

## The Problems of Sexual Consent in colleges Environment

Erna Dewi<sup>1</sup>

### ABSTRACT

*Problems regarding sexual consent contained in existing regulations in Indonesia cannot be separated from the encouragement of the legal feminist movement. Various countries in Europe have long adopted sexual consent in their criminal laws and included it in regulations related to sexual offences. The notion of sexual consent in law reform in Indonesia has generated a lot of polemic, beginning with the view that sexual consent is considered as the legalization of adultery, which is contrary to Pancasila as the nation's ideology. This study aims to examine conceptually sexual consent through the legal views of feminism and its suitability with the socio-philosophical values of the Indonesian people and to examine related to sexual consent in regulations that apply in Indonesia, especially in Permendikbud 30 of 2021. This research uses a normative juridical approach and refers to the views of jurists and legal doctrine.*

**Keywords:** *sexual consent, legal feminism, national ideology.*

### 1. INTRODUCTION

Social phenomena in Indonesian society are currently filled with worries and anxieties so that they are already at a stage that is troubling for various groups. Women are a group that is more vulnerable to sexual harassment, making this problem a very scary thing for women, and creates fear of crime, because the crime rate related to sexual violence for women is relatively higher than for men. Violence and sexual harassment are not only experienced by adult women, but can also be felt and experienced by children, many of these children are victims of sexual violence or harassment, and this happens not only in public places or in the family environment, but sadly also in the educational environment, which should be a safe and nurturing environment for children.

Komnas Perempuan has recorded sexual violence, especially related to sexual violence against women, as long as it is recorded in 2021 as the year with the highest number of cases of Gender-Based Violence (KBG) over the past few years, which has increased by 50% from 2020, namely as many as 338,496 cases. This number even exceeded that of the KBG before the Covid-19 pandemic. We can conclude from these data that sexual violence against women is relatively higher and continues to experience a significant increase every year, even though there are regulations in effect, the existing regulations only provide a deterrent effect when the crime has been committed but does not focus on action. preventive measures in prevention efforts before the crime occurs.

Arrangements regarding sexual violence in the Criminal Code are contained in the Law of the Republic of Indonesia Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual and other related regulations that apply in Indonesia's Criminal Code

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<sup>1</sup> Faculty of Law, University of Lampung, Indonesia

(KUHP), the types of sexual violence contained are only rape and Obscene acts can be declared rape if there has been penetration of the genitals between a man and a woman.

Sexual violence is often considered as an ordinary crime of decency, while the facts show that one of the impacts caused by the victim as a result of sexual violence is very serious, not only makes the victim physically injured but also mentally, besides that it can burden the victim morally and victims can experience it in a relatively long period of time or even a lifetime.

The government took steps in addressing the limitations of regulations regarding sexual violence and saw the need for a special law that could deal further and comprehensively with regard to sexual violence, which then in 2016 the People's Representative Council took the initiative to formulate RUU Penghapusan Kekerasan Seksual (PKS) which will regulate sexual harassment more broadly, which has now been legalized Undang-Undang Nomor 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual. The enactment of this regulation it can prevent and minimize criminal acts of sexual violence in Indonesia.

Undang-Undang Tindak Pidana Kekerasan Seksual and Permendikbud Nomor 30 Tahun 2021 is not only a bright spot to overcome criminal acts of sexual violence but also generates a lot of debate. One of them is the attitude of criticizing issues related to sexual consent or sexual consent which is seen through the paradigm of Indonesian law. Renewal of the criminal law related to sexual consent opens a new polemic regarding existing regulations in Indonesia regarding criminal acts of sexual violence which can provide deeper and broader considerations regarding this matter.

Sexual consent in Indonesian criminal law, especially in the case of crimes of sexual violence, has sparked a lot of controversy. One of the movements that has encouraged and been very productive in voicing sexual consent into the draft law is the feminist movement. In the perspective of feminist groups, efforts to liberate sexual violence from the shackles of the private sphere to become a public issue is an opportunity to emphasize that women and other marginalized groups have an equal position. That is necessary to understand the meaning of the phrase "without the victim's consent" because these two things are interrelated. There will be no attempt to express an agreement without a situation that fulfills the intention of sexual violence beforehand.

Sexual consent has various definitions, including legal and scientific definitions. From a medical point of view, according to Yusra Firdaus, sexual consent is defined as sexual activity which, if carried out without the consent of one of the parties, is included in the category of sexual harassment or violence. The issue of sexual consent is an issue that requires more detailed and in-depth study and discussion, because in Indonesia itself the phrase related to sexual consent is relatively new and still raises many pros and cons issues.

Based on the explanation and elaboration of the background above, it is therefore necessary to carry out further research to see sexual consent in the view of feminist law and its suitability with the socio-philosophical values of the Indonesia society and to see the problems related to sexual consent in Permendikbud No. 30 Tahun 2021 and related rector regulations regarding the Prevention and Handling of sexual violence in colleges environments.

## **2. RESEARCH METHODOLOGY**

The research method used in this article is a normative juridical research method equipped with a conceptual approach. The data is obtained from primary and secondary legal materials in the form of laws and regulations, books, scientific journals, electronic news, and other relevant and reliable sources. The data analysis method used in this study is a qualitative method.

### 3. RESULTS AND DISCUSSION

#### 1. Sexual consent in feminist law and socio-philosophical values of the Indonesian nation

A legal approach with a women's perspective based on gender equality and justice in the political, economic and social fields. This theory is called Feminist Jurisprudence or can be called Feminist Legal Theory which uses the point of view of feminist theories. This theory was born against the backdrop of the view that in history, law has been an instrument used to perpetuate gender injustice. Besides using feminist theories, feminist legal theory also uses critical legal studies.

Feminist legal theory uses the method of asking women what women really want, and considering all the concrete and unique experiences of women. So that there is no difference between theory and legal practice that occurs. This theory focuses on, firstly, how the law affects women and contributes to oppression and how the law can be used to transform the status of women by changing the law and perspective on gender issues to be more just and balanced.

It is necessary to distinguish between the two concepts of men and women in sex and gender. The concept of gender refers to the biological characteristics of men and women. The biological nature between women and men lies in the unique biological characteristics of each. There are also different trends, but not absolute, for women and men. For example, men tend to be more muscular, women contain more fluids in their bodies. The differences in biological and reproductive characteristics, in fact, lead to interpretations or constructions that differentiate the positions, roles and values of men and women.

The concept of Gender is referred to as a social construction, because it is created by humans themselves, not brought about from birth as the will of the Creator. Gender ideology as a social construction causes the perpetuation of myths and distinctions or discrimination against women. Women are seen as inferior, different, companion, object, property, unable and do not have the right to self-regulate, exist for the benefit of men and so on. People beliefs that's logically result in women being more vulnerable to experiencing violence than men. It also influences the structures and systems that exist in society.

Another manifestation of the distinction between men and women is the creation of an unequal pattern of power relations. Strausz-Hupe defines power as "the ability to impose will on others, and emphasizes that all social organizations, from philatelic associations to barracks states, all have an element of coercion, in which one or several of its members perform frankly coercive functions. Furthermore, Barrington Moore added that power is concluded in his efforts to discover and explain how certain groups and individuals succeed in dominating others.

Feminists have ideas related to sexual consent starting with looking at the position of sexuality of women in society. The feminist movement in Indonesia itself has also attempted to include the paradigm of sexual consent in substance related to the renewal of Indonesian criminal law, namely reform from the perspective of the Criminal Code (KUHP) as well as providing advice regarding reform of special criminal law outside the Criminal Code (KUHP).

The debate about sexual consent in Indonesia splits into two groups. For groups that support, sexual consent is the most crucial thing that must be fulfilled in a healthy relationship when having a sexual relationship. In order to provide evidence that a crime related to sexual violence occurred, this consent is very important. Consent or consent in having sexual relations is an important point, which provides legitimacy for the state to intervene in the private lives of its citizens. The state must be present in this case to take preventive steps, namely legal protection for victims when sexual intercourse is carried out without consent.

The group that rejects sexual consent in the crime of sexual violence questions the imperfection of sexual consent conceptually. According to Esty Diah Emaniar, sexual consent still brings problems. According to her, sexual consent does not yet have a clear understanding, even though it has been used as a legal paradigm for the settlement of sexual violence in various regions.

Sexual consent does not yet have clear indicators, whether consent is given in the form of speech or action, shown or hinted at, even when consent is expressed as an attitude, it also still faces ambiguity when on the one hand there are those who argue that consent is still stated even though it is present with a little coercion. and on the other hand states that consent is recognized if there is no element of coercion at all.

Expressions of support and rejection related to sexual consent can be traced both in academics in the form of seminars. For support groups, sexual consent is the main thing that must be fulfilled in a healthy relationship when having sexual relations. It is understood that the consent of those involved in sexual activity is without coercion at all and cannot be assumed, but must be clearly stated through unambiguous words and actions.

The same thing was conveyed by the Institute for Criminal Justice Reform (ICJR), which emphasized that sexual relations can be categorized as a crime or crime, if the sexual relations are carried out without sexual consent. This agreement is a very important point to be able to prove whether a person has committed a crime or not.

The existence of sexual consent is an important point, which provides legitimacy for the state to intervene in the private lives of its citizens. The state must be present to provide protection to the victim when sexual relations are carried out without sexual consent. On the other hand, if the sexual relations are based on sexual consent, the state has absolutely no authority to intervene.

Apart from still having problems, it is feared that refusal regarding sexual consent in sexual violence will legalize adultery and conflict with the values that grow and develop in the Pancasila state. The rejection came from the Majelis Ulama Indonesia (MUI) which was conveyed by KH. Cholil Nafis, according to him apart from sexual consent, still brings problems as revealed in Esty Diah Imaniar's research, he emphasized that sexual violence must use the paradigm of religious norms and Pancasila, not sexual consent.

The politics of criminal law, Barda Nawawi Arif emphasizes the importance of socio-political, socio-philosophical and socio-cultural values in providing content for the content of norms and the substance of criminal law that aspires. The concept of a rule of law state adopted by Indonesia is not rechtsstaat or the rule of law, but has its own concept of a rule of law state which is based on the views and philosophy of the noble life of the Indonesian nation, namely Pancasila which is a crystallization of views and a philosophy of life that is full of ethical and moral values that are sublime as stated in the preamble of the 1945 Constitution.

Pancasila in its position as the source of all sources of law is contained in MPR Decree No. III of 2000, in Article 1 paragraph 3, which places Pancasila as a source of national basic law. This is in line with the stufenbautheorie or Hans Kelsen's hierarchical framework of norms, namely the hierarchy of laws and regulations topped by the grundnorm (basic norm) or what Hans Nawiasky calls "The Staatfundamentalnorm".

Hamdan Zoelva in giving an introduction to a book written by Meyrinda Rahmawati Hilipito entitled Sexual Crime Vs Sexual Violence emphasizes the position of the first precept Belief in One Almighty God as the "causa prima" of the other precepts. In the understanding of Belief in the One and Only God, the teachings of whatever religions are adhered to in Indonesia must be placed as a source of values which form the basis and corridor for every state policy. Whatever policy is made must not contradict or deviate from that basis and corridor.

The understanding of humanity or human rights contained in the precepts of a just and civilized humanity may not conflict with the first precept because it would conflict with the *prima causa* of Pancasila. The same thing was stated by Kaelan, according to him the precepts of the one and only God are a source of spirituality, the moral basis for the Indonesian nation in implementing state and social life and functioning as a legal order where every applicable law in Indonesia must be coherent with God's law as a source of morals and a source of values.

Responding to differences in viewing sexual consent and its suitability with the socio-philosophical values of the Indonesian nation, which has the ideals of Pancasila law, cannot be separated from the choice of interests to be protected. According to Mahfud MD, the legal politics of a country will be influenced by the choice of the value of interests, whether they prioritize individual prosperity or will prioritize the prosperity of many people.

Indonesia refuses to follow one extreme ideology, but chooses the good side of the two views in the form of guaranteeing individual freedom as a human right while placing shared interests above individual interests. This prismatic concept of law must also be used as a common ground in the renewal of Indonesian criminal law. the good side of sexual consent in realizing good, moral sexual relations is wrapped in religious and legal values that live in Indonesian society.

## 2. Seksual consent in Permendikbud No. 30 Tahun 2021

Criminal acts that apply in Indonesia have regulations that do not comprehensively cover all types of sexual violence, one of which is that they do not yet exist in terms of procedural law and case proving procedures. This has a fairly significant impact on the lack of existing law enforcement processes. This makes it difficult for law enforcement officials to uphold and provide justice as fair as possible in accordance with the aspired law and to take appropriate remedial steps for victims due to weak existing regulations.

Indonesia has cases of sexual violence from year to year experiencing a significant increase, in the sphere of education, especially in higher education, which is in the spotlight. Komnas Perempuan in its annual records (*Catahu*) from 2015 to 2021 shows that tertiary institutions are places of educational institutions with the highest total violence against women, namely as many as 35% of cases of sexual violence.

The high number of cases of sexual violence in the campus environment has moved the government to make policies or regulations related to sexual violence in tertiary institutions, which in its implementation resulted in the issuance of a rector's regulation regarding the prevention and handling of sexual violence in various universities in Indonesia.

Permendikbud No. 30 Tahun 2021 concerning the Prevention and Handling of Sexual Violence in Higher Education Environment is aimed at tackling sexual violence in the campus environment. The establishment of the Permendikbud can be used as a reference for regulations dealing with crimes. The crime in question is a crime related to sex. The legal division Permendikbud includes matters of criminal matters even though in this Permendikbud the sanctions that are regulated are more directed at administrative issues. This is because all law enforcement officers involved in this matter represent the government in carrying out the sentencing process. In the Permendikbud, it is possible that related to sexual violence that occurred on the campus environment, it can be continued to a criminal justice mechanism.

Permendikbud Nomor 30 Tahun 2021 explains that sexual violence can be interpreted as an act that is offensive and or demeans a person or part of a person's body, because of the gap in power or gender relations that can impact the victim mentally or physically, which can have long-term consequences for the victim and resulting in losses from various aspects of the life of the victim concerned. Sexual Violence in Permendikbud No. 30 Tahun 2021

includes actions that are carried out verbally, non-physically, physically, and/or through information and communication technology which can be carried out in the form of actions.

The government, in this case the Ministry of Education and Culture, needs to make an effort to change the politics of communication regarding the formulation of a regulation. Because basically, however, the form of government regulation is a form of legal product. Therefore the Ministry of Education and Culture needs to involve experts in the field of law in the form of strengthening and supporting their arguments. In addition, the government and law enforcement officials are not only the shapers of a rule or regulation, but also as supervisors of the ongoing implementation of a regulation from the regulations that have been passed.

#### 4. CONCLUSSION

Sexual consent in criminal law is inseparable from the legal feminist movement that voices and fights for it. This perspective then gives birth to thoughts that are more inclined to normalize sexuality that are free from traditional moral concepts, but this is contrary to the ideology of the Indonesian nation, namely Pancasila as the source of the nation's socio-philosophical values. On the other hand consent in a sexual activity is important. The consent given must be without an element of coercion, which cannot only be assumed, but must be expressed verbally and through action. The phrase without the consent of the victim contained in the Minister of Education and Culture or the Chancellor's regulations regarding the prevention and handling of sexual violence in the tertiary environment is intended to provide protection for all parties in the campus environment and to distinguish what matters can be followed up by the task force team regarding the prevention and handling of sexual violence in the tertiary environment.

#### References

- Arief, Barda Nawawi. 2008. Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep KUHP Baru), (Semarang: Kencana Prenada Media Group).
- Alifatussadiyah, dkk. 2020. "Fear of Crime Ditinjau dari Gender, Usia, Etnis, dan Sosio Ekonomi", Psikoislamedia Jurnal Psikologi, Vol.5, No.02.
- Amal, B, "Tinjauan Hukum terhadap Frasa 'Tanpa Persetujuan Korban' dalam Permendikbud Nomor 30 Tahun 2021 tentang Pencegahan dan Penanganan Kekerasan Seksual", Jurnal Crepido, Vol.3, No.2 (2021).
- Boa, Fanis Yona. 2018. "Pancasila Sebagai Sumber dari Segala sumber Hukum", Jurnal Konstitusi, Vol 15 Nomor 1.
- Fuadi, Munir. 2013. Teori-Teori Besar (Grand Theory) Dalam Hukum. (Jakarta: Kencana Prennamdeia Group).
- Ghazali, Abdurrahman. 2003. Fiqih Munakahad. Jakarta: Kencana Prenada Media.
- Hidayat, Arif. 2019 "Negara hukum berwatak Pancasila" Dalam [https://www.mkri.id/public/content/infoumum/artikel/pdf/artikel\\_15\\_03\\_arief\\_hidayat.pdf](https://www.mkri.id/public/content/infoumum/artikel/pdf/artikel_15_03_arief_hidayat.pdf), diakses pada tanggal 28 Desember 2021.
- Husaini, Adain. 2020. "Tak Hanya Islam Larang Zina Tapi Juga Yahudi dan Kristen" Dalam <https://www.republika.co.id/berita/qk1th7320/tak-hanya-islam-haramkan-zina-tapi-juga-yahudi-dan-kristen> diakses pada 27 Desember 2021.
- Imaniar, Esty Diah. 2021. "Problematika sexual concent sebagai paradigmapenghapusan kekerasan seksual." Dalam <https://insists.id/problematika-sexual-consent-sebagai-paradigma-penghapusan-kekerasan-seksual/> diakses pada tanggal 26 Desember 2021.
- Institute Criminal Justice Reform. 2020. "Ketiadaan Kesepakatan Adalah dasar Kekerasan Seksual." Dalam <https://icjr.or.id/ketiadaan-kesepakatan-consent-adalah-dasar-kekerasan-seksual/> diakses pada tanggal 29 September 2022, pukul 12:33 WIB.

- Kaelan. 2018. *Negara Kebangsaan Pancasila; Kebangsaan Multikultural Bhineka tunggal Ika*. (Yogyakarta: Paradigma).
- Kinandita, Patresia. 2017. "Fenomena Melepas Kondom dan Pentingnya Consent Sex," Dalam <https://tirto.id/fenomena-melepas-kondom-dan-pentingnya-consent-sex-codK> diakses pada 26 desember 2021.
- Komnas Perempuan. 2022. "Catahu 2022 : Catatan Tahunan Kekerasan Terhadap Perempuan Tahun 2021. Dalam <https://komnasperempuan.go.id/kabar-perempuan-detail/peluncuran-catahu-komnas-perempuan-2022> , diakses pada 9 Mei 2022, pukul 09:55WIB.
- MD, Moh. Mahfud. 2010. *Membangun Politik Hukum Menegakkan konstitusi*. (Jakarta: Rajawali Press).
- Navis, Cholil. 2021. "Diksi Persetujuan dalam permendikbud,landasannya agama atau nafsu." Dalam <https://mui.or.id/opini/32376/diksi-persetujuan-dalam-permendikbud-landasannya-agama-atau-nafsu/> diakses pada tanggal 27 Desember 2021.
- Poerwandari, Kristi. 2008. *Penguatan psikologis untuk menanggulangi Kekerasan Dalam Rumah Tangga dan Kekerasan Seksual, Panduan dalam Bentuk Tanya-Jawab*. (Jakarta: Program Studi Kajian Wanita Program Pascasarjana Universitas Indonesia).
- Rambe, Hendri Nauli. 2014. "Perzinahan Dalam Prespektif Islam Sebagai Alternatif Pembaharuan Hukum Pidana Tentang Perzinahan Di Indonesia" (Universitas Sumatera Utara).
- Sigiro, A. N, dan Takwin, B. 2021 "Mengenal kebutuhan dan Tantangan Penanganan Korban Kekerasan Seksual: Belajar dari Pengalaman 'Forum Pengada Layanan'", *Jurnal Perempuan*, Vol.26, No.2.
- Torenz, Rona. "The Politic of Affirmative concent : Consideration from a gender and sexuality studies prespective." *Jerman Law Jurnal*, Vol 22 spesial issue 5.
- Wahid, Marzuki. 2014. *Fiqh Indonesia*. (Bandung: Marja Nuansa Cendekia).