

Progressive Legal Framework for the Regulation of Sexual Violence Crimes in Indonesia

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Abstract: This article aims to describe the progressive legal dimension in regulating sexual violence crimes. The research method used is a normative research method with a statute approach and a conceptual approach. The results of the study show that the progressive legal dimension in the regulation of sexual violence crimes is reflected in the material criminal law which regulates forms of sexual violence in accordance with the times, as well as the formal criminal law relating to evidence. The legal dimension of progression in regulating criminal acts of sexual violence in Indonesia in Law Number 12 of 2022 concerning Crimes of Sexual Violence has uncovered the veil of law which so far has failed to achieve substantive justice because it is trapped in material and formal criminal law rules that are procedural and formalistic in nature. handling cases of sexual violence.

Keywords: criminal; law; progressive; sexual violence.

1. Introduction

A good law is a law that has the maximum benefit for humans. If the existing law is unable to solve social problems in the social life of the community, nation and state, or if the law because of its rigid procedures fails to achieve substantive justice, then at that time the community's needs will be resolved by establishing progressive legal rules. Progressive law has something in common, that is, they both want a breakthrough in the world of law which is too positivistic so that the law is more beneficial to humans and does not make humans become hostage with the rules they make themselves.¹ Progressive law was born out of a sense of dissatisfaction among the law community against the developing theory and practice of traditional law. Its adherents criticize it so much *gap* between law in reality and legal theory. The law is often considered to have failed in responding to every problem that occurs in society. On the other hand, society wants law to no longer be a tool for the interests of those in power, or political interests.² The success of law in reassuring society is highly dependent on law enforcement officials, legal culture, and what is no less important is the substance of the law itself.³ In criminal law enforcement, for example, the provision of punishment or punishment for someone must be based on law. This means that, in order to convict someone for an act he has committed, it must be ensured that the act has been regulated in a law as an act which is prohibited from being carried out and that anyone who commits it shall be given a criminal sanction. Thus, it is certain that the punishment of a person does

¹ Eko Noer Kristiyanto, "The Urgency of the Omnibus Law in Accelerating Regulatory Reform in a Progressive Legal Perspective," *Journal of De Jure Legal Research* 20, no. 2 (2020): 233, <https://doi.org/10.30641/dejure.2020.v20.233-244>.

² Lutfil Ansori, "LAW ENFORCEMENT REFORM PROGRESSIVE LAW PERSPECTIVE," *Juridical Journal* 4, no. 2 (2017): 148–63, <https://doi.org/https://doi.org/10.35586/.v4i2.244>.

³ Orin Gusta et al., "The Impact of Covid-19 Pandemic on Effective Electronic Criminal Trials: A Comparative Study," *Journal of Human Rights and Legal System* 3, no. 2 (2023): 185–209, <http://www.jhcls.org/index.php/JHCLS/article/view/57>.

not conflict with the principle of legality.⁴ The principle of legality is a fundamental principle in criminal law, on the other hand, changes in law and formation of laws require a lot of time. The inability of the law to reach criminal acts committed by legal subjects, often results in these actions not being punished. One of the crimes that has developed according to the times is a gender-based crime, which is more specific to sexual violence. Technological sophistication makes crimes committed not only conventional, but also electronic based. This situation makes crimes in the form of sexual violence can be carried out electronically. However, the absence of a legal umbrella to cover acts of sexual violence using electronics has hampered cases of sexual violence committed with the help of technology. Even though there is an Electronic Information and Transaction Law which regulates the prohibition of sending or distributing moral content with electronic assistance, it should be noted that the electronic information and transaction law is not actually a specific crime law that provides optimal protection for victims of sexual violence, but administrative laws that have criminal sanctions. The inability of the law to provide legal protection has resulted in an increase in crimes both in terms of number and perpetrators, it is also difficult to provide general prevention as criminal purposes.

The high number of cases of sexual violence is still one of the most common crimes in Indonesia. Indonesia has even been named a country with an emergency predicate of sexual violence. This can also be seen from the number of cases of sexual violence, be it victims of women, children, and even male victims. The number of cases of violence against women (KtP) throughout 2020 amounted to 299,911 cases, consisting of cases handled by the District Court or Religious Courts totaling 291,677 cases. Komnas Perempuan partner service agencies recorded 8,234 cases. Still in the same year, 77 cases of violence against women with disabilities and women with intellectual disabilities were the group most vulnerable to experiencing violence by 45%.⁵ Sexual violence is contrary to divine and human values, and disturbs the security and peace of society.⁶ Everyone has the right to protection from violence and the right to be free from torture or treatment that degrades human dignity as guaranteed in the constitution of the Republic of Indonesia. Even though there are laws that regulate criminal sanctions against sexual violence, these various regulations are not optimal in providing prevention, protection, access to justice, recovery, and do not fulfill the rights of victims of sexual violence and do not comprehensively regulate procedural law.

On April 12, 2022, the Bill on the Crime of Sexual Violence was passed into law at the DPR RI Plenary Session.⁷ It is hoped that the TPKS Law that is currently in effect will become a middle way for the deadlock in law enforcement in cases of sexual violence and as a complement to the legal instruments that have existed so far. Based on this background, this article will focus on examining the progressive legal dimension in regulating sexual violence crimes in Indonesia, both from the material criminal law aspect and from the formal criminal law in Law Number 12 of 2022 concerning Crimes of Sexual Violence.

⁴ Orin Gusta Andini, "Measuring the Relevance of Corruptor Punishment Guidelines for Corruption Eradication Efforts," *Tanjungpura Law Journal* | 5, no. 2 (2021): 133–48, <https://doi.org/http://dx.doi.org/10.26418/tlj.v5i2.46109>.

⁵ National Commission on Violence Against Women, "Fact Sheet and Key Points to Know about National Commission on Violence Against Women in 2020," *Komnas Perempuan*, vol. 14 (Jakarta, 2021), <https://openparliament.id/wp-content/uploads/2021/10/Lembar-Fakta-dan-Poin-Kunci.pdf>.

⁶ President of the Republic of Indonesia, "Law Number 12 of 2022 Concerning Crimes of Sexual Violence" (2022).

⁷ Eko Nurisman, "Minutes of Challenges to Law Enforcement of Sexual Violence Crimes After the Birth of Law Number 12 of 2022," *Journal of Indonesian Legal Development* 4, no. 2 (2022): 170–96, <https://doi.org/10.14710/jphi.v4i2.170-196>.

2. Method

This paper employs doctrinal⁸ research that focuses on legal rules, concepts, principles, and doctrines. This article's approach, namely conceptual and statutory. A conceptual approach is a type of approach in legal research that answers questions using legal perspectives and doctrines.⁹ Statute approach is a type of legal research approach that uses legal sources, such as statutes, as the primary source for research on legal issues.¹⁰ The conceptual method is used to analyse the concept of progressive law. The approach to sexual violence law through act focuses on sexual violence law and other research-related regulations.

3. Results and Discussion

3.1 Crime of Sexual Violence: Alignment of Material Criminal Law Aspects

The crime of sexual violence is a crime that has been regulated in the Criminal Code and is spread in several other laws, including the Law on Child Protection, the Law on the Elimination of Sexual Violence in the Household. This is intended as a form of legal protection. Legal protection is an important element aimed at regulating citizens who are victims of criminal acts. Article 1 Paragraph 3 of the 1945 Constitution has emphasized that Indonesia is a state based on law so that by itself legal protection becomes an essential element as well as a consequence in a state based on law and the state is obliged to guarantee the legal rights of its citizens. Legal protection in question is a legal remedy that must be provided by law enforcement officials to provide a sense of security, both mentally and physically against disturbances and various threats from any party.¹¹ Prior to the birth of the TPKS Law, the existing legal provisions were not sufficient enough to protect the legal interests of women.¹² The Criminal Code only recognizes three forms of sexual violence, 1) Article 285 concerning rape. Rape punishes anyone by force or threat of force to force a woman to have intercourse with him outside of marriage; 2) Obscene acts, i.e., anyone who uses force or threats of violence forces someone to commit or allow obscene acts to be carried out. Threatened for committing an act that attacks the honor of decency.

table. 1 Comparison of Types of Sexual Violence in the Criminal Code & the TPKS Law

Criminal Code	UU TPKS
Rape	Non-Physical Sexual Harassment
Fornication	Physical Sexual Abuse

⁸ Irwansyah, *Legal Research: A Choice of Article Writing Methods & Practice*, ed. Ahsan Yunus, 1st ed., vol. 1 (Yogyakarta: Mitra Buana Media, 2020).

⁹ Johnny Ibrahim, *Normative Law Theory and Research Methods* (Malang: Bayu Media, 2005).

¹⁰ Ani Purwati, *Legal Research Methods: Theory And Practice* (Surabaya: Jakad Media Publishing, 2020).

¹¹ Diana Yusyanti, "Legal Protection of Child Victims of Perpetrators of Sexual Violence Crimes," *Journal of De Jure Legal Research* 20, no. 4 (2020): 619, <https://doi.org/10.30641/dejure.2020.v20.619-636>.

¹² Ibnu Sina Chandranegara, Gusta Orin Andini, and Nani Mulyati, "Women in the Maelstrom of Law & Custom: Reflections on the Emergency of Sexual Violence in Indonesia," in *Indonesian Law in the Future*, ed. Ibn Sina Chandranegara, 1st ed. (Jakarta: Rajagrafindo Persada, 2022), 356, <https://ebooks.gramedia.com/id/buku/hukum-indonesia-di-masa-depan>.

Other	Forced Contraception
	Forced Sterilization
	Marriage Force
	Sexual Abuse
	Sexual Exploitation
	Electronic Based Sexual Violence

Source: Author's Analysis

Prior to the existence of the TPKS Law, sexual violence in Indonesia was regulated in several laws. From a material perspective, this is a legal policy diversification. In a pragmatic legal context, diversification of legal policies is necessary to close legal gaps.¹³ Even so, several distributions of legal regulations regarding sexual violence have not been able to become a solution for cases of sexual violence which are increasingly comprehensive. As contained in the comparative table on the regulation of sexual violence in the Criminal Code and the TPKS Law. The Criminal Code only regulates criminal acts that are very conventional in nature. This is understandable because the Criminal Code is a criminal law book inherited from the Netherlands. The limited scope of sexual violence regulated in the Criminal Code, the Law on the Elimination of Sexual Violence in the Household, the Law on Human Rights, the Law on Child Protection, and the Law on Pornography. criminal justice because law enforcement officials do not have a normative legal basis so that law enforcement against sexual violence experiences impunity.

Table 2. Comparison of several laws that have legal policies on sexual violence

Child Protection Act	Article 76 I concerning Sexual intercourse with children, obscene acts against children, sexual exploitation of children
Law Number 44 of 2008 Concerning Pornography	Article 11 concerning Pornography involving Children atop pornography which explicitly contains violence and sexual exploitation
Law Number. 23 of 2004 concerning the Elimination of Domestic Violence	Article 5 regarding sexual violence within the household

¹³ Ninik Rahayu, *Legal Politics of Eliminating Sexual Violence in Indonesia*, ed. triantono Triantono, 3rd ed. (Jakarta: Bhuana Popular Science, 2021).

The TPKS Law, with quite detailed arrangements, has regulated several acts which previously had not been qualified as delicts, which have now been criminalized.¹⁴ sAs for the forms of sexual violence regulated in the TPKS Law, they include 1) Non-Physical Sexual Harassment. Previously, the term non-physical sexual harassment was not recognized in Indonesian criminal law, as was the terminology for sexual harassment. The TPKS Law has provided a definition of what is meant by non-physical sexual harassment, namely any person who commits non-physical sexual acts aimed at the body, sexual desire, and/or reproductive organs with the intention of demeaning a person's dignity based on his sexuality and/or decency. . 2) Physical Sexual Harassment. Physical sexual harassment is imposed on anyone who commits physical sexual acts aimed at the body, sexual desire, and/or reproductive organs with the intention of demeaning a person's dignity based on his sexuality and/or decency which is not included in other, more serious criminal provisions; 3) Forced Contraception. , including carrying out physical sexual acts aimed at the body, sexual desires, and/or reproductive organs with the intention of unlawfully placing a person under their authority, both within and outside of marriage; 4) Forced Sterilization. Forced sterilization is an act of forcing another person to use contraception using violence or threats of violence, abuse of power, misdirection, fraud, creating or taking advantage of a helpless condition that can cause permanent loss of reproductive function; 5) Forced Marriage. An act of forcing a marriage is an act committed by a legal subject unlawfully forcing, placing a person under his or other person's authority, or his power to perform or allow marriage to be carried out with him or another person; 6) Sexual Abuse. Any official or person acting in the capacity of an official, or a person acting because the official has moved or is aware of, commits sexual violence against a person with the aim of: a. intimidation to obtain information or confessions from that person or a third party; b. persecute or impose punishment on suspected or committed acts; and/or c. humiliate or humiliate for reasons of discrimination and/or sexuality in all its forms; 7) Sexual Exploitation. Sexual exploitation is an act of a person, with violence or threats of violence or by abusing one's position, authority, trust, abuse arising from deception or a relationship of circumstances, vulnerability, inequality, powerlessness, dependence of a person, debt bondage or giving payments or benefits with the intention of gain advantage, or make use of sexual organs or other organs of that person aimed at sexual desire with him or with other people; 8) Sexual Slavery. Sexual slavery is an act that will be subject to criminal responsibility for everyone who unlawfully places a person under his or other people's control and renders him powerless with the intention of sexually exploiting him; 9) Electronic-based sexual violence (KSBE). KSBE is an act of recording and/or taking sexually charged pictures or screenshots without the will or without the consent of the person who is the object of the recording or screenshot or screenshot, transmitting electronic information and/or electronic documents with sexual content against the will of the recipient directed against sexual desire; and/or stalking and/or tracking using electronic systems against people who are objects in electronic information/documents for sexual purposes.

¹⁴ Olqd Dfh et al., "CRIMINALIZATION OF SEXUAL HARASSMENT PERFORMED BY PEOPLE WITH FETISHISTIC DISORDER WHICH REFLECTS THE PRINCIPLES OF LEX CERTA AND LEX STRICTA," *Frontiers in Neuroscience* 14, no. 1 (2021): 1–13.

From the comparison of several forms of sexual violence that have been described in the table above, it appears that the dimension of progressive law accommodates forms of sexual violence that are appropriate to the current situation. It is hoped that the limitations on forms of sexual violence can be complemented by the TPKS Law as a legal umbrella in cases of sexual violence. In addition, the TPKS Law also regulates sanctions in the form of restitution, in which case the judge is required to determine the amount of restitution for the crime of sexual violence which is punishable by imprisonment for 4 (four) years or more and one of the additional sanctions in the form of deprivation of profits and/or assets obtained from the Crime of Sexual Violence with a note that this additional sentence does not apply to capital punishment and life imprisonment.

3.2 Progressive Legal Dimensions in Formal Criminal Law in Cases of Sexual Violence

Progressive law is a legal concept that is not limited to the concept of the text of the Law alone, but also pays attention to the sense of justice that lives in society. Despite this, as Immanuel Kant and Montesquieu opined that there is no agreement about the law that should be open to an age, even other legal schools of thought state that judges are just funnels from the law (*mouth of the law*).¹⁵ Problems related to sexual violence are often difficult to uncover because of the bad paradigm and stigma in society towards victims of sexual violence. This must be coupled with the fear and embarrassment for victims and the difficulty in accessing legal protection when sexual violence occurs.¹⁶ In addition, the criminal justice system greatly influences the effectiveness of handling cases of sexual violence.¹⁷ The criminal justice system also relies on formal legal substance. Formal criminal law is the law that is used to enforce when there is a violation of material criminal law.¹⁸ Various risks experienced by victims of sexual violence are also reasons for victims not to report cases of sexual violence they experience, even if the victim reports to a sexual violence assistant, the possibility of the victim's reluctance to attend examinations and so on to reach the criminal stage against the perpetrators experiences many challenges. The process of examining victims of sexual violence must be carried out carefully to pay attention to the victim's condition, minimize repeated trauma, as well as other inconveniences including the victim's fear of reporting to sexual violence assistants.

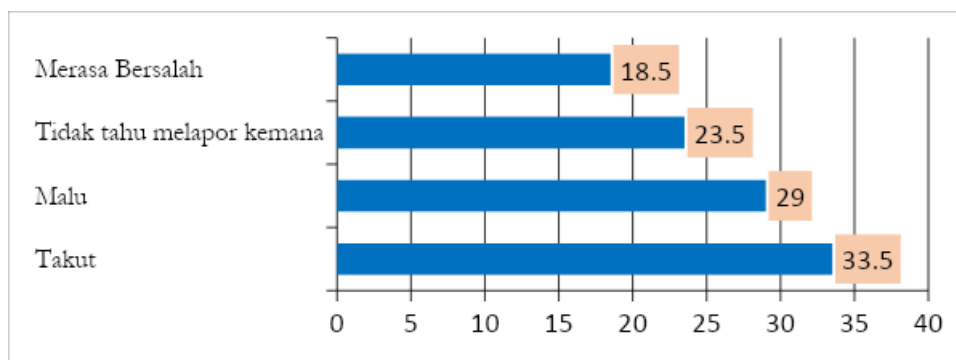
Diagram 1. Victim's Choice of Right to Report

¹⁵ Munir Fuady, *Critical Law School, Legal Powerlessness Paradigm* (Bandung: Aditya Bahkti, 2003).

¹⁶ Orin Gusta Andini, "The Urgency of Lpsk Involvement in Handling Cases of Sexual Violence in Higher Education," *National Law, Social and Economic Seminar (2022 Sanctions)*, 2022, 119–28.

¹⁷ Deborah Richards b Syeda Hashmi MD c and J. Paul Fedoroff A, "A Descriptive Analysis of Sentencing Decisions by the Canadian Criminal Justice System of People with Intellectual Disabilities Convicted with Sexual Offences," *International Journal of Law and Psychiatry* 78 (2021), <https://doi.org/https://doi.org/10.1016/j.ijlp.2021.101730>.

¹⁸ Vivi Ariyanti, "Law Enforcement Policies in the Indonesian Criminal Justice System," *Juridical Journal* 6, no. 2 (2019): 33–46, <https://doi.org/https://doi.org/10.35586/jyur.v6i2.789>.



Source: Survei Barometer IJRS & INFID, 2022

Based on IJRS 2022 data¹⁹ 57.3% of victims of violence chose not to report cases of sexual violence they experienced, while the reasons for victims to do so were based on several reasons, the most common of which was fear. Fear of victims can be triggered by various things, lack of support from family and environment, re-victimization, and other causes of fear are being reported for defamation charges or criminal acts of defamation. Sexual violence occurs not only as a result of sheer desire but because of an imbalance of power relations between the perpetrator and the victim. Power relations open space for abuse of power and threats against victims, so that victims tend to be powerless or afraid to ask for help. On the other hand, the psychological aspect of the victim also needs to be understood and paid attention to, this is very influential in the process of handling sexual violence, the victim's consideration of fate, public opinion and threats, forces the victim to think long and hard about the decisions they experience, often forcing the victim not to report violence experienced by the authorities. This situation often causes victims of sexual violence to choose not to resolve cases of sexual violence and avoid the criminal justice process. The choice of settlement made by the victim had another impact, namely the perpetrator who carried out the counterattack (*fight back*) against the victim by accusing the victim of defamation. According to Chairul Huda, defamation is a group of criminal acts, one of which is insult. Another criminal act included in the defamation group is slander.²⁰

With the existence of the TPKS Law, it is hoped that the formal legal dimension which has been an obstacle in the criminal process can find a solution in proceedings. The TPKS Law regulates the substance which confirms that the testimony of the witness-victim, supported by one other valid piece of evidence, constitutes valid evidence. The following table shows a comparison of the Criminal Procedure Code and the TPKS Law.

Table 3. Evidence of the Criminal Procedure Code & the TPKS Law

Criminal Procedure Code	UU TPKS
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¹⁹ Indonesia Judicial Research Society, "The Majority of Cases of Sexual Violence Do Not Get Resolution," 2021.

²⁰ Orin Gusta Andini, "Review of the Law of Defamation Against State Officials: Study of Judge's Decision Number 341/Pid.B/2014/PN.SGM," *Journal of Legal Discourse* 25, no. 2 (2019): 44, <https://doi.org/10.33061/1.jwh.2019.25.2.3002>.

Witness Statement	Evidence in accordance with the Criminal Procedure Code
Member Statement	Electronic evidence of information and/or documents
Letter	Evidence used to commit a crime
Instruction	
Defendant's Statement	
Electronic evidence as in the Electronic Information and Transaction Law	

Source: author analyss

The comparison table shows that valid evidence in proving a case is evidence as referred to in the criminal procedure law, other evidence in the form of electronic information and/or electronic documents as regulated in the provisions of laws and regulations, evidence used to commit a crime or as the result of the Crime of Sexual Violence and/or objects or goods related to the crime. Including evidence of witness statements, namely the results of examinations of witnesses and/or victims at the investigation stage through electronic recording. Legitimate evidence in proving TPS cases, especially letters, reaffirms that a certificate from a clinical psychologist/psychiatrist, or a psychiatrist specialist, medical records, forensic results, and bank account examination results have evidentiary power. Statements of Witnesses and/or Victims with Disabilities have the same legal force as statements of Witnesses and/or Victims who are not with Disabilities. The testimony of witnesses and/or victims is sufficient to prove that the defendant is guilty, provided that it is accompanied by 1 (one) other valid evidence and the judge obtains confidence that a crime has actually occurred and it is the defendant who is guilty of committing it. Especially in the aspect of formal criminal law which so far has shackled substantive justice. The following is described in the table regarding comparative evidence of the TPKS Law and the Criminal Procedure Code.

The family of the accused can testify as a witness under oath/pledge, without the consent of the defendant. The TPKS Law also provides layered protection that criminal cases of sexual violence cannot be settled outside of the judicial process, except for child offenders. This means that cases of sexual violence do not have the potential to be resolved through restorative justice.²¹ Article 69 letter g, Victims and/or reporters of criminal charges or civil lawsuits for sexual violence crimes that have been reported have the right not to be prosecuted criminally and not be sued civilly for reports of sexual violence crimes or this protection also applies to families of victims and companions of sexual violence . From the

²¹ Orin Gusta Andini, Nilasari Nilasari, and Andreas Avelino Eurian, "Restorative Justice in Indonesia Corruption Crime: A Utopia," *Legality Scientific Journal of Law* 31, no. 1 (2023): 72–90, <https://ejournal.umm.ac.id/index.php/legality/article/view/24247/12233>.

formal or procedural law aspect, the TPKS Law provides a breakthrough and affirmation which has been an obstacle to the law enforcement process in cases of sexual violence.

4. Conclusion

The progressive legal dimension in regulating sexual violence crimes is reflected in material criminal laws that regulate forms of sexual violence in accordance with the times, as well as formal criminal laws relating to evidence. The progressive legal dimension in regulating criminal acts of sexual violence in Indonesia through what is contained in Law Number 12 of 2022 concerning Crimes of Sexual Violence has uncovered the veil of law which so far has failed to achieve substantive justice because it is trapped in material and formal criminal law rules that are procedural in nature and formalistic handling of cases of sexual violence.

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