REFORMING INDONESIAN RAPE LAW: ADOPTING U.S. RAPE SHIELD LAW IN EXCLUDING PREJUDICIAL EVIDENCE

Choky R. Ramadhan*

* Faculty of Law, Universitas Indonesia

Article Info
Received : 10 April 2017 | Received in revised form : 21 March 2018 | Accepted : 31 March 2018
Corresponding author's e-mail : chokyramadhan@gmail.com

Abstract
Rape is a complex crime in terms of law enforcement and is usually perpetrated by somebody who has a close relationship or connection to the victim. The availability of evidence is usually limited. Unfortunately, law enforcement officials and the justice system often poorly deal with victims of sexual violence. There have been several cases in which a judge undermined a victim’s testimony because of the victim’s sexual history and purported lack of resistance during the rape, leading to a lenient punishment for or acquittal of the defendant. Therefore, I assert that rape law should be revised to minimize the involvement of a judge’s prejudice or bias with regard to certain forms of evidence. I suggest that Indonesia could learn from the introduction of a rape shield law in the U.S., which protects sexual violence victims from being cross-examined in court about their sexual history. This law encourages victims to report a sexual crime and increases the probability of a conviction because it excludes from court accounts of the victim’s sexual history and inability to resist the attack.

Keywords: Rape, Criminal Law, Criminal Procedure

Abstrak
Perkosaan merupakan kejahatan yang rumit dalam hal penegakan hukum. Kejahatan ini biasanya dilakukan oleh seseorang yang memiliki hubungan dekat dengan korban. Ketersediaan bukti juga terbatas. Sayangnya, korban perkosaan yang mengalami kekerasan seksual seringkali tidak mendapatkan penanganan yang layak dari penegak hukum. Dalam beberapa kasus, hakim menilai rendah keterangan korban karena riwayat seksual korban dan ketiadaan perlawanan yang mengarah pada hukuman rendah atau justru membebaskan terdakwa. Oleh karena itu, saya menegaskan bahwa pengaturan mengenai hukum dalam kejahatan perkosaan itu seharusnya direvisi untuk meminimalisir prasangka dan/atau bias hakim dalam pembuktian. Saya menyarankan bahwa Indonesia dapat mempelajari hukum pemeriksaan di Amerika Serikat yang memberikan perlindungan lebih kepada korban kekerasan seksual. Hukum ini mendukung korban untuk melaporkan dan menyinggalkan probabilitas penghukuman karena mengeluarkan riwayat seksual korban dan ketiadaan perlawanan korban.

Kata Kunci: Pemeriksaan, hukum pidana, acara pidana

DOI : http://doi.org/10.15742/ilrev8n1.383
I. INTRODUCTION

Recently, there have been numerous news reports of rape attacks occurring across Indonesia. The National Commission on Violence Against Women (Komnas Perempuan) reported that the greatest proportion of sexual violence committed against women was accounted for by rape cases.\(^1\) Between January and June 2015, 34% of news items from nine media sources publicized rape cases.\(^2\) In February 2016, news shocked the nation when it was reported that a woman was raped by three men in Central Java. Another rape case that occurred in Palembang has horrified the entire country; a 14-year-old girl was brutally attacked and repeatedly raped by 14 sexual predators.\(^3\) Tragically, the perpetrators strangled the victim to death, and one of the perpetrators raped her even after she was dead.

Komnas Perempuan’s annual report records that over the past three years, rape has been the most common form of sexual violence committed against women. There were 2,399 (72%) rape cases reported in 2015.\(^4\) This is an increase from the two previous years—2,183 (56%) rape cases in 2014\(^5\) and 1,074 (23%) in 2013.\(^6\)

The general public has expressed grave concerns over the threat posed to society by such extreme rape violence. There have been increasing demands to severely punish rape perpetrators. The government has responded to public demand by revising the Child Protection Law to increase the severity of punishment for rapists. In September, the revision received approval from the legislature.\(^7\)

Under this law, the crime of sexual intercourse with a child carries a minimum sentence of 10 years imprisonment. This law also provides further penalties for recidivist rapists after their release, including chemical castration and monitoring by

---


2 Ibid., p. 46.


tracking device. The majority of the public agrees with these heavier punishments proposed by the government with 85% of respondents finding the minimum sentence to be fair and 60% supporting chemical castration.

However, several Non-Governmental Organizations criticized the measures, arguing that chemical castration as a type of corporal punishment is outdated and conflicts with the United Nations Convention against Torture. Moreover, the Indonesian Doctors Association (IDI) rejected the scientific premise of chemical castration. The Association issued a letter to its members, requesting them to refuse to participate in the practice of chemical castration. In support of their stance, IDI pointed out that sexual desire does not necessarily decrease after chemical castration.

In agreement with these concerns, the author further argues that increasing the severity of the punishment will not by itself reduce sexual violence. Instead, crimes of sexual violence could be reduced if the probability of apprehension and the conviction rates were high. The law enforcement system has difficulties in prosecuting all rape cases. In 2014, the Attorney General Office reported that its prosecutor could only take on 92 of the 281 (32%) rape cases. Moreover, 74 of those 92 cases were still undergoing a trial process and had not yet been decided by the judge. The prosecution’s performance in handling rape cases has not significantly improved. In 2015, the number of rape cases successfully prosecuted stood at 98 out of 283 (34%).

In addition, the new law providing harsher punishment will only apply to instances of rape in which the victim is a child. However, women are still not fully protected by the rape law. In exercising the law, agents of the justice system such as the prosecutor and judge often manifest biased opinions against women. This situation has prevented women, especially rape victims, from being granted equal protection.

---

12 Ibid.
Nurtjahyo identified four conditions that burden sexual assault victims. First, the victim is occasionally demanded to present witnesses, which are rarely available in rape cases. Second, the victim is asked to prove that she resisted the act of sexual intercourse. Third, there are limits to the forms of sexual violence that are regulated by the Indonesian Penal Code. Fourth, the justice system perceives all sexual intercourse as a predominantly consensual act.

The focus of this paper is to discuss potential policy reforms for dealing with rape crime, to tackle systemic prejudice against female victims by the justice system, especially with regard to the current requirements for women to discuss their sexual history in court and to prove that they were unable to resist the rape. Judges are too dependent on social custom when considering a victim’s credibility. Unfortunately, there is significant disparity in rape conviction rates between cases where the victim is considered a virgin and those where she is not. Also, the judge often considers evidence of the extent to which the victim resisted, whether verbally or physically, the rape. The judge scrutinizes the victim’s evidence of resistance to prove that sexual intercourse was forceful and against the victim’s will.

Under the Indonesian Penal Code (“the KUHP”), rape is defined as an act of forcefully sexual intercourse carried out by a man against a woman who is not his wife. According to the KUHP, it does not constitute rape if the forcibly sexual intercourse was conducted by a woman against a man. Moreover, same-sex rape and marital rape are similarly not considered as rape in the eyes of Indonesian law. This description will be useful as a guide to the reader in understanding the scope of rape law in Indonesia.

Considering the above, I assert that a revision of Indonesian rape law should be concerned with not only increasing punishment but also providing guidance to the agents of law enforcement to ensure that they handle sexual violence cases more effectively and sensitively. Indonesia could learn from the rape shield law, which originated in the U.S. and does not permit any discussion of the victim’s sexual history in court or require the victim to prove that they resisted the attack. This protection arguably could reduce the systemic prejudice of the justice system that currently

---


23 Article 285 Indonesia Penal Code

discriminates against female victims. Consequently, victims would be protected from the distress and trauma of having their character questioned while giving their testimony.

This paper analyzes several court decisions on rape cases to assess the performance of law enforcement representatives, especially judges, in handling sexual violence. The author explores the practice of “victim blaming” carried out by judges: in part one, by considering how judges deal with the victim’s sexual history, and in part two, by looking at the judges’ responses to the victim’s accounts of their inability to resist. Following that, the author explains the judge’s response to a victim’s sexual history where it resulted in lenient punishment, based on both a quantitative and qualitative analysis of the court’s decision. Then, the author describes a number of court decisions from both Indonesia and the U.S. in which it was reported that the victim was unable to prove they had resisted sexual intercourse, and therefore, the element of force as required by rape law had not been proven. Next, the author explains the U.S. experience of rape shield law by describing its history, features, and implementation. In conclusion, the author recommends that rape shield law should be adopted in revising rape law in the Indonesian Penal Code to improve the justice system’s handling of rape cases.

II. VIRGINITY AND SEXUAL HISTORY

In sexual violence cases where law enforcement representatives, in particular the judges, blame the rape victim, it can be argued that they are not acting impartially. As all human beings are, law enforcement representatives are subject to the influence of any prejudice that exists in society. In many societies, including Indonesia, a woman is still labeled as a “… person who has a seductive body and [will] always be blamed [sic] as a significant cause of any sexual crime such as prostitution, rape, pornography, etc.”

In discussing commonly known rape myths, Helen Benedict describes some misconceptions regarding the victims, such as “women provoke rape,” “women deserve rape,” and “only loose women are victimized” [emphasis added]. All of those myths condemn the woman for her rape, and blame it on her appearance, actions, or attire. It is easy to see why the general public believes that rape is justifiable since these myths perpetuate the idea that women can prevent rape by behaving “properly.”

Such gender stereotyping in the question of rape is not only common practice among lay people but also with high-ranking officials and some academics. In 2011, the former governor of Jakarta accused a girl because she wore a mini-skirt on angkot (public transportation). A similar accusation was also made by the former

28 Ibid.
29 Yuli Saputra, "Kenapa perempuan korban pemerkosaan selalu disalahkan? [Why the women of rape
Ironically, some academics also assert the same perspective. Arif Gosita, for example, proposes that the potential rape victim (a woman) should be responsible for preventing rape: the potential victim needs to be given instruction on what behavior is acceptable, or when is it safe to venture outside and where is she permitted to venture. Compounding these social attitudes, some Indonesian judges also agree with these assumptions. Regrettably, those prejudicial perceptions are frequently taken into consideration by the judge in court.

A. Virginity Concept

Social constructs remarkably influence women’s sexuality. In a patriarchal society, every aspect of society—values, government, or mores—is controlled by men. Man, for example, is justified in displaying aggressive sexual behavior. On the other hand, it is not appropriate for a woman to display aggressive sexual conduct. Religion also has a role in shaping social values about sexuality, especially virginity “... as something that is akin with innocence, purity and chastity and most religions expect that it is something that should be reserved for marriage.”

Historically, a woman is viewed as the property of a man, either her father or husband. Rape law originally regulated to protect man’s property so it would not be stolen. Under this concept, a rapist steals a woman’s virginity, which is viewed as the most valuable object possessed by a father before it is transferred to a husband.

In Indonesia, the majority of the public perceives the loss of virginity before marriage to be taboo and it brings shame upon transgressors. However, a survey found that 62.7% of junior and senior high school students are not virgins. 


Ibid.


Ida Ruwaida Noor, “Relasi Seksual dan Isu Gender [Sexual Relation and Gender Issues],” in Seksualitas: Teori dan Realitas [Sexuality: Theory and the Reality], Irwan M. Hidayana et. al. (Depok: Program Gender dan Sekualitas FISIP UI, 2004E


Ibid.


Mustiana Lestari, Cinta Tidak Sebatas Selaput Dara [Love is not limited to the hymen], October 15, 2014, https://www.merdeka.com/khas/cinta-tidak-sebatas-selaput-dara-arti-keperawanan-1.html, ac-
claims that virginity exists in two states: (1) a physical state that is defined by either “hymen intact” or “never experiencing sexual intercourse”; and (2) a moral or spiritual state, which is connected to “a quality of the spiritual relationship with God.”

Some people misguidedly consider the loss of a woman's virginity to be marked by the bleeding that often (but not always) occurs after breaking her hymen upon consummation of a marriage by sexual intercourse. A woman, for example, might be worried that her potential husband would despise her because she loves horse riding. Some doctors argue that tears in the hymen could not ascertain virginity. Dr. Heru Oentong asserts that a woman's hymen could be impaired for non-sexual reasons, such as extreme sports or an accident. Hegazy and Al-Rukban also argue that bleeding of the hymen does not always occur after the first experience of sexual intercourse. Then, they asserted the following:

Other causes of hymenal rupture, other than sexual intercourse include vaginal insertion of objects such as tampons and digits, vigorous sporting activities, surgical procedures and falling on sharp objects.

A woman's loss of virginity is also perceived as being the first act of sexual intercourse, regardless of whether bleeding occurs or not. Most people reserve their virginity for his or her life partner, and we cannot dictate who their life partner will be. Some people may consider their special one to be the person in his or her marriage; however, other people who will not get married will consider this person to be his or her partner.

Under the Indonesian Penal Code, which was inherited by the Dutch during the period of colonization, the rape crime provision is as follows:

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.

According to this provision, a perpetrator could only be charged if he engages in (1) sexual intercourse, the intrusion of a penis into vagina, with a woman other than his wife; and (2) by using physical force or the threat of physical force. This concept privileges the virginity concept because the lawmaker and law enforcement representatives assume the woman will reserve her virginity for her husband and would refuse or resist any other form of sexual intercourse, so the perpetrator must enact the crime by use of physical force or the threat of physical force.

Arguably, in law and custom, the rape victim is not considered to have lost her

---


43 Ibid.


45 Ibid.

46 Stephanie, “Losing your virginity”

47 Ibid.

48 Article 285 Indonesian Penal Code
virginity if she is raped before having chosen to lose her virginity. Augustine excused a woman who was raped as a non-virgin. His view was influenced by the suicide of Lucrecia who was a rape victim.\textsuperscript{49} Excusing virginal rape victims from the stigma of having lost their virginity before marriage is reasonable because a woman’s first sexual intercourse should be voluntary. Stephanie states that the victim “… was raped as a virgin rather than [she] lost [her] virginity to rape.”\textsuperscript{50}

The basic definition of rape should be described to let us understand why a woman’s virginity or sexual history is not a factor requiring scrutiny. Since Roman Law, rape has been considered primarily a crime of assault.\textsuperscript{51} Regardless of the victim’s virginity or sexual history, rape is still an assault on someone’s body that potentially causes physical and mental damage or injury. Sri Nurherawati even asserts that rape is more than an assault because it damages the victim’s pride as well as the body.\textsuperscript{52}

B. Judicial Reasoning on Virginity or Sexual History

Women’s virginity and previous sexual history are frequently scrutinized by the Indonesian criminal process. The examination of both aspects is carried out predominantly by way of negative labeling of the woman. Unfortunately, the judge sometimes takes on board this biased perspective when deciding his or her opinion in court, and in this article, the author has been arguing that such bias could bring injustice upon the victim.

Indonesia’s Court Monitoring Society (MaPPI FHUI)’s researcher found that the judge tended to mete out a lenient punishment to the defendant if the victim was not a virgin at the time when the rape occurred.\textsuperscript{53} In 14 cases where the victim had had sexual intercourse before the rape, the average punishment was 3.6 years’ imprisonment. However, the average punishment of defendants across 27 cases who raped a “virgin” was a six-year prison sentence.

Moreover, Bela Annisa illustrates three cases whose judge used the victim’s virginity and previous sexual history to exonerate the defendants. Also, there are two cases in which the defendant was given a lenient punishment because of the nature

\begin{itemize}
\item Wallace, “Jeopardized Virginity,” p. 36.
\item Stephanie, “Losing your virginity”
\item Eileraas, “Rape, Legal Definitions of.”
\item Ramadhan, “Asesmen Konsistensi Putusan”
\end{itemize}
of the victim's sexual history. During cross-examination, the judge weighed in on the victim's behavior and sexual history.

In Putusan No.28/Pid.Sus/2013/PN.PWR, the victim's boyfriend forced her to engage in sexual intercourse in exchange for money. The judge acquitted the defendant because of the victim's sexual history. She had had sexual intercourse four times with her boyfriend. The judge also considered her former experience in receiving money after being raped before.

Moreover, the judge set the defendant free in case No.74/Pid.B/2008/PN.KPG. The court focused on revelations that the victim had an affair with the defendant and a child out of wedlock. The victim was bleeding and wounded because of the perpetrator's act; nevertheless, these facts could not convince the judge to put the perpetrator behind bars.

Lastly, the judge decided that the defendant was not a rapist and acquitted him in Putusan No.35/Pid.B/2012/PN Marisa and MA No.10/K/PID/2013. This was because the sexual intercourse between the victim and defendant occurred several times. The judge expressed the opinion that the victim should have reported the rape when it happened the first time. The victim's relationship with the defendant was also weighed up; in short, the judge determined that the sexual intercourse must have been based on their mutual consent. In fact, the victim had been threatened with violence and choked before the defendant forced sexual penetration.

In some cases, the victim's sexual history resulted in lenient punishment for the defendant. In case 1390/Pid.B/2012/PN.LP (Lubuk Pakan) and PK No.30/PK/Pid/2010, for example, the victim had been presented to the court as a bad woman because she was not a virgin and had had sex with her boyfriend. Moreover, the victim's drinking behavior added to the court's stereotyping of the victim as a “bad woman.” Hence, the judge meted out a mere five-month imprisonment to the defendant. The judge also gave a five-month imprisonment to the defendant in case No. 562/Pid.B/2014/PN.SIM. During the relationship between the defendant and the victim, the defendant had sexual intercourse with the victim. This fact influenced the judge to mete out a lenient punishment.

Those examples show that Indonesian judges have repeatedly taken into consideration the sexual history of the victim when deciding on the criminality of the defendant. As has been demonstrated above, a woman's sexual history could be weighed as evidence to prove a rapist’s guilt, or, it could offer consideration to the judge to give the defendant lenient punishment. This prejudicial treatment of evidence arguably disadvantages the victim against reporting any rape crime that occurs against her.

III. FORCE AND THREAT OF FORCE IN RAPE CASES

The definition of rape in the Indonesian Penal Code is comparatively similar to rape in common law. Under the Indonesian Penal Code, rape is forcefully sexual intercourse

---

54 Bela Annisa, “Penafsiran Unsur”
55 Purworejo District Court, “Decision No. 28/Pid.Sus/2013/PN.Pwr”
56 Kupang District Court, “Decision No. 74/Pid.B/2008/PN.KPG”
57 Bela Annisa, “Penafsiran Unsur”
58 Simalungun District Court, “Decision No. 562/Pid.B/2014/PN.SIM”
acted out by a man with a woman who is not his wife. Based on Commonwealth v. John Burke, rape in common law had been defined “… as the having carnal knowledge of a woman by force and against her will.”

One of the fundamental elements of Indonesian rape law is “force” or “threat of force” as an event that precedes the sexual intercourse. That element of rape crime needs to be proved to convict the perpetrator. Those are used to coerce the victim to fulfill rapist’s lust. The victim arguably involuntarily conducts sexual intercourse because of force, either through the rapist’s use of a weapon or bare hands, or through verbal threats.

In examining force or the threat of force, the Indonesian judge is influenced by several law scholars. Unfortunately, most scholars restrictedly define force or the threat of force, so its consequence is limited to physical injury. The police were influenced by two scholars who were also police officers, R Soesilo, and Dading.

R. Soesilo commented on force as it features in Article 89 of the Indonesian Penal Code, which describes physical power, such as battering or kicking. He explained that some acts could be considered as being a kind of force where the consequence of the act could make someone pass out or incapable of resisting. A perpetrator, for example, gives a drink or drug to the victim to make them unconscious. In addition, the perpetrator locks the victim in a room or ties the victim’s hand with a rope; consequently, the victim is unable to resist. In addition, former Brigadier General of Indonesian Police, Dading, limitedly explained force as a physical force to a woman. He also commented that the victim must resist countering such force.

Force has been broadly defined by contemporary feminist intellectuals. Elli, for example, explains that force is a structure or a treatment that constructs the physical and mental condition of the inequality of woman. This condition costs women across various aspects of her life. Nursyahani argues that violence against women should be perceived as a result of the unequal social relations between state and citizen, and also between men and women. Those arguments are supported by The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

Because of the Indonesian justice system’s limitations in its interpretation of the

---

61 P.A.F. Lamintang, Delik-delik Khusus: Tindak Pidana-Tindak Pidana Melanggar Norma-Norma Kesusilaan dan Norma-Norma Kepatuhan, (Bandung: Mandar Maju, 1990), p. 113
63 Ibid.
66 Nursyahani Katjasungkana & Mumtahanah, Kasus-kasus Hukum Kekerasan Terhadap Perempuan: Sebuah Drama tentang Patriarki dan Dominasi Laki-laki (Seri 1) [Violence towards Women Legal Cases: A Dramaon the Patriarchy and the Men’s Dominance (Series 1), Jakarta (LBH Apik Jakarta, 202), p. 6.
element of force, Munti argues that rape law would be hardly expected to indict rape cases in the case of submissions (ketundukan), such as a boss to his staff, or a teacher to his student.\textsuperscript{68} Rape is also unique in that "... because of the sex and socialization of the victim, it may require less force and generate less resistance."\textsuperscript{69} Sexual assault does not only occur in the form of physical force, but also in the form of exertion, intimidation, or submission.\textsuperscript{70} In addition, the World Health Organization states that sexual violence potentially occurs when the victim cannot give consent voluntarily, such as if drunk, asleep, or in the case of mental retardation.\textsuperscript{71}

Next, I will illustrate the judicial reasoning on the element of force or threat of force both in Indonesian and U.S. courts. This explanation shows that the force element was and is still being examined at trial. We could also learn from court decisions that discuss the element of force. In that way, the explanation will support the reformation of rape law to exclude the requirement for a demonstration of resistance in proving an element of force having been used.

A. Judicial Reasoning on Force or Threat of Force in Indonesia

There are two interesting Indonesian court decisions discussing the element of force. In case \textit{Nomor 110/Pid.B/2013/PN.SKG} (Sengkang), the perpetrator entered the victim's room and covered her face with a pillow until she was unconscious. Then, the defendant engaged in sexual intercourse with the victim twice. He was convicted guilty of rape and sentenced to four years' imprisonment.\textsuperscript{72}

However, a judge dissented that there was a lack of supporting evidence to prove the element of force. The dissenting judge did not believe the victim's testimony. He disregarded her testimony because the victim was unchaste, one of the irrelevant factors that I criticized above. Because of this factor, the judge argued that the sexual intercourse had been consensual and therefore lacking an element of force.\textsuperscript{73}

Recently, a Bengkulu District Court judge broadened the interpretation of force in the case of \textit{Nomor 410/Pid.B/2014/PN.Bgl}. In this case, the victim lost her virginity to the perpetrator after he had promised to marry her. She asked the perpetrator twice not to leave her if she agreed to have sex with him. The defendant, however, stopped contacting and meeting the victim a month after engaging in sexual intercourse.

The majority of judges interpret force as including seduction. So for example, by promising to marry her, the perpetrator in \textit{Nomor} enticed his victim into sexual activity. The judge viewed this hollow promise to bear similar consequences as physical force. The promise that he would marry her created a condition in which the victim was intimidated and unable to resist. The judge also recognized that physical force is almost absent in rape cases where perpetrator has had a relationship with


\textsuperscript{72} Bela Annisa, "Penafsiran unsur".

\textsuperscript{73} \textit{Ibid.}
the victim.

B. Judicial Reasoning on Force or Threat of Force in the U.S.

In *Rusk v. State*, the judge decided that force is the fundamental element of rape crime. The defendant was acquitted by the judge because there was a lack of evidence supporting an element of force. The victim was invited to come into the perpetrator’s house while she was driving him home. After arriving at his house, the perpetrator took the car key so the victim could not drive away. Then, she decided to respond to his invitation by coming into his house even though she had refused it before. Inside the house, the perpetrator pulled her to the bed, took off her clothes, and raped her.

The judge stated that the victim could not prove her resistance or struggle. Therefore, the sexual intercourse was viewed by the judge as voluntary. The judge also considered the fact that the victim did not yell to indicate that she did not consent. Moreover, the judge also considered a slight choke and frightening look were not sufficient reason for the victim’s fear that she claimed led to an inability to resist the actions of the defendant. The judge’s opinion referred to *Hazel v State*, which required proving the element of force to determine that the perpetrator was guilty. The resistance of the victim arguably proves that the victim is forced to engage in sexual intercourse.

Judge Willner dissented from the majority opinion by arguing about verbal resistance or refusal. He claimed that the victim’s failure to resist or run was justifiable because she was unfamiliar with the perpetrator’s neighborhood, and the perpetrator possessed her car key. Wilner, interestingly, cited research that only 12.7% of rape victims physically resist. Most victims do not resist out of fear of physical injury and being beaten by the perpetrator. There are studies showing that 71% of rape victims received physical injuries because they fought back, and 40% of those were hospitalized.

In *Commonwealth v. Berkowitz*, an element of forcible compulsion was also required by a judge to successfully convict the perpetrator of rape. The victim verbally resisted saying “no” to the perpetrator. The judge, however, considered that verbal resistance was not sufficient because it did not meet the standard set by *Commonwealth v. Rhodes*. In that case, there are several standards to determine compulsion, such

- [1] the respective ages of the victim and the accused;
- [2] the respective mental and physical conditions of the victim and the accused;
- [3] the atmosphere and physical setting in which the incident was alleged to have taken place;
- [4] the extent to which the accused may have been in a position of authority, domination or custodial control over the victim; and
- [5] whether the victim was under duress.

---

75 Ibid.
77 Ibid.
In 1992, the New Jersey Supreme Court judges had a more progressive perspective regarding the element of force in a rape case. They held that any sexual intercourse without the victim’s consent is rape, in *New Jersey in the Interest of M.T.S.* This decision recognizes verbal resistance as non-consent of the victim. Moreover, the victim’s behavior could provide a measure of her resistance to engage sexual intercourse. The judge also realized that rape crime mostly occurs with someone who is close to the victim, in which case they rarely use force to initiate sexual intercourse.

IV. LEARNING FROM U.S. RAPE SHIELD LAW

The criminal justice system, ideally, gives the victim a role in the criminal process to support law enforcement in investigating and prosecuting the perpetrator. The victim can report a crime to police; thus a person who commits a crime can be arrested to guarantee a safe society. Moreover, a victim’s testimony should be heard to expose the facts of a crime so the judge can establish the facts-based truth (*kebenaran materi*). Unfortunately, those rights potentially affect the negative side. Muladi recognizes that the defendant or its defense counsel might savage the victim. The victim is also likely to bear the “risk of secondary victimization.”

Above, I described two important circumstances that lead to unfair prejudice in prosecuting sexual assault cases. These are a woman’s (1) sexual history; and (2) absence of resistance, which brings disadvantages upon the victim. This situation dissuades the victim from reporting rape crime because of being “afraid of being retraumatized by the legal system.” Consequently, rape has become “one of the most underreported and under-prosecuted of crimes.”

Law enforcement representatives and the defendant (or his counsel) also frequently scrutinized the victim’s credibility in U.S. cases. Then, in 1975, rape shield law was enacted to address those problems. Fundamentally, rape shield law excludes the victim’s previous sexual history from court because it is not relevant to prove the occurrence of rape. At that time, the reform of rape law was only regulated in Michigan, which was claimed as “the most important model for reform.”


81 Ibid.

82 Ibid.


84 Ibid., p. 87

85 Ibid.

86 Ibid.


88 Ibid.


90 Garvin, Wilkinson and LeClair, “Excluding Evidence”

Subsequently, Michigan’s rape shield law became a model for reforming rape law across the U.S. In 1977, North Carolina followed Michigan in excluding the victim’s past sexual behavior in a rape case. Currently, rape shield law is adopted by all states and by the federal government after 20 years since its enactment. Rape shield law does not only apply in the U.S. but also in several other countries. Canada, for example, passed rape shield law in 1982 even though its scope was later narrowed in 1991. A Canadian High Court judge decided that the victim’s past sexual history could only be excluded as evidence to the judge’s discretion. This model, of permitting the judge’s discretion when deciding whether to exclude past sexual history, has also been applied in Ireland since 1981.

A. Rape Shield Law Feature

Rape shield law would ideally address two biases: sexual history and proof of resistance, which frequently creep into the criminal process in Indonesia. In the U.S., several states have reformed their law progressively, such as Michigan and Pennsylvania. Both states removed the requirement for proof of resistance, in order to protect the victim’s interest. In rape crime, the perpetrator does not always use force; thus proof of the resistance of the victim is rarely available. Proof of resistance is arguably absent in rapes where the victim has been intoxicated. A victim might not resist because of fears for her survival.

There are four classifications of rape shield law according to Harriet Galvin. First, rape shield law as influenced by the Michigan model that eliminated the prior sexual history of the victim from evidence. This could be admissible as evidence only if the defendant makes an offer of proof at an in camera hearing. Before determining the admissibility of evidence, a judge will examine the evidence without the presence of

---


96 Ibid.
101 Ibid.
the parties. After being determined as admissible evidence, the parties could look at the evidence.102

Second, the Arkansas type of rape shield law does not ban accounts of the victim’s past sexual history.103 The evidence, regarding past sexual history, needs to be determined by a judge at an in camera hearing.

Third, federal rape shield law does not disregard a previous sexual history between the victim and defendant for proving consent. Moreover, a victim’s past sexual history with others is also admissible to show that “... physical evidence of sexual assault is not attributable to the defendant.”104

Fourth, there is the California model, which determines that a victim’s sexual behavior relates to their credibility such that possible acts of false reporting have to be taken into account, and so the victim’s sexual history is admissible as evidence, but the issue of proving consent is inadmissible.105 The inclusion of the victim’s sexual history as a means to attack the victim’s credibility was criticized as “... ambiguous and [it was] feared that the exception would swallow the rule.”106

B. The Implementation of Rape Shield Law

Following the implementation of rape shield law in the U. S., certain interesting consequences are worth considering to learn from the U.S. experience. The proponents of rape shield law argued that it would encourage more victims to report rape because they would no longer fear having their sexual history exposed to the public.107 Ronet Bachman and Raymond Paternoster found those arguments convincing by examining NCVS’ violent crime victimization data from 1973 to 1990.108 They state that “… there was a 28% increase in rape victims who reported to the police from 1980 to 1990.”109 Rape shield law also aims to convict more rapists because it excludes several pieces of evidence that potentially acquit perpetrators such as the victim’s previous sexual history and lack of resistance.110 Since 1981, there has been a 200% increase of arrested rapists who were imprisoned.111

Those findings have been supported by Cassia C. Spohn & Jule Horney who also examined the trial reports of rape crime before and after rape-reform periods.112 They examined trial records from 1970 to 1984 in six jurisdictions in Detroit.113 They reported that there was a 17.6% to 24.4% increase in rape cases handled by

---

102 Garvin, Wilkinson and LeClair, “Excluding Evidence”
104 Ibid., p. 1249.
105 Ibid., p. 1250.
108 Ibid.
109 Ibid., p. 566.
110 Ibid., pp. 567-568.
111 Ibid.
113 Ibid.
the court.\textsuperscript{114} Regarding conviction rates, their report also supported Bachman and Paternoster finding that there was a significant change in conviction rate on rape crime, from 16.7\% to 50.0\%\textsuperscript{115}.

The victim, however, is still potentially attacked by the defense attorney at court regarding the truthfulness or untruthfulness of a witness.\textsuperscript{116} In rape cases, the only witness is often the victim.\textsuperscript{117} As Chief Justice Sir Matthew Hale popularly stated in 1680 “[rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”\textsuperscript{118}

A victim’s credibility would be at stake if she had made a false allegation against the suspect in the past. Moreover, a victim who recanted her complaint would have her credibility undermined.\textsuperscript{119} Brett explains two reasons that construct this perception; first, the public views false allegations as a recurring issue that should be addressed in a trial, and second, some jurisdictions acknowledge a recantation as evidence because of the presumption as it was a false allegation, it led the victim to recant her claim.\textsuperscript{120}

Nevertheless, the reason that the victim has recanted her report is not only down to it being a false accusation or as a result of insufficient evidence, but also out of the fear of being raped for a second time at trial.\textsuperscript{121} A victim’s credibility was discredited not only in the U. S., but also in Scotland, where defense lawyers “… simply want to destroy a complainant.”\textsuperscript{122} Brett, therefore, proposes the amendment of rape shield law, especially in examining false allegation. She suggests the following:

\begin{itemize}
\item [\textsuperscript{114}]Ibid.
\item [\textsuperscript{115}]Ibid.
\item [\textsuperscript{117}]Ibid., p. 137.
\item [\textsuperscript{119}]Ibid., p. 904.
\item [\textsuperscript{120}]Ibid.
\item [\textsuperscript{123}]Applegate, “Prior (False?) Accusations,” p 920.
\item [\textsuperscript{124}]Garret, \textit{Op. Cit.}, pp. 84-89.
\end{itemize}
from one analyst to another.\textsuperscript{125} Furthermore, serology could be invalid because “many millions of people might also share [same] blood type.”\textsuperscript{126}

DNA testing was first used to release a wrongfully convicted person in 1989.\textsuperscript{127} This was Gary Dotson who had been convicted of aggravated kidnapping and rape. He was sentenced between 25 to 50 years of imprisonment in July 1979. That conviction was made because of a victim’s false testimony who told law enforcement that Gary Dotson raped her although she had had consensual intercourse with her boyfriend. The victim said that she had lied about her testimony several years later. However, the judge refused to hold a new trial. Afterward, Dotson asked the court for post-conviction DNA testing, and the court granted it. The post-conviction DNA testing trial proved that Dotson was innocent.\textsuperscript{128}

The reliability and validity of DNA inspired many other innocent people, and law enforcement agencies, to use it in the criminal justice system. DNA evidence brought significant reform to the U.S. criminal justice system, especially in evidence rulings.\textsuperscript{129} Similarly to Dotson, 344 people have been exonerated because of DNA test.\textsuperscript{130} Moreover, 148 actual perpetrators could be convicted because of DNA testing.\textsuperscript{131} DNA evidence should be utilized to increase the probability in proving a perpetrator’s guilt where several items of prejudicial evidence such as a victim’s previous sexual history and proof of resistance had been excluded.

\section*{V. Conclusion}

Prejudicial evidence such as a victim’s previous sexual history and lack of resistance has brought injustice upon rape victims. Such prejudices are still considered as credible evidence to acquit a defendant, or used as justification to give a lenient sentence. And yet the victim will be humiliated by the defense counsel or law enforcement representatives regarding both of these types of prejudicial evidence. They experience impartiality at trial, which potentially stops other victims from reporting a crime because they know that the criminal process is traumatizing. This situation arguably puts women in a more dangerous position in society because sexual predators are left free to roam.

The U. S. has responded to this unfair system by enacting rape shield law since 1975. This law protects rape victims by excluding from court a victim’s sexual history and by not requiring proof of resistance. The exclusionary rule about that evidence resulted in increasing the number of victims who reported rape. In addition, the rate of convictions in rape crime also increased. Across the U. S., however, there are some differences in how rape shield law is regulated, especially concerning what evidence can be excluded, and what process is to be taken to eliminate that evidence from consideration.

\begin{footnotesize}
\begin{enumerate}
\item Ibid., pp. 86.
\item Ibid.
\item Ibid., p. 88.
\item Innocence Project, \url{http://www.innocenceproject.org/}, accessed September 26, 2016.
\item Ibid.
\end{enumerate}
\end{footnotesize}
In contrast, where rape shield law was criticized it was claimed that it would encourage wrongful convictions consequent to false allegations of rape. Some states order that a victim’s history of false accusation cannot be excluded from trial, so as to ensure a fair hearing. Moreover, DNA testing is widely used by law enforcement agencies to prove the perpetrator’s guilt. DNA testing is also useful to minimize the risk of wrongful conviction after a false allegation is made.

In the future, a discussion of Indonesian regulations on forms of evidence, based on the Indonesian Criminal Procedure (KUHAP), should be written. In this Procedure, the judge convicts someone as guilty on the basis of two pieces of evidence. There is concern among law scholars that should the prejudicial evidence be excluded it will only create another problem for the victim because the judge would hardly meet the minimum requirement of evidence. There is also a debate about the judge’s impartiality in considering and deciding cases.
Bibliography

Legal Documents


Kupang District Court, “Decision No. 74/Pid.B/2008/PN.KPG”

Purworejo District Court, “Decision No. 28/Pid.Sus/2013/PN.Pwr”


Simalungun District Court, “Decision No. 562/Pid.B/2014PN.SIM”


Books


Soesilo, R. Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal [The Penal Code with the Articles-to-Articles


Articles


*Rape and the Effectiveness of the Legislature’s Response*, 40 Vill. L. Rev. 193 (1995),


**Websites**


September 26, 2016.
