

UNVEILING THE ISSUES: FEMINIST LEGAL THEORY'S CRITIQUE ON RAPE FORMULATION IN INDONESIA

Maryamul Chumairo' Al Ma'shumiyyah^{1*}

¹Universitas Gadjah Mada, Yogyakarta, Indonesia

Citation:

Al Ma'shumiyyah, Maryamul Chumairo'. 2023. "Unveiling the Issues: Feminist Legal Theory's Critique on Rape Formulation in Indonesia." *Walisongo Law Review (Walrev)* 5(2):221-44. doi: <https://doi.org/10.21580/walrev.2023.5.2.13555>.

Copyright © 2023 by Author

This work is licensed under a Creative Commons Attribution-ShareAlike 4.0 International License.



Abstract: The crime of rape remains a crucial issue in Indonesia. The formulation of the rape offence regulated in Article 285 of the Criminal Code has several weaknesses and is considered no longer in line with current legal developments, leading to suboptimal handling of rape cases. This research further analyzes the problematic formulation of the crime of rape in various laws and regulations, especially in the Criminal Code, and the reformulation and redefinition of rape in the new Criminal Code using the Feminist Legal Theory approach. This is a doctrinal study utilizing a literature review. The results indicate that the formulation in Article 285 of the Criminal Code has weaknesses, including issues related to the scope of rape, the conventional interpretation of intercourse, and limitation to a specific gender. Rape is closely linked to gender relations inequality, placing female rape victims at risk of victimization from various parties. Therefore, it is essential to shape laws with a gender perspective.

Tindak pidana perkosaan masih menjadi permasalahan krusial di Indonesia. Formulasi

* Corresponding Author: Maryamul Chumairo' Al Ma'shumiyyah (maryamulchumairoalmashumiyyah@mail.ugm.ac.id), Universitas Gadjah Mada, Yogyakarta, Indonesia

delik perkosaan yang diatur dalam Pasal 285 KUHP memiliki sejumlah kelemahan dan dianggap tidak lagi sesuai dengan perkembangan hukum, sehingga penanganan kasus perkosaan tidak optimal. Penelitian ini mengkaji lebih lanjut mengenai problematika formulasi tindak pidana perkosaan dalam berbagai peraturan perundang-undangan, khususnya dalam KUHP, serta reformulasi dan redefinisi perkosaan dalam pembahasan KUHP baru dengan menggunakan pendekatan Feminist Legal Theory. Penelitian ini bersifat doktrinal dan menggunakan studi pustaka. Hasilnya menunjukkan bahwa formulasi dalam Pasal 285 KUHP memiliki kelemahan, seperti ruang lingkup perkosaan, pemaknaan konvensional tentang persetujuan, dan keterbatasan pada satu gender tertentu. Perkosaan terkait erat dengan ketidaksetaraan dalam relasi gender, yang membuat perempuan korban perkosaan rentan terhadap viktimisasi dari berbagai pihak. Oleh karena itu, penting untuk membentuk hukum yang berperspektif gender.

Keywords: Formulation; Rape; Feminist Legal Theory.

INTRODUCTION

The crime of rape was still a crucial problem in Indonesia. Every year, the number of rape crimes continued to increase. The 2022 Annual Records (Catahu) published by The National Commission on Violence Against Women showed that the highest type of sexual violence committed in personal relationships in 2021 was rape which reached 597 cases (25%) followed by marital rape with 591 cases (25%). Rape cases in the public sphere were also the same, being the highest cases of violence, namely 459

cases, sexual harassment 359 cases, and indecent relations 281 cases (Komnas Perempuan 2022:54). This figure certainly could not represent all cases that occurred considering that the data collected was only limited to cases reported by victims and the number and power of institutions involved in data compilation efforts for that reason the Catahu's data was only an indication of the tip of the iceberg on the issue of gender-based violence.

News about the rape of both children and adults also always filled the media every year, although the terms used are varied. For example, the term obscenity was still often used, especially by the police, courts, and government-based service institutions. These obscene cases usually also contain cases of non-vaginal penetration of rape with the penis and other sexual harassment. The term sexual intercourse was also still used, generally, this case cannot be included in the category of a criminal act of rape because it did not meet the element of 'coercion' as regulated in the Criminal Code (KUHP) (Komnas Perempuan 2022:62).

The use of different terms also has implications for the problems caused by the different meanings of rape offenses in various laws and regulations in Indonesia. The Criminal Code as the parent of criminal law in Indonesia regulated the crime of rape in Article 285 of the Criminal Code: "Any person **who** by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, shall, being guilty of rape, shall be punished with a maximum imprisonment of twelve years."

The formulation in Article 285 still had many weaknesses and had been widely criticized by previous researchers. Mulyani's research showed that the **formulation** of rape in Article 285 was not in favor of the interest

of women because the element of coercion only emphasizes physical coercion therefore that evidence of physical resistance was needed in addition to the testimony of the victim's witness, even though the victim also experiences psychological disorders such as symptoms of tonic immobility. On several occasions, the judge also asked for proof of a virginity test in a rape case which made it difficult for the victim. (Mulyani 2021).

Novantoro also criticized Article 286 which is included in the article related to rape, but the victim was in a state of helplessness or fainted. This article has been criticized because the sentence given is lighter than Article 285 even though the perpetrator can consciously take advantage of the condition of the victim who is helpless so that he can freely commit the crime (Novantoro 2018). Various existing studies showed that Articles 285 and 286 of the Criminal Code which regulate rape offenses still have weaknesses, including the narrow scope of the definition of criminal acts of sexual intercourse carried out illegally, not recognizing marital rape, ruling out rape that is not carried out without penetration of the penis into the vagina, rape that is carried out without physical coercion and mention of one particular gender, therefore, the case of male rape was not included in the scope of the rape. Even the existence of Article 286 showed that the perpetrator who commits rape where the victim was unconscious or helpless, the punishment became lighter.

The existence of this article has been considered obsolete and is clearly no longer relevant to the times. Efforts to change the formulation of the crime of rape have been carried out starting with the emergence of new regulations as *lex specialis*. The Criminal Code places rape only on bonds

outside of marriage so Law Number 23 of 2004 concerning the Elimination of Domestic Violence accommodates cases of forced intercourse within a marriage bond (marital rape) as a form of crime within the household. As for child rape, Law Number 35 of 2014 concerning Child Protection specifically regulates the protection of child victims of rape along with criminal penalties for perpetrators.

Another reform that also caused great euphoria for women activists was the passing of Law Number 12 of 2022 concerning Crimes of Sexual Violence. This regulation is hot news, especially for survivors of sexual violence, considering that the law regulates in more detail related to the various types of sexual violence that exist as well as rules that are more victim perspective. Unfortunately, the Rape Law does not specifically regulate the crime of rape because this crime is included in the Criminal Code.

In fact, the existing legal arrangements have not been able to resolve rape cases that occurred in Indonesia, bearing in mind that there has been no legal renewal in the Criminal Code until now. The Draft Criminal Code as an *ius constituendum* still has a long way to go in its ratification. Nonetheless, the 4 July 2022 edition of the Draft Criminal Code regulates the crime of rape with an expanded meaning. Article 477 states that rape is not only limited to genital penetration but also oral, anal, and objects into the genitals. The scope of the act of rape has also expanded in Article 245, namely if it is committed as a political act out of hatred for a certain race and ethnicity, then there is a criminal penalty for it. The expansion that occurs is a very good legal progressiveness considering that other countries have also regulated the expansion of the meaning of rape crime.

Problems do not only occur within the setting but also at the handling stage where there are still many law enforcement officials who place the victim as if he is also guilty of what happened to him. Questions such as "how was the victim dressed", "did the victim sigh and enjoy it", and "why were they walking alone" only further cornered the victim and made the victim more vulnerable in the case that happened to him. In fact, in some cases, the victim could become a victim again because she was raped a second time by the victim's lawyer, was raped in a safe house, and other places that should have provided a safe space for the victim.

A range of studies have explored the intersection of feminist legal theory and the formulation of rape laws in Indonesia. Rakia (2022) and Liko (2023) both highlight the presence of feminist issues in Indonesian laws but note that these are often overshadowed by overlapping regulations and limited application of radical feminist principles. Strassler (2004) delves into the gendered visibility of the Reformasi crisis, shedding light on the invisibility of violence against Chinese Indonesians, including rape. Tongat (2020) adds to this discussion by examining the construction of abortion due to rape in Indonesian law, revealing the complex legal consequences of decriminalization in health law. These studies collectively underscore the need for a more comprehensive and feminist-informed approach to addressing sexual violence and rape in Indonesia.

Referring to these conditions, the author then feels the need to fully analyze the problems that occur at the level of formulation and handling of the crime of rape, especially from a gender perspective. Even though there have been many other studies that have discussed the crime of rape, this

research will look further at how the paradigm built by the current new KUHP on the crime of rape has not been touched by many other researchers. Feminist Legal Theory will be used to find solutions to existing problems so that 'women's experiences', especially victims, can be involved in formulating laws relating to rape in Indonesia and building a legal culture that is more gender perspective.

This research used a juridical-normative (doctrinal) research method by exploring literature studies and previous research. The data used was secondary data and using techniques of data collection in the form of literature or documentation. This research would focus on the most recent edition of the Draft Criminal Code although it would not limit it to looking at the paradigm developments in each edition.

RESULT AND DISCUSSION

Formulation of Rape Arrangements in Legislation in Indonesia

The Criminal Code generally recognized two terms, namely 'rape' and 'obscene act'. This had real implications for existing cases, especially if it was related to the interpretation of law enforcers towards concrete events which were then determined to be legal. In its development, the meaning of rape and obscenity had created several new problems in Indonesia. The case of the alleged rape of a father to his three biological children under the age of 10 in East Luwu, South Sulawesi was one example of how the interpretation of cases could become problematic. The police through a press conference stated that the case was not a rape case but an obscenity act based on the results of the post-mortem examination at the Malili Health

Center received on October 15 2019 which showed no abnormalities in the victim's genitals and rectum(Rahma 2021).

The case then came into the public spotlight and received a negative response from the community (Gunadha and Indriani 2021). This categorization was a problem because it was related to the criminal threat that would be given to the perpetrator. Adultery was regulated in Article 289 of the Criminal Code, which carried a maximum sentence of nine years, while rape was regulated in Article 285 of the Criminal Code, which carried a maximum sentence of twelve years.

As previously mentioned in the introduction, the regulation on rape in the Criminal Code was no longer able to accommodate developments in existing cases and was very limited in nature. Various problems that arise in handling them were also caused by problems that arise in the formulation of rape regulations in regulations. The author then tried to analyze various laws and regulations in Indonesia which explicitly regulated rape as in table 01.

Table 01 - The setting of 'Rape' in Legislation

Law	Substance	Information
Article 285 Criminal Code	Any person who by using force or threat of force forces a woman to have sexual intercourse with him out of marriage, should be guilty of rape, and should be punished with a maximum imprisonment of twelve years.	Cases of rape committed without violence/threats of violence, committed within a marriage bond, or cases of rape against men (male rape) were not accommodated in this article. This article also limited the definition of rape to penetration of the vagina by the penis.
Article 286 Criminal Code	Any person who out of marriage had carnal knowledge of a woman of whom he knows that she was unconscious or helpless, should be	The state of being unconscious or helpless indicated that the victim has no control over her body, so the perpetrator uses it to commit the crime. However,

	punished by a maximum imprisonment of nine years.	this article actually punished the perpetrators more lightly than Article 285.
Article 8 Elimination of Violence in Household	The sexual violence referred to in Article 5 letter c should include: <ul style="list-style-type: none"> • forcing sexual intercourse to be carried out against an individual living within the scope of the household. • forcing sexual intercourse against one of the individuals within the scope of the household for commercial purposes and/or a certain purpose. 	This article regulated marital rape which was not regulated in the Criminal Code.
Article 46 UU PKDRT	Anyone committing sexual violence act as referred to in Article e letter a should be punished with imprisonment of not longer than 12 (twelve) years or a fine of not more than Rp36,000,000.00 (thirty-six million rupiah).	Closing the legal vacuum of the Criminal Code which only regulated rape outside of marriage.
Article 76D Child Protection Act	Everyone was prohibited from committing violence or threats of violence to force a child to have intercourse with him or with another person.	This arrangement was a lex specialist if the victim of rape is a 'child'
Article 81 Child Protection Act	(1) Anyone who violated the provisions referred to in Article 76D should be subject to imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah). (2) The criminal provisions referred to in paragraph (1) also apply to Everyone who deliberately committed deception, a series of lies, or induces a Child to have intercourse with him or with another person.	The Child Protection Law did not only limit cases of child rape with elements of violence or threats of violence but was broader than that, if someone committed deception, a series of lies, or persuasion, the perpetrator could be charged with rape offenses.
Article 4 Paragraph 2	In addition to the Crime of Sexual Violence as referred to in paragraph (1), the Crime of Sexual Violence	The Law on Sexual Violence Crimes only explains that rape and obscenity are included in

<p>The Law on Sexual Violence Crimes</p>	<p>also included: a. rape; b. obscenity; c. intercourse with a child, obscene acts against a child, and/or sexual exploitation of a child; d. acts of violating decency that are contrary to the will of the victim; e. pornography involving children or pornography that explicitly contains violence and sexual exploitation; f. forced prostitution; g. criminal acts of trafficking in persons aimed at sexual exploitation; h. sexual violence within the household; i. money laundering crime whose predicate crime is a Sexual Violence Crime; and J. other criminal acts that are expressly stated as Crimes of Sexual Violence as regulated in the provisions of laws and regulations.</p>	<p>the category of criminal acts of sexual violence but does not stipulate criminal threats because these offenses are included in the Criminal Code.</p>
--	--	---

Source: Author search analysis

The table 01 above showed that there were still several weaknesses in the regulation of rape, especially in the Criminal Code Article 285 of the Criminal Code could be referred to as an offense qualified from Article 289 of the Criminal Code. This was because the element of the activities regulated in Article 285, namely the element of "having intercourse" was one of the meanings of obscenity in Article 289 of the Criminal Code. So cases were often found where the act could be categorized as an act of "coitus", but rather fulfills the element of an "obscene act" Article 289 of the Criminal Code (Akbari, Saputro, and Annisa 2016:133).

R. Soesilo regarding Arrest Hoge Raad (Decision of the Dutch Supreme Court) on 5 February 1912 stated that intercourse was "Complaints between male and female genitalia were carried out to get children, so the male genitalia must enter the female genitalia so that semen was released." (Tarigan and Barus 2021). This conventional definition was indeed

still often found in the doctrines of criminal experts in classic criminal law books and could even be seen in the implementation of Article 285 in judges' decisions (Akbari et al. 2016:133).

Research conducted by Akbari et.al. in 2016 of 50 court decisions related to rape showed that all these decisions defined intercourse as “penile penetration of the vagina”, regardless of the presence or absence of semen. However, 41 out of 50 decisions studied still mentioned the presence of sperm or semen, both issued in the vagina and outside, in their consideration. The majority of judges still required the hymen to be torn in rape cases, both old and new torn (Akbari et al. 2016). This requirement indicated that in several cases of rape where the perpetrator suffered from azoospermia, it could not be categorized as a rape offense. Likewise, cases of coerced intercourse using tools other than the penis could not be accommodated by Article 285 of the Criminal Code.

Redefining Rape Arrangement by Feminist Legal Theory Approach

The Draft Criminal Code was introduced to replace regulations in the Indonesian criminal code and remove remnants of the Dutch colonial system, as part of efforts to reform Indonesia's criminal justice system (Reni and Fakhry 2020). This spirit of renewal arises considering that the Criminal Code which had long been in force in Indonesia was a colonial legacy where the Legal substance contained in the Criminal Code or WvS was adapted to the legal culture of the Dutch society, which of course had a significant difference with the legal culture in Indonesia and was no longer by existing legal developments including regulations regarding rape so that it required renewal of the original criminal law from Indonesia.

The Draft Criminal Code was good news, especially for criminal law academics, even though in its journey, the Draft Criminal Code had reaped various kinds of controversies that had not been resolved. This research was certainly not intended to analyze the controversy that had occurred but only to see this phenomenon as part of the journey that must be taken by the Draft Criminal Code toward its ratification. The longer the policy formulation process of the Draft Criminal Code, the longer the ratification of rape offenses in the Draft Criminal Code will take. In fact, the Draft Criminal Code had offered concept changes/developments, especially concerning the definition and scope of rape.

The following reads Article 477 regarding rape contained in the KUHP. "(1) Any Person who with violence or threats of violence forced someone to have intercourse with him should be punished for committing rape, with a maximum imprisonment of 12 (twelve) years. (2) Including the crime of rape and being punished as referred to in paragraph (1) includes acts of: (a) intercourse with someone with his consent, because that person believed that person was his legal husband/wife; (b) intercourse with a Child; (c) intercourse with someone, even though it was known that the other person is unconscious or helpless; or (d) intercourse with a person with a mental disability and/or intellectual disability by giving or promising money or goods, abusing authority arising from a relationship of circumstances, or by deception to induce him to have or allow intercourse with him, even though he was known about his disability. (3) It was also deemed to have committed the crime of rape, if under the circumstances referred to in paragraph (1) and paragraph (2) an obscene act was committed in the form

of: (a) inserting genitals into another person's anus or mouth; (b) inserting another person's genitals into his own anus or mouth; or (c) inserting a part of his body that was not genitals or an object into another person's genitals or anus. (4) If the crime as referred to in paragraph (1), paragraph (2) letter c, paragraph (2) letter d, and paragraph (3) was committed against a child, the criminal should be punished with imprisonment for a maximum of 15 (fifteen) years. (5) The provisions referred to in paragraph (4) also apply to Everyone who forced a Child to commit a Crime as referred to in paragraph (1), paragraph (2) letter c, paragraph (2) letter d, and paragraph (3) with other people. (6) If the crime referred to in paragraph (1) was committed within a marriage bond, no prosecution would be carried out except for the victim's complaint. (7) If one of the criminals acted referred to in paragraph (1) to paragraph (3) resulted in serious injury, the penalty should be imprisonment for a maximum of 15 (fifteen) years. (8) If one of the criminals acted as referred to in paragraph (1) to paragraph (3) resulting in the death of a person, the sentence should be added to 1/3 (one-third) of the sentence referred to in paragraph (1), and (9) If the victim as referred to in paragraph (4) was a biological child, stepchild, or child under guardianship, the penalty should be added to 1/3 (one-third) of the penalty referred to in paragraph (4).

The Criminal Code showed an expansion in the scope of rape which was previously very limited in the Criminal Code rules. This could be seen in Paragraph (3) which stated that rape was not only limited to the penetration of the penis into the vagina but also when the act uses a body part other than the genitals or objects into the genitals of another person.

Article 477 of the Indonesian Bill of Penal Code also abolished the element of women in the previous Criminal Code so that not only rape experienced by women but also men could accommodate rape. Another new thing that was also offered by the Draft Criminal Code was regarding rape rules if it was based on racial and ethnic discrimination, then the penalty would be added 1/3 (See in Article 245 The Draft Criminal Code).

Other developments were also seen in the concept related to the mention of the terms indecent relations and sexual intercourse. In general, the Criminal Code separated the formulation of offenses related to obscenity and sexual intercourse. Usually, there was a formulation of a paired offense between the two offenses. For example, the offense of sexual intercourse with violence (rape) regulated in Article 285 was paired with the offense of obscene acts with violence in Article 289; the offense of intercourse with a helpless woman (Article 286) is paired with Article 290 1 for the act of obscenity. In addition, the Criminal Code also had an offense of obscenity that had no partner with the offense of intercourse, namely the offense regulated in Articles 293-296. Against the delicts that had no partner (Arief 2008:264).

The legal progress built by the RKUHP was in line with legal developments in the global realm. The results of research conducted by Akbari et.al showed that most countries in the European Union had explicitly regulated that rape was not only limited to the element of 'coitus', namely penetration of the penis into the vagina but also encompasses various other forms of penetration. In addition, regulated rape was also not restricted to a specific gender, meaning that both women and men could

potentially become victims. The Netherlands, Italy, and Great Britain were listed as countries that were quite progressive in regulating the crime of rape (Akbari et al. 2016:8).

In addition, a country that also had good rules regarding rape was New Zealand. Based on the 2022 Global Peace Index, New Zealand was the most peaceful country in the region and the second most peaceful country overall in the 2022 GPI (Institute for Economics&Peace 2022:16). New Zealand was also the safest country for women in the Asia Pacific region based on a survey conducted by a Singapore-based consumer advisory agency, Value Champion. (Prime 2019). This award was certainly not without reason, in the context of law, New Zealand had comprehensive rules regarding sexual crimes.

As for rape, it was specifically regulated in Part 7 Session 128 of the 1961 Criminal Act. “(2) Person A raped person B if person A had a sexual connection with person B, affected by the penetration of person B's genitalia by person A's penis, – (a) without person B's consent to the connection; and (b) without believing on reasonable grounds that person B's consents to the connection. (3) Person A had an unlawful sexual connection with person B if person A had a sexual connection with person B– (a) without person B's consent to the connection; and (b) without believing on reasonable grounds that person B consents to the connection (penetrates your vagina with their finger or another part of their body, or with a physical object, penetrates your anus with their penis or finger or another part of their body, or with a physical object and touching your penis, vagina, or anus with their mouth or tongue)”.

New Zealand recognized that rape was restricted to cases of a male penetrating a female's vagina with his penis. However, under the law, this was just one of two types of the crime of "sexual violation". The other type – “unlawful sexual connection” – covered all the other types of sexual assault. The maximum sentence was 20 years imprisonment. As explained above, the definition of rape was not only limited to penetration of the genitals but also when using other body parts. Meanwhile, if someone intentionally touched the penis, vagina, or anus with their fingers or hands, this could be a different crime called "indecent assault" (max. 7 years jail). It made no difference whether they were of a different sex/gender or the same sex/gender (Community Law 2022). Consent was also very important in handling cases (Session 128A).

Nevertheless, the formulation of the offense of rape in the RKUHP still drew criticism, including relating to the term intercourse. In line with Article 285 of the Criminal Code, Article 477 Paragraph (1) of the Criminal Code also still used the term 'coitus' as an element of the act. The impact was the emergence of the potential to re-implement the meaning of conventional intercourse by law enforcement, where intercourse was only limited to the penetration of the penis into the vagina, the presence of sperm, and the torn hymen (Akbari et al. 2016:135). Mangabeira-Unger states that formalism and objectivism were suspected as the source of legal hypocrisy which often occurred when lawmakers said otherwise and law enforcers did otherwise (Mochtar and Hiarij 2021:330). This was what then raises major concerns about the different interpretations of law enforcement regarding rape in Indonesia.

Another criticism leveled at the Draft Criminal Code was regarding the placement of the crime of rape in the chapter on criminal acts of decency. According to Akbari et.al, the placement was still the same as that carried out by the current Criminal Code. In fact, as the definition of rape developed in various countries, the crime of rape should no longer be included in the chapter on criminal acts of decency, but it was more appropriate to include it in the section on crimes against life and body (Akbari et al. 2016:135). Opinions regarding the definition of 'decency' and the scope of what types of crimes fall under the category of decency offenses can differ in each country. Barda Nawawi Arief in his book has shown that of the 28 countries compared, 24 countries include rape as an offense against the values of decency/morality/chastity/human dignity, while 4 countries include it as an offense against the body, namely former British colonies using common law. system namely Brunei, India, Malaysia, and Singapore (Arief 2008:281). This was what then becomes a consideration why the rape offense in the Draft Criminal Code was still included in the category of crimes against decency.

The problem of regulating and handling the crime of rape had indeed been going on for a long time. The high number of rape cases was an indicator that the handling of rape cases in Indonesia was not optimal. This was also related to the existing legal culture where the public, including law enforcement officials, often places victims in the wrong position. It must sadly be admitted that women in Indonesia were still experiencing many forms of injustice. One of these was the tendency to blame women as the

primary cause of rape (victim blaming), a manifestation of Indonesia's pervasive rape culture (Kristianto 2019:46).

Kearns et.al conducted a study showing that high gender inequality had a positive correlation with physically violent rape occurring in the United States. Based on feminist theory and research at the community level, it was known that this gender inequality had an etiological relationship with patriarchal beliefs and violence against women. This belief tended to reinforce domination and power and perpetuate male aggression against women (Kearns, D'Inverno, and Reidy 2020).

Kosvianti et.al also conducted a study of 29 rape perpetrators aged 14-18 years so that they found three ways the perpetrators interpreted rape, namely as coercion of sexual intercourse; as consensual sex, and as a deviant form of solidarity in friendship groups (Kosvianti et al. 2022:10). These findings confirmed the role of patriarchal culture in triggering acts of rape among boys in Bengkulu. In this case, gender inequality, subordination, and stereotypes of women that were rooted in the joints of life unconsciously become legitimate for sexual aggression committed by boys (Kosvianti et al. 2022:14).

Discussion of rape, in the end, cannot be separated from the existing patriarchal culture and gender inequality. Women victims of rape were also vulnerable to experiencing victimization from the community and family in the form of stigmatization and ostracism. In the realm of law enforcement, they were also vulnerable to secondary victimization from law enforcement officials who often think they were also enjoying the rape that happened to them simply because they showed no resistance. The law was phallogocentric,

so the law was often not on the side of women. For adherents of the Feminist Legal Theory, the law was an order from men which was built and constructed using male logic. A further implication was that law often strengthens juridical-patriarchal social relations (Mochtar and Hiariej 2021:344-45).

Feminist Legal Theory present to fight the patriarchal culture that was manifested in the law. This theory believes that legal neutrality and objectivity will only result in gender-biased laws. For this reason, a study of law was needed using feminist methods, one of which was asking women's questions by studying law based on women's experiences combined with political activity to form new legal reasoning that considers women's experiences as one of the main considerations (Irianto and Savitri 2006). The formation of laws relating to rape should also consider the experience of women, especially victims of rape, the majority of whom are women.

Women are often disqualified from many things to perfect their life as an individual by being understood as property, including their sexuality. To change this paradigm, feminists encourage the inclusion of "victim consent" into the formulation of the crime of rape because they regard this as a positive element that can strengthen women's freedom and autonomy sexually (Akbari et al. 2016:75). The paradigm of sexual consent which has also been used in several countries has also begun to receive attention from the government, especially with the advent of the Rape Law. Although in the end, this consent also led to a long debate in various circles.

In redefining rape, Vidu and Martinez acknowledged rape as being an issue of power and privilege. Framing the frontiers of citizenship, she

emphasized women's changing values in society against unfair situations with unprivileged communities. By describing the period of racial segregation and women's suffrage, Freedman emphasized the importance of women's rights advocates who struggle for expanding awareness of gaining legal protection for sexual abuse and assault, coercive sexual relations, and any type of harassment, including sexual abuse of children. Current feminist movements still grappled with the victories and limitations of the first reform efforts to keep redefining rape and sexual abuse within every law and culture (Vidu and Martínez 2019:96).

Society often places rape victims as the guilty party, both way they dress, the way they walk, and so on. Rape, then, happens chiefly because men did not properly deal with their desires, not because of the way women dress. Therefore, the most effective solution to reducing instances of rape in Indonesia was not, for example, by requiring women to cover themselves up completely, but by teaching men to cope with their desires (Kristianto 2019:34). Building good law did not only mean improving its formulation but also improving its perspective and legal culture.

The essence of efforts to renew or 'reform' criminal law was to reorient and reevaluate the views and values underlying the formulation of an offense. Barda Nawawi Arief was of the view that if the value orientation of the Draft Criminal Code concept was still the same as the old KUHP (WvS), then it could not be said to be a criminal law reform (Arief 2008:283). Therefore, changes in the concept of rape offenses in the Draft Criminal Code must be viewed from this point of view by considering developments in existing laws and the needs of society, especially victims.

CONCLUSION

Regulations regarding rape, especially in Article 285 of the Criminal Code, still had weaknesses including the narrow scope of the definition of the crime of sexual intercourse that was committed illegally, not recognizing domestic rape, ruling out rape that was not committed without penetration of the penis into the vagina because the meaning of rape was still conventional, rape committed without physical coercion and the mention of one type certain gender only so that cases of male rape were not included in the scope of rape. The existence of Article 286 also showed that for the perpetrators who committed rape when the victim was unconscious or helpless, the punishment becomes lighter. The formulation of the offense of rape was no longer relevant to existing legal developments. Various kinds of new regulations as *lex specialist* such as the Elimination of Violence in the Household which regulated the matter of marital rape, The Law on Child Protection as a response to the high number of cases of rape against children, and the Rape Law as a form of filling the legal void had also not been able to resolve cases of rape that had occurred in Indonesia. The Draft Criminal Code as a reformation of criminal law then showed the development and changes in the concept of rape offenses in its design, including expanding the scope of rape not only to the penetration of the penis into the vagina but also when the act used a body part other than the genitals or an object into the genitals of another person. Article 477 of the Indonesian Bill of Penal Code also abolished the element of women in the previous Criminal Code so that not only rape experienced by women but also men could accommodate rape. Another new thing that was also offered by the Draft

Criminal Code was regarding rape rules if it was based on racial and ethnic discrimination, then the sentence will be increased by 1/3. In reformulating and redefining rape, the Feminist Legal Theory approach was urgently needed considering that rape was also closely related to patriarchal issues and existing gender inequality. [W]

REFERENCES

- Akbari, Anugerah Rizki, Adery Ardhan Saputro, and Bela Annisa. 2016. *Reformasi Pengaturan Tindak Pidana Perkosaan*. Jakarta: Masyarakat Pemantau Peradilan Indonesia dan Badan Penerbit Fakultas Hukum Universitas Indonesi.
- Arief, Barda Nawawi. 2008. *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru*. Ed. 2., cet. 6. Rawamangun, Jakarta: Kencana.
- Community Law. 2022. "Individual Rights & Freedoms." <https://communitylaw.org.nz/community-law-manual/chapter-8-gender-and-sexuality/sexual-orientation-and-your-rights/rape-sexual-assault-and-family-domestic-violence/>
- Gunadha, Reza, and Ruth Meliana Dwi Indriani. 2021. "Polri Sebut Kasus 3 Anak Di Luwu Bukan Pemerkosaan Tapi Pencabulan, Publik Ngegas Emosi." *Suara.Com*.
- Institute for Economics&Peace. 2022. *Global Peace Index 2022: Measuring Peace in a Complex World*. Sydney.
- Irianto, Sulistyowati (ed), and Niken Savitri. 2006. "Feminist Legal Theory dalam Praktik." in *Perempuan dan Hukum: Menuju Hukum yang Berperspektif Kesetaraan dan Keadilan*. Jakarta: Yayasan Obor Indonesia.
- Kearns, Megan C., Ashley Schappell D'Inverno, and Dennis E. Reidy. 2020. "The Association Between Gender Inequality and Sexual Violence in

the U.S.” *American Journal of Preventive Medicine* 58(1):12–20. DOI: 10.1016/j.amepre.2019.08.035.

Komnas Perempuan. 2022. *Bayang-bayang Stagnansi: Daya Pencegahan dan Penanganan Berbanding Peningkatan Jumlah, Ragam dan Kompleksitas Kekerasan Berbasis Gender terhadap Perempuan CATAHU 2022*.

Kosvianti, Emi, Agung Suhadi, Nopia Wati, Riska Yanuarti, and Bintang Agustina Pratiwi. 2022. “Studi Konstruksi Sosial Perkosaan pada Kelompok Pelaku Berusia di bawah 18 Tahun.” *Jurnal Kesmas Asclepius* 4(1):11.

Kristianto, Stefanus. 2019. “Women and Rape Case: Considering the Second Antithesis.” *Asia Journal of Theology* 33(1):34–46.

Mochtar, Zainal Arifin, and Eddy O. S. Hiarij. 2021. *Dasar-Dasar Ilmu Hukum Memahami Kaidah, Teori, Asas Dan Filsafat Hukum*. Indonesia: Red & White Publishing.

Mulyani, Melly Setyawati. 2021. “Kebijakan Formulasi Tindak Pidana Perkosaan Pasal 285 KUHP dalam Perspektif Kepentingan Perempuan Korban.” Universitas Sebelas Maret.

Novantoro, Dwi. 2018. “Perlindungan Hukum Terhadap Korban Tindak Pidana Persetubuhan Yang ‘Tidak Berdaya’ Dalam Pasal 286 Kitab Undang-Undang Hukum Pidana.” Universitas Jember.

Perdana, Agni Vidya. 2019. “Singapura Dan Selandia Baru Paling Aman Bagi Wanita Di Asia Pasifik, Indonesia Peringkat 13.” *Kompas.Com*, March.

Rahma, Andita. 2021. “Bukan Pemeriksaan, Polri Sebut Kasus Di Luwu Timur Dugaan Pencabulan.” *Tempo*.

Reni, Dewi Savitri, and Syarifah Reihana Fakhry. 2020. “RKUHP: What It Means for Criminal Justice in Indonesia.” *SSEK Indonesian Legal Consultants*, March.

Tarigan, Maria Isabel, and Naomi Rehulina Barus. 2021. “Tertinggal Zaman: Pemaknaan Perkosaan Dan Pencabulan Dalam Hukum Di Indonesia.” *The Conversation*.

- Vidu, Ana, and Gema Tomas Martínez. 2019. "The Affirmative 'Yes'. Sexual Offense Based on Consent." *Masculinities & Social Change* 8(1):91. DOI: 10.17583/mcs.2019.3779.
- Djarmiko, Wahyu Prijo. 2019. "Law and Public Relations in Indonesia: Viewed from the Theory of John Henry Merryman on Strategies of Legal Development." *Walisongo Law Review* 1(1):1-16. doi: 10.21580/walrev.2019.1.1.4751.
- Liko, Aprilina Matilda, Maria Christussa Nasamputu, Maria Noviyanti Meti, Ignastius Kayus Duan, and G. Widiartana. 2023. "Sexual Violence in Indonesian Law Number 12 Of 2022: Viewed from the Concept of Radical Feminism." *International Journal of Social Science and Human Research* 06(02). doi: 10.47191/ijsshr/v6-i2-65.
- Rakia, A. Sakti R. S., and Wahab Aznul Hidayat. 2022. "Aspek Feminist Legal Theory Dalam Peraturan Perundang-Undangan Di Indonesia." *Amsir Law Journal* 4(1):69-88. doi: 10.36746/alj.v4i1.104.
- Strassler, Karen. 2004. "Gendered Visibilities and the Dream of Transparency: The Chinese-Indonesian Rape Debate in Post-Suharto Indonesia." *Gender & History* 16(3):689-725. doi: 10.1111/j.0953-5233.2004.00361.x.
- Tongat, Isdian Anggraeny. 2020. "Abortion Due to Rape in The Perspective of Criminal Law and Health Law in Indonesia." *Journal of Law, Policy and Globalization* 103(8). doi: 10.7176/JLPG/103-02
- Criminal Act 1961 (New Zealand's Law)
- Criminal Code
- Draft Criminal Code, July 4, 2022
- Law Number 12 of 22 concerning Sexual Violence
- Law Number 23 of 2004 concerning the Elimination of Domestic Violence
- Law Number 35 of 2014 concerning Child Protection