepts the incident that occurred to the victim, not attempting to resolve it through the legal path for fear of sanctions.

Article 285 of the Criminal Code states that anyone who, by violence or threats of violence, forces a woman who is not his wife to have sex with him is charged with committing rape, with a maximum of twelve years of imprisonment as punishment. It turns out that rape crime regulated in Article 285 of the Criminal Code has objective elements only: the who, the use of violence or threats of violence, coercion, a woman, and sex outside of marriage. Article 285 of the Criminal Code does not require an element of intent, but it does include an element of “coercion.” Therefore, rape as defined in Article 285 of the Criminal Code must be committed intentionally. As implied in Article 285 of the Criminal Code, rape is intentional. As such, the intent must be proven by the prosecutor or judge at the trial where the case is examined and judged and the perpetrator charged with violating the prohibition regulated in the article of the Criminal Code.

There are other articles of the Criminal Code that regulate the legal protection of women against rape crime. Article 286 of the Criminal Code states that anyone who has sex with a woman outside of marriage when the woman is clearly unconscious or helpless is threatened with imprisonment for a maximum of nine years. Article 287 of the Criminal Code states that anyone who has sex with a woman outside of marriage, when it is known or suspected that she is under fifteen years old, or if her age is unclear yet it is not the time for her to marry, shall be punished with imprisonment for a maximum of nine years. The prosecution is only carried out if there is a complaint unless the woman is not yet twelve years old or if there is one of the matters mentioned in Article 291 and Article 294. Article 288 of the Criminal Code states that anyone who has sex with a woman in marriage, who is known or suspected that it is not the time for her to marry and that his act results in injury will be sentenced to imprisonment for a maximum of four years. If the act results in serious injury, he will be sentenced to imprisonment for a maximum of eight years. Finally, if the act results in death, he will be sentenced to imprisonment for a maximum of twelve years. One of the elements of action in rape crime regulated in Article 285 of the Criminal Code is the act of intercourse. According to the comments of Dutch authors, the act of intercourse in Article 285 of the Criminal Code is a specific definition of obscene acts while the general meaning of obscene acts is regulated in a separate article, namely Article 289 of the Criminal Code. Besides the Criminal Code, Law No. 35 of 2014 on

Amendments to Law No. 23 of 2002 on Child Protection also regulates rape crime, specifically in Article 76D, which states that anyone is prohibited from using violence or threats of violence to force children to have intercourse with him or with other people.

Rape crime is a crime of depriving women of their honor and virginity. The Criminal Code has been regulating rape crime normatively, but in reality, the protection of rape victims is still inadequate. From the investigation of the victims and witnesses, it must be clear that the victims were raped. If necessary, *visum et repertum* can be included to support the evidence in reporting the case. Hindu law views rape as a great sin. In *Sad Atatayi*, rape is called *Dratikrama*. In Hinduism, sin consists of *langgah*, *dura cara*, *durhaka*, and *tresna dadu*. In Hindu law, the sin of committing rape is considered the sin of *dura cara*.

Sloka 153 of Book *Sarasamuscaya* states that one should not commit rape because it shortens lifespan. *Manawa Dharmasastra* III.63 explains that by having sex outside of marriage/rape, disregarding *pawiwahan* and *Vedas*, committing a despicable act, and ignoring the advice of revered individuals, the great, wealthy, and influential families will fall apart. Based on the description of rape in the teachings of Hinduism and its holy books, rape is a great sin and thus, the sanction for it must be severe as well (Alit Putrawan, 2018: 2). Some slokas other than those in *Sarasamuscaya* also mention about rape and adultery regulated in Hindu law, such as the *Veda Smriti*. *Manawa Dharmasastra* III.63 states that by having sex outside the forms of marriage, namely *Brahma Wiwaha*, *Prajapati Wiwaha*, and *Dandaiwa Wiwaha*, by disregarding the marriage ceremony, by disregarding the *Vedas*, by committing a despicable act, by ignoring the advice of a *sulinggih*, *brahmins*, and revered individuals, the great, wealthy, and influential families will certainly fall apart.

The norm in Hindu law with direct relation to rape crime is in Article 364 of the *Astamo'dhyayah Manawa Dharmasastra*. It states that anyone who rapes a woman with force must be punished with direct corporal punishment, but if the person enjoys it and get the woman's consent, he will not get corporal punishment if the intercourse happens with a woman from the same class.

3.2. Criminal Sanctions on Rape Crime from the Perspective of Criminal Law and Hindu Law

Sanctions are consequences, actions, or punishments that serve to force people to keep an agreement and obey the provisions of the law. In the criminal law system, there are two types of sanctions of an equal position: criminal sanction and action sanction. Criminal sanction is used most often in imposing punishment on a person found guilty of criminal acts. Action sanction is a type of sanction used more often outside the Criminal Code. Some examples of actions sanctions are hospital treatment and being returned to parents or guardians for people unable to be responsible for themselves or minors. Criminal sanction is sorrow or suffering inflicted on someone guilty of committing an act prohibited by criminal law. With sanctions, it is expected that people will not commit a crime. Rape is also considered a form of sexual harassment, however, sanctions for suspects of sexual harassment often feel unfair to the victims, their relatives, or people who feel sorry for the victims (Pramana Hamsa, I Nyoman Gede Sugiarta, Ni Made Sukaryati Karma, 2021: 472).

Observing the criminal sanction in the Criminal Code, one will find some of the provisions that concern rape crime, specifically the imposition of sanctions, questionable. According to Article 286 of the Criminal Code, anyone who rapes an unconscious or helpless victim will be sentenced to nine years of imprisonment. It is lighter than the sentence in Article 285 of the Criminal Code, which is twelve years of imprisonment for

someone who commits rape on a victim who can still fight against the perpetrator. The sanction for someone who commits rape to an unconscious or helpless victim should be more severe. Furthermore, in Article 287 paragraph (1), the sentence for the perpetrator of a rape crime where the victim is a minor is only nine years of imprisonment. It is lighter than the sentence in Article 285 of the Criminal Code, which is twelve years of imprisonment. When the victims are minors, the sanction must be more severe. It is because children are the nation's next-generation that adults must protect. Yet, in paragraph (2), the prosecution is held only when a complaint is made, even though rape is a serious crime and prosecution should not be held only when there is a complaint. However, it is changed to an ordinary delict that the police could process without complaint. As a result, the child protection law is formulated to protect children's rights and obligations.

In Article 288 paragraph (1), an act resulting in injuries receives a sentence of only four years of imprisonment whereas, in paragraph (2), an act resulting in serious injuries receives eight years of imprisonment, and in paragraph (3), an act resulting in death receives twelve years of imprisonment. In that article, violence occurs in marriage and the victim is someone who is not yet married or minor. The punishment in paragraph (1) and (2) of that article is less severe than the punishment in Article 285 of the Criminal Code. Yet, in Article 288 paragraph (3), the punishment for an act that results in death is the same as the punishment in Article 285 of the Criminal Code, which is twelve years of imprisonment. It feels odd, because if the victim is the perpetrator's wife and she might be unable to marry yet, or if the victim is a minor, then the punishment must be more severe. It is because a husband's duty is to protect his wife. It is this that sets the background for Law No. 23 of 2004 on the Eradication of Domestic Violence. It is clear from the previous description that criminal sanction for the perpetrators of rape against women is not yet effective because its imposition of sanction is still questionable.

Sanction for rape in Hindu criminal law is based on the Book of Kantaka Sodhana, as contained in Manavadharmasastra, Sarasamuscaya, Adi Agama, Kutara Manawa, Manawa Swarga, and their derivatives. The application of the Book of Kantaka Sodhana/the Hindu Criminal Code can further incriminate perpetrators of rape and crimes of decency. Education experts state that to reduce the rate of crime in community groups, it is necessary to use an educational approach with adequate human values (Rothman, Jack, 1995: 217). Besides fines, the maximum punishments received by the perpetrator is ranging from finger cutting to the death penalty. Sanctions according to Hindu law and custom are harta danda and sangngaskara danda, dismissal from being a krama (kanorayang), and performing a purification ritual (prayascitta) consisting of purifying the sekala and niskala, which aims to restore the sanctity of the Hindu woman that has been tarnished by the perpetrator.

Criminal sanctions for perpetrators of rape against women in Hindu law have been widely applied in some areas of Bali. Additionally, the application of the sanctions in Bali uses both the Hindu holy books and awig-awig of the desa pakraman as a guide. Yet sanctions for rape in Hindu law are not enough to deter the perpetrators because, in reality, rape cases keep occurring in society. Some factors that cause these occurrences are characteristics and moral, economic, and the surrounding. The moral character of a society can be improved by a sustainable religious education, which can change one's behavior (McDavid, James C. 2006: 221).

IV. Conclusion

Legal protection of women against rape in the Criminal Code is contained in Article 285, which states that “anyone who, by violence or threat of violence forcing a woman who is not his wife to have sex with him, is charged with rape and imprisonment for a maximum of twelve years.” Besides Article 285 of the Criminal Code, rape crime is regulated in Article 286-288 with different sanctions, depending on the object of the perpetrator. Rape is considered an obscene act because there is an explanation for “sexual intercourse” in Article 285 of the Criminal Code. Article 289 of the Criminal Code regulates the obscene act further. It states that “anyone by violence or threats of violence forces a person to commit or allow an obscene act to occur, is charged with an act of attacking honor and decency and a maximum of nine years of imprisonment.” The offense of rape against women in Hindu law is regulated in Sloka 153 of the Sarasamuscaya, which states that one should not commit rape because it can shorten one’s lifespan. Manawa Dharmasastra III.63 also explains that by having sex outside of marriage/rape, disregarding the ceremony of pawiwahan and the Vedas, committing a despicable act, and disregarding the advice of revered individuals, the great, wealthy, and influential families will fall apart.

Observing the Criminal Code, there are some questionable provisions concerning rape crime, specifically the sanctions for the crime. In Article 286 of the Criminal Code, if the victim is unconscious or helpless, the sanction is imprisonment for nine years whereas in Article 285 of the Criminal Code, if the victim can still fight, the sanction is imprisonment for twelve years. Taking this difference into account, the sanction for perpetrators in Article 286 should be more severe. In Article 287 paragraph (1), if the victim is a minor, the sanction is just imprisonment for nine years while the sanction in Article 285 of the Criminal Code is imprisonment for twelve years. When the victims are minors, the sanction must be more severe. It is because children are the nation’s next-generation that adults must protect. Yet, in paragraph (2), the prosecution is held only when a complaint is made, even though rape is a serious crime and prosecution should not be held only when there is a complaint. In Hindu law, the sanction for rape in Sloka 153 of the Sarasamuscaya is a short lifespan while in Parasara Dharmasastra X.30, the sanction is expulsion. In Article 207 of Adi Agama, the sanction is the death penalty by the king whereas, in Article 159 amungpang of Kutara Manawa, it is the death penalty. Finally, in Article 28 and Article 198 on Sad Atatayi of Manawa Swarga, the sanctions are the death penalty and a fine. The application of sanction for rape crime according to Hindu law is not enough to deter the perpetrators of rape because, in reality, rape cases keep occurring. These cases occur due to several factors, including characteristics and moral, economic, and the surrounding.

References

- Adia Wiratmadja, J.G.K, (1987), Bunga Rampai Agama Hindu, Parisada Hindu Dharma Indonesia, Pustaka Indonesia, Jakarta.
- McDavid, James C. (2006). Program Evaluation & Performance Measurement. New York: SAGE Publication.
- Muhammad Tholchan Hasan, (2011), Perlindungan terhadap Korban kekerasan Seksual, Seconf Print, PT Refika Aditama, Jakarta.
- Pande Komang Satya Parama Hamsa, I Nyoman Gede Sugiarta, Ni Made Sukaryati Karma, (2021), Tinjauan Yuridis Terhadap Tindak Pidana Pemerkosaan Yang Menyebabkan Kematian (Studi) Kasus Pengadilan Negeri Kendal, Jurnal Prefensi

Hukum, Vol. 2, No.3.

Rothman, Jack. (1995). *Strategies of Community Intervention*. F. E. Peacock Publisher.

Shah, M. et al. (2020). The Development Impact of PT. Medco E & P Malaka on Economic Aspects in East Aceh Regency. *Budapest International Research and Critics Institute-Journal (BIRCI-Journal)*. P. 276-286.

Soekanto dan Sri Mamudji, (2013), *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Raja Grafindo Persada, Jakarta.

Soetandyo Wignyo Subroto, (1998), *Perspektif Perkawinan Ditinjau dari Sudut Hukum, Sosial dan Agama Khonghucu*, Penerbit Komnas HAM.

Suparman Marzuki, (2011), *Pelecehan dan Kekerasan Seksualitas Terhadap Perempuan*, Faculty of Law, Universitas Islam Indonesia, Yogyakarta.