

Necrophilia in Wedderrechterlijkheid Perspective

Erma Rusdiana

Faculty of Law

Universitas Trunojoyo Madura

Bangkalan, Indonesia

erma.rusdiana@trunojoyo.ac.id

Abstract— Generally, rape is committed against the live women, but some of it is committed against the dead women (necrophilia). Judicature practice indicates that the presence of necrophilia in one case is not made the foundation to indict and to decide on a case. It means that necrophilia is not considered as a crime. This article is the result of normative juridical research using statute and case approaches. Analysis was conducted deductively. The result of research showed that Indonesian penal code does not contain regulation about necrophilia explicitly. The regulation about rape can be distinguished by how the deed is done, whether with violence or violence threat and rape against faint or helpless women. On the other hand, necrophilia is the disgraceful deed, so that it is unlawful viewed from material law and it can be qualified to be crime and its perpetrator should be condemned.

Keywords— necrophilia, rape, *wedderrechterlijkheid*, criminal act.

I. INTRODUCTION

Rape is a type of moral crime that is sexual in nature. The word *rape* derives from Latin *rapere* meaning stealing, forcing, seizing, or carrying away [1]. In Indonesian Big Dictionary, the word *perkosaan* (rape) derives from the word *perkosaan* meaning molest sexually or violating with violence. Meanwhile, the word *perperkosaan* is defined as raping process, way, action, or violating with violence[2].

Generally rape is committed against the live women, but some of it is committed against the dead ones. For example, a morgue attendant, Douglas, was accused to commit sexual crime (molest sexually the corpse) during his night shift in Ohio, United States of America. During 1991-1992, Douglas has violated three female corpses. When his case was revealed, 100 female corpses have been his sexual abuse victims in the last 16 (sixteen) years [3]. In Ogan Ilir Regency, South Sumatera, Indonesia rape also occurred to the victim of murder named Inah Antimurti (20 years old) [4] and the a female corpse found by the people in a ravine in Paal Dua, Manado, is the victim of rape committed by the suspect (Erwin). Having killed her, Erwin raped her [5]. In 2009, the similar case occurred in Palembang. The victim was dr. Alia Pranita Sari. The perpetrator has killed and then violated her. In Palembang District Court's Verdicts Number: 1842/Pid.B/2009/PN.PLG and

055/PID/2010/PT.PLG, the perpetrator was indicted by public prosecutor with Articles 340, 338, 353 clauses 1 and 2, and article 351 of Penal Code, in their deliberation, the judges sentenced lifetime imprisonment. However, in his case development, the perpetrator through his lawyer appealed to Palembang Provincial Court, and was sentenced with 15 (fifteen years) imprisonment, and then the defendant also appealed to Supreme Court that granted his appeal and voided the Palembang Provincial Court's verdict Number: 005/PID/PT.PLG, on April 13, 2010 and confirmed Palembang District Court's Verdict Number: 1842/Pid.B/2009/PN.PLG, on February 16, 2010, stating that the defendant Iwan Andriansyah has been authenticated to be guilty legally and convincingly for committing murder crime and sentencing him with 15 (fifteen years) imprisonment.

The case above is very interesting because the public prosecutor's indictment and Judges' rationale and decision do not discuss copulation with the victim, containing rape element in its case chronology after the murder event, and it is very contradictory with the values living within society. However, the rape against the dead victim was not touched at all and only the murder event was addressed. It is, of course, not compatible to the fact showing that the crime contains *conkursus*.

The facts above shows that the act of engaging in sexual relations with corpses, thereafter called necrophilia, is not considered as a criminal act. The problems of research studied are:

1. How does Penal Code govern necrophilia ?
2. How is penal code's perspective on necrophilia act viewed from *wedderrechterlijkheid* ?

II. RESEARCH METHODS

This article is the result of juridical normative research, using statute, conceptual, and case approaches. As a normative law research, the author conducted law material inventorying including primary and secondary law materials adjusted with the theme of research, *Necrophilia in wedderrechtelijkheid perspective*. Then, the analysis was conducted using deductive method.

III. RESULTS AND DISCUSSION

A. No Article Governing Necrophilia in Indonesian Penal Code

Generally sexual intercourse between man and woman is humane action and it is a given need as long as it is compatible to the norms living within society and not contradictory with legal interest of other legal subjects. The bad character of sexual activity will emerge when it is in contradiction with the legal interest of other legal subject, thereby generating a variety of sexual crimes. One of sexual crimes is rape crime as governed in Book II of Penal Code, furthermore elaborated in the following articles:

1. Article 285 of Penal Code: Governing Rape

The word rape is found in the provision of Article 285 of Penal Code only stating that: whoever compelling a woman (other than his wife) with violence or violence threat to copulate with him, will be condemned for the rape crime with imprisonment of maximally twelve years. The elements include: 1. Deed: compelling to make copulation, 2. Mode: with violence or violence threat, 3. Object: woman other than his wife.

Article 285 of the Criminal Code regulates the rape. The definition of rape in Article 285 of the Criminal Code is only limited to the action, which is perpetrated by a male actor(s) against female victim(s) [6].

Dwingen (compelling deed) is the action intended to others by oppressing the one's willingness in contradiction with his/her volition to make him/her accepts the compelling one's willingness. Accepting his/her willingness at least leads to two possibilities: the compelled one will accept what will be done against him/her or the compelled one will do what the compelling one wants he or she does [7].

R. Soesilo says that the word *memaksa* (compelling) as mentioned in article 285 aims to make the woman becoming the victim available to accept what he will do against her, being available to be copulated [8]. In the same vein, M.H. Tirtamidjaja suggests the definition of copulation as the contact between inside part of man's and woman's vital organs which generally can result in pregnancy, unnecessarily with the secretion of sperm in the woman's vital organ [9]. The compelling ways formulated in Article 285 of Penal Code is limited to two ways: violence (*geweld*) and violence threat (*bedreiging met geweld*). These two compelling ways are not explained further in Penal Code. This law (Penal Code) formulates the expanded definition of violence only, exactly in Article 89 [7].

2. Article 286 of Penal Code: Rape against faint or helpless women

The provision of Article 286 of Penal Code mentions that whoever copulating with a woman (other than his wife), while he knows that the woman is faint or helpless, will be imprisoned maximally nine years.

From the provision of article 286, it can be interpreted that woman becoming the victim of rape is a woman other than his wife, and objectively on faint or helpless condition. R. Soesilo explains that faint means "unconscious", for example, due to consuming *kecubung* (poisonous plant) poison or other drugs making an individual remembering nothing. A faint individual cannot find out what occurs to her. Being helpless meaning having no strength or power at all, thereby making no resistance when her hands and legs are tied, she is confined in a room, and she is injected with any drug making her paralyzed. The helpless individual still know what occurs to her [8].

Adami Chazawi argues that what mentioned in Article 286 of Penal Code has different meaning, although faint individual is basically helpless as well. The difference lies on an assumption that on faint condition, an individual is unconscious so that she does not know what others do, in this case copulation with her. An individual on sleeping condition or injected with barbiturate can be called faint. On helpless condition, the individual understands and is aware of what others do to her. For example, the woman is threatened with knife, or she is sick, thereby is helpless. The element of faint and helpless condition is an objective one based on or known by the creator (the one creating this condition). Faint or helpless condition does not result from the perpetrator's deed but a condition that has occurred. The perpetrator is only required to know subjectively that the woman is on faint or helpless condition [7].

It has been aforementioned that rape crime is generally committed by man against live woman. It can be seen from how the deed is committed whether using violence or violence threat, against faint or helpless woman. However, not all humans behave normally. To fulfill their sexual passion, some of them have deviating behavior. Sexual deviation or sexual abnormality or sexual perversion or sexual harassment is the form of sexual impetus and sexual satisfaction obtained or shown to sexual object uncommonly [10]. It is called uncommon because sexual deviating behavior is followed with sexual fantasy oriented to the achievement of orgasm through sexual intercourse out of heterosexual intercourse, for example the one with the same sex or with minor sexual partner or sexual intercourse normatively contradictory with sexual behavioral norms recognized and acceptable to the public [11].

One of examples is deviating sexual behavior, in this case copulation with corpse. It is this that underlies an assumption that copulation with corpse is the human disposition's abuse and contradictory with common sense. James A. Inciardi, as cited in Neng Jubaidah [12], says that there are several sexual intercourses belonging to sexual offence: *Forcible rape, Statutory rape, Fornication, Adultery, Incest, and Sodomy*. Necrophilia,

a sexual intercourse with corpse, is a type of sodomy crime.

Furthermore, *Necrophilia* is subdivided into three types [13]:

1. necrophilic homicide, the one developing this disease should kill first to obtain corpse and to get sexual satisfaction.
2. regular necrophilia, the one developing this disease uses the dead person (the existing corpse) to get sexual satisfaction.
3. *necrophilic fantasy*, the one developing this disease fantasies as if he makes sexual intercourse with corpse, but he does not.

Although necrophilia or copulation with corpse is a sexual offence, in fact there has been no explicit regulation either in or out of penal code. Meanwhile, rape or sexual intercourse with corpse can be categorized into deviating behavior occurring really. There is, of course, legal interest of victim (corpse) and/or her family broken by the perpetrator, and it should be considered.

In Indonesian penal code's perspective, determining whether or not a deed is a crime should be based on legality principle. This principle of legality is mentioned in **Article 1 clause (1) of Penal Code**, stating that: "A deed cannot be condemned unless based on the strength of preexisting criminal law provision".

The absence of regulation in Indonesian penal code explicitly mentioning the prohibition of necrophilia and stating it to be crime of course has an implication to law enforcement. Therefore, law enforcer should find the law or interpret the law bravely in order to apply rape-related articles to the perpetrator of necrophilia.

B. Penal Code's Perspective on necrophilic action viewed from wedderrechterlijkheid

Although sexual intercourse with corpse is not contradictory explicitly with the legislation, but such deed is a disgraceful deed contradictory with religious, customary, and moral norms.

1. Necrophilia is in contradiction with religious and moral norms

Indonesia upholds religious norms, as included into the first principle of Pancasila (1) Belief in the divinity of God. These religious norms function to be divine life guidance (originating from God) for mankind. Religious norms provide behavioral limitations as the life guidance governing inter-human relationship and the relationship between human beings and their God, and as the regulation of behavioral order and social action that is preventive in nature.

If necrophilia is associated with religious norms, it is of course contradictory with the religious norms existing in Indonesia. In religious perspective, making sexual intercourse should be initiated with marriage, conducted corresponding to the religious stipulation. Similarly, it has been governed in positive law, Indonesian Marriage

Act, subjected to Law No. 1 of 1974. In the context of Religious norms, particularly the religions existing in Indonesia and moral norm, sexual intercourse with corpse or necrophilia is considered as disgraceful and prohibited action.

2. Necrophilia is in contradiction with moral norm

Moral norm is defined as life rules concerning good and bad conducts, constituting "whispers" or inner voice. Considering his humanity character, each of human's consciences "stores" potential moral values. It is analogues with human rights owned by each personal human due to his humanity character, as the God's gift. Because potential moral values are stored in each of human consciences (with sensibility), the human conscience is called the source of moral norms. In line with this, Widjaja suggests the morality connected to ethic, addressing moral order and decorum. Moral order encourages people to do good deed, as their heart considers it as good or originating from their conscience, free of relation with others or others' effect [14]. The provisions of religious norm can also be stipulations of moral norm, because essentially religious and moral values derive from Almighty God. Similarly, because of its characteristics inherent to every mankind, moral values are universal in natures. In other words, the universal moral values are free of spatial and temporal dimension, meaning to prevail anywhere and anytime. Similarly, everyone surely considers necrophilia as the act breaking morality all over world and in any times. Thus, the act of copulation can be categorized into disgraceful or materially unlawful deed.

Viewed from norm perspective, making sexual intercourse with corpse or necrophilia is a deed contradictory with religious and moral norms, thereby constituting disgraceful deed. A disgraceful deed can be measured or assessed from whether or not it breaks or is contradictory with religious, customary, and moral norms, and other norms developing within society.

Considering this, necrophilia belongs to disgraceful deed; therefore it automatically belongs to unlawful deed materially. Material unlawfulness can be seen from whether or not it breaks the law, not only as included in the law but also viewed from the enactment of non-written legal principles.

3. Necrophilia as disgraceful deed in wedderrechterlijkheid perspective

In Indonesian legal life, not only written law definition is know, but it also involves non-written legal provisions still living within society. Therefore, the presence of customary law still plays an important role, moreover due to an imperative for the judge to assess the norms of disgraceful deed within community, despite no formal (written) regulation governing it. Sometimes a deed considered as disgraceful by certain customary society is

not governed in Penal Code and vice versa. Although necrophilia is not governed explicitly in Indonesian Penal Code, this act is disgraceful and should be condemned. Therefore, the judge is obliged to follow the dynamic of law not only in the definition of written law but also non-written law within society, as confirmed with Article 5 clause (1) of Law No.48 of 2009 about the Power of Justice. This article states firmly that [15] : “Judge and constitutional judge should obligatorily explore, follow, and understand legal values and feeling of justice living within community”.

Based on Article 5 clause (1) of Law No.48 of 2009 about the Power of Justice, a judge can not surely decline the case coming, with an excuse that there is no rule governing it in Penal Code, but a judge should obligatorily explore, follow, and understand values living within society, to decide on a case fairly. Thus, in the presence of such article, the judge should obligatorily decide on the case of necrophilia not governed explicitly both in and out of Penal Code, but based on values living within society, copulation with corpse can be categorized as a disgraceful and materially unlawful act.

For that reason, according to Mardjono Reksodiputro, the justification of decision to make the law living within society the source of Indonesian penal code can also be found in a judge’s duty obliged to seek for justice or fairness. Therefore, the judge should ensure that the one considered as guilty for committing disgraceful act by the community will be condemned. The criteria of disgraceful or condemned act can be defined by legislators and can be based on (customary) law living within corresponding society. The judge’s obligation of seeking for justice can be seen in the provisions of Justice Power Act as well, exactly in Article 5 clause (1) of Law No.48 of 2009 prohibiting the judge from declining to examine and to trial a case filed by a “victim”, and its obligation to explore the living law values [16].

Moeljatno states that “criminal act should absolutely contain formal element or be compatible to the formulation of law (*tatbestandsmatigheit*) and material element or be contradictory with the ideal community intercourse or briefly unlawfulness (*rechtwidrigkeit*)...” It means that criminal act is considered as unlawful not only because it is included into the law, but also because it is in contradiction with the law living within society [17].

Necrophilia is a disgraceful and materially unlawful act in positive sense, as it is in contradiction with customary norm. Referring to Moeljatno’s explanation, criminal act is considered as unlawful not only because it is included into the law but also because it is in contradiction with the law living within society. In the case of necrophilia, the act of copulating with corpse can be called a disgraceful and materially unlawful act.

IV. CONCLUSIONS AND SUGGESTIONS

Several sexual intercourses belong to sexual offences: *Forcible rape, Statutory rape, Fornication, Adultery, Incest, and Sodomy*. Necrophilia, a sexual intercourse with corpse, is a type of sodomy crime. The necrophilia belonging to crime category is *necrophilic homicide*, in which the one developing it should kill first to obtain corpse and to get sexual satisfaction and regular necrophilia in which the one developing it uses the dead person (the existing corpse) to get sexual satisfaction. Indonesian penal code does not govern necrophilia explicitly. The regulation of rape can be distinguished by how the deed is done, whether with violence or violence threat and rape against faint or helpless women. On the other hand, necrophilia is a disgraceful deed, so that it is unlawful viewed from material law and it can be qualified to be crime and its perpetrator should be condemned.

Acknowledgment

This research is funded by Law Faculty, Universitas Trunojoyo Madura.

References

- [1] Hariyanto, *Dampak Sosio Psikologis Korban Tindak Pidana Perkosaan Terhadap Wanita*. Jogjakarta: Pusat Studi Wanita Universitas Gajah Mada, 1997.
- [2] *Kamus Besar Bahasa Indonesia*. .
- [3] Tiara Shelavie, “Astaga! Petugas Rumah Sakit Sudah Ratusan Kali Setubuhi Mayat Wanita, Begini Kejadiannya,” <https://www.tribunnews.com/>, 2019. .
- [4] Raja Adil Siregar, “sosok inah, mayat wanita yang di bunuh,” <https://news.detik.com/>, 2019. .
- [5] D. Nielton, “Mayat Wanita Setengah Baya Itu Ternyata Korban Perkosaan, Begini Pengakuan Pelaku,” www.tribunnews.com/regional, 2017. [Online]. Available: <http://www.tribunnews.com/regional/2017/09/29/mayat-wanita-setengah-baya-itu-ternyata-korban-perkosaan-begini-pengakuan-pelaku>.
- [6] Qurrata Ayuni, “Judicial Review of Criminal Code Articles on Adultery, Rape and Same-Sex Obscene in Indonesia Constitutional Court, Advances in Social Science, Education and Humanities Research,” *Int. Conf. Law Justice*, vol. 162, p. 169, 2017.
- [7] C. Adami, *Pelajaran Hukum Pidana Bagian 2*. Jakarta: PT Raja Grafindo Persada, 2005.
- [8] Soesilo, *Kitab Undang-Undang Hukum Pidana.Politeia*. 1989.
- [9] M. Ledeng, *Kejahatan terhadap Kesusilaan dan Masalah Prevensinya*. Jakarta: Sinar Grafika, 2004.
- [10] Abdullah, “Definisi Penyimpangan Seksual,” 2019.

- [11] D. Junaedi, *17+ Seks Menyimpang*. Jakarta: Semesta Rakyat Merdeka, 2010.
- [12] N. Djubaedah, *Perzinaan Dalam Peraturan Perundang - undangan di Indonesia Ditinjau dari Hukum Islam*. Jakarta: Kencana Media Group, 2010.
- [13] mer/vta, “Kelainan Seksual, Orang-Orang Ini Tidur Dan Bercinta Dengan Mayat,” <https://health.detik.com/berita-detikhealth/>, Jakarta, 2019.
- [14] A. W. Widjaja, *Pedoman Pokok-Pokok dan Materi Perkuliahan Pancasila di Perguruan Tinggi*. Jakarta: Akademika Pressindo, 1985.
- [15] L. Loqman, *Kapita Selekta Hukum*: Mengenang Almarhum Prof. H. Oemar Seno Adji, S.H. Jogjakarta: Cetakan Pertama, Ghalia Indonesia, 1995.
- [16] Mardjono Reksodiputra, *Pembaharuan Hukum Pidana*. 1995.
- [17] Moeljatno, *Perbuatan Pidana dan Pertanggungjawaban Pidana dalam Hukum Pidana*. Jogjakarta: Bina Aksara., 1983.