

Comparison of the Rape Law in the Indonesian Penal Code and the Indian Penal Code

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ABSTRACT

Rape is a crime that violates women's rights as human beings which are exacerbating. This article aims to examine the differences and similarities in the regulation of rape between the Indonesian Penal Code and the Indian Penal Code. This research is normative or commonly referred to as library research with a comparative law approach, which juxtaposes the rape law contained in the Indonesian Penal Code and the Indian Penal Code. The data comprise legal documents, journals, various sources from the internet, and/or relevant literature. The results showed that there were similarities and differences between both Penal Codes. The similarities define it as an act that can be punished, but there are fundamental differences, namely in the formulation of the act and criminal sanctions. The scope of rape in the Indian Penal Code is wider so that this can be considered in the Penal Code reform since it further expands the protection for women from severe sexual assault.

Keywords: Rape, Indonesia Penal Code, India Penal Code

1. INTRODUCTION

Gender-based violence or commonly known as violence against women is a violation of women's human rights which should never happen. However, the majority of women across the world experience such assault. In Indonesia, violence against women also occurs, according to data from *Komnas Perempuan* (National Commission on Violence against Women) in the last two years as follows.

Table 1. Cases of Violence against Women according to data from the Annual Report of Violence against Women in 2019 and 2020

No.	Year	Cases	Information
1	2019	406.178	The majority are cases of sexual violence in private or public settings including 58% cases of rape.
2	2020	431.471	Cases of sexual violence including rape still dominate.

Source: Report in 2019 and 2020 [1]

The declining cases of violence against women in 2020 during the pandemic period are because they refused to report complaints. Apart from that, it is caused by the unpreparedness of service agencies during the pandemic. However, it should be noted that crimes including violence against women crime are an iceberg phenomenon.

In India, cases of violence against women are extremely high according to the National Crime Records Bureau (NCRB) from 2018 - 2020 as shown in the following table.

Table 2. Cases of Violence against Women in India

No.	Year	Number	Information
1	2018	378,326	<i>Rape and domestic violence against women still dominate</i>
2	2019	405,861	
3	2020	371,503	

Source: NCRB India 2018 – 2020 [2]

This source signifies that in 2020 cases of violence against women decreased due to the COVID-19 which restricted the social movement and even lockdown, cases of violence against women in public settings decreased as well. Unfortunately, cases of violence against women in the domestic area increased.[3]

Therefore, it can be determined that the decreasing cases of violence against women are due to limited activity movement and even regional lockdown.

All countries have agreed to eliminate this vile act since it is a form of discrimination against women which can be motivated by culture and/or gender differences. According to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), it is expressed that the state is obliged to eliminate all forms of discrimination against women through various policies. Indonesia who partook has ratified CEDAW with Law no. 7/1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination against Women [4].

State policies, especially legislative policies as a manifestation of this convention, in particular, to eliminate violence against women, contain ratified laws, such as Law No. 23 of 2004 on the Elimination of Domestic Violence, Law no. 21 of 2007 on the Eradication of the Criminal Act of Trafficking in Persons, and so on.

Indonesia is a country with the foundation of Pancasila, which the value of Belief in God and human values as the main principle in all aspects of life, including legal setting. In previous research, it was revealed that independence had formulated violence against women as a crime in the Indonesian Penal Code (KUHP), especially in the chapter on Misdemeanors relating to Morals. However, the Penal Code is a colonial legacy with various adjustments. As an independent and sovereign nation, it has to follow community development because crime expands according to the current time [5].

Therefore, a study of the law which in this case is the Penal Code (KUHP) of other countries should be conducted to investigate the regulation of the development of crime. Several comparative studies had been carried out by previous authors in accordance with normative research. The results showed that sexual violence against women in particular is rape, which the formulation in the Indian Penal Code is wider than that of Indonesia [6]. In addition, in criminal sanctions, India accommodates the provisions stipulated by Islamic law although whipping strokes are reduced. Dessy Kusuma Wardani, et al. on "Comparison of the Arrangements for the Criminal Act of Rape according to the Indonesian Penal Code (KUHP) and the Indian Penal Code" focus on the study of comparing the criminal sanctions. The results indicated differences, however, the different

reasons were not elaborated. The study in this paper also compared violence against women but the focus was on rape and the Penal Code and the object of the comparison was the Indian Penal Code.

The selection of the Indian Penal Code is based on the consideration that India and Indonesia are developing countries in Asia. In addition, in its constitution, India guarantees the protection and respect for human rights, including women's rights. Legal experts agree that the protection of human rights is one of the characteristics of the rule of law. Apart from these considerations, there are other considerations. Firstly, India has a non-Muslim majority population, while Indonesia has a majority Muslim population [7]. Secondly, the legal system in force in India is based on the Anglo-Saxon legal system, while Indonesia adheres to the European continental legal system or the civil law system. Even though this separation of legal systems is no longer extreme since the globalization and the legal system are dynamic. In connection to this rationale, the subject of this study is the formulation of the rape law in the Indonesian Penal Code and the Indian Penal Code.

2. RESEARCH METHODS

This paper is library research or referred to as normative research with a comparative perspective and comparative law approaches. The main research data consist of secondary data -- legal documents, namely the Indonesian Penal Code and the Indian Penal Code. In addition, the research also used data from journals, documents from the web, and/or black law dictionaries. The secondary data were collected by identifying and recording the results of this search as well as classifying and comparing as data analysis. Furthermore, it was presented in a descriptive narrative form.

3. RESULTS

3.1. The Formulation of the Rape Law in the Indonesian Penal Code and the Indian Penal Code

The Indian Penal Code formulates that rape is not simply defined as in the Indonesian Penal Code. It is further explained in Article 375 letters a, b, c, and d, which is done against her will, without her consent, or with her consent. Although the formulation of the article emphasizes that rape can be done with the consent of the woman, but the consent is given due to particular reasons so that she gives consent. Therefore, in giving

consent, women are not free to choose to give consent or otherwise. In essence, rape with consent is similar to rape against the will of women, thus the normative concept of rape in criminal law resembles linguistic concepts.

3.2. Criminal Sanctions Against Rape in the Indonesian Penal Code and Indian Penal Code

The criminal sanctions imposed on the offender of rape are single in the Indonesian Penal Code, while the Indian Penal Code is cumulative, which is extreme imprisonment and fines. The single formulation system

for criminal sanction of rape in Indonesia only covers imprisonment [9]. These differences in the formulation of rape should be taken into consideration and/or input for the legislature in reforming the Indonesian Penal Code so it can eradicate cases of sexual assault on the pretext of legal marriage.

Based on the results of the discussion on the formulation and criminal sanctions for rape as described above, the similarities and differences between the Indonesian Penal Code and the Indian Penal Code are obtained as follows.

Table 3. Similarities and Differences in Rape in the Indonesian Penal Code and the Indian Penal Code.

Similarities			
No	Aspect		
1	Both Penal Codes formulate rape in the respective law		
2	Rape is imposed with imprisonment		
Differences			
No	Aspect	Indonesian Penal Code	Indian Penal Code
1	Formulation of Act	Concise and clear, intercourse between man & woman with violence or threats of violence	More detail because there is the description of intercourse called rape: a. Against her will; b. Without her consent; c. With her consent, in fear of death or threat; d. With her consent, because she is persuaded by him that he will legally marry her. e. With the consent, but the consent was obtained by reason of unsoundness of mind; f. With or without her consent, when she is under eighteen years of age.
2	Rape Description	Only one form of rape – sexual intercourse out of marriage with violence/threats of violence	There are 3 forms, namely: a. Sexual intercourse against her will; b. Sexual intercourse without her consent; c. Sexual intercourse with the consent of a woman under certain circumstances.
3	Punishment	Imprisonment	Cumulative: imprisonment and fines
4	Formulation of offender	Anyone means the perpetrator is everyone	There are qualifications for the offender

4. DISCUSSION

4.1. The Formulation of Rape Law in the Indonesian Penal Code and the Indian Penal Code.

According to, rape is unlawful sexual intercourse by a man with a woman who is not lawful wife by force

and against her will. This is a concept of rape from an etymological perspective, but in the penal code (KUHP) it is based on that etymological concept [10].

The Indonesian Penal Code regulates rape in Book II, Chapter XIV Crimes against Decency, especially in Article 285 of the Penal Code that " 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." This formulation

indicates several points therein. First is the element of the rape law, namely (a) violence or threats of violence; (b) coercing women; (c) intercourse with a man; (d) out of marriage. Second is the qualification of actions that meet these elements should be referred to as rape. The third is that criminal sanctions are formulated in a single form, in the form of deprivation of freedom, namely imprisonment for a certain time [11].

The formulation of the rape crime is a gender-neutral formulation. When viewed from the division of offenses/criminal acts, the formulation of Article 285 of the Penal Code is a formal offense because if the act has fulfilled the elements, it is deemed a criminal act without any consequences. However, if viewed from the prosecution perspective, this act is not a complaint offense or an ordinary offense, it is a criminal act that can be prosecuted without complaint requirement [12].

In the Indian Penal Code which regulates rape criminal act in Chapter XVI of Offences Affecting the Human Body, especially the sexual offenses section, Article 375 stipulates that a man is said to commit rape if he:

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person.
2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person.
3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person.
4. applies his mouth to the vagina, anus, urethra of a woman.

It is said rape if it fulfills the following circumstances:

1. Against her will.
2. Without her consent.
3. With her consent.
4. With her consent, but under a ruse.
5. With her consent, but consent is given with the reason of unsoundness of mind.
6. With or without her consent when she is under 18 years of age.
7. When she is unable to communicate consent.

The formulation of the rape criminal acts in the Indian Penal Code has historically undergone several changes, especially the regulation of rape. In 1949, it

changed the ages of women who were considered qualified to give consent, which was 16 years and 15 years, if the woman is married. Apart from that, there were also some changes due to the occurrence of rape cases that caused public outrage, such as the Mathura-Nirbhaya Case [14]. Changes in rape law emphasize that women are not objects of crime but legal subjects who have human rights that must be protected. According to these cases, it should be encouraging to expand the formulation of Article 375 of the Indian Penal Code that rape includes all forms of sexual acts through the mouth, anus, and urethra that violate the dignity of women. Amendments to the Indonesian Penal Code are mostly carried out by ratifying new laws outside the Criminal Code, but the rape criminal act has never been amended so the formulation remains the same as in Article 285 of the Penal Code [15].

The Penal Code reform has been carried out since 1963, which has not been ratified to date - it is only limited to the Bill (RUU) of the Penal Code, which the latest was the 2019 Criminal Code Bill. This bill provides changes in the formulation of rape in Article 479, expanding the concept of the rape criminal act which is committed with her consent in a condition that is not free, persuaded, whom she is or believes herself to be lawfully married.

In the Indian Penal Code, it is departed from a gender perspective, which is a study that always creates a dichotomy of an object. In this case, the male and female sexes are contradictory [16]. The formulation of sexual offense in Article 375 of the Indian Penal Code based on a gender perspective includes a formulation that is not gender-neutral because the formulation of the article clearly displays that the perpetrator of rape is a man, and must be a man [17]. According to this formulation, the aim is to accommodate women's interests and be sensitive to their needs. This is understandable because cases of violence in India increase every year except in 2020, which is due to the lockdown during the pandemic.

Based on previous research, during the period 2012-2016, the sexual offense crimes continued to increase at a rate (56.3%), which was higher than that recorded in the previous ten years from 2002-2012 (52.2%) [18]. An Indian online media source affirms that the cases of violence against women, especially rape based on Article 375 of the Indian Criminal Code for the past three years are as follows.

Table 4. Cases of Rape in India [19]

No	Year	Number
1	2018	33,356
2	2019	32,033
3	2020	28,153

Source: National Crime Records Bureau (NCRB)

4.2. Criminal Sanctions Against Rape in the Indonesian and Indian Criminal Codes

Criminal sanctions against rape in the Indonesian Penal Code are formulated into one or attached to the formulation of the act, namely in Article 285 of the Penal Code, namely in the form of imprisonment for a certain time with a maximum of 12 years. The criminal sanction that can be imposed on the act of rape means that it is only in the form of imprisonment. Other criminal sanctions cannot be imposed. This is different from the Indian Penal Code. According to the Indian Penal Code, the formulation of criminal sanctions is separate from the formulation of the action. The formulation is in Article 376 as follows:

“(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine].

(2) Whoever: (a) being a police officer, commits rape.

Shall be punished with rigorous imprisonment for a term which shall not less than ten years, but which may extend imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine.” [20].

The criminal sanctions imposed in article 376 of the Indian Criminal Code are imprisonment and fines. The sentence imposed is not less than 10 years and can be extended for life.

This article initially sanctioned rape, only that there was no classification of the perpetrator, however, following the Mathura case, a girl who was raped in prison by a prison employee was acquitted by the court of the first instance and the high court of the employee. According to this case, it triggered strong protests by the entire Indian community so that the legislature made amendments to criminal sanctions, as quoted above [21]. The punishments for rape in that article are formulated cumulatively, namely imprisonment and fines. This shows that the court must impose sanctions on

perpetrators of rape in the form of imprisonment and fines.

Apart from this case, there was also the case of Nirbhaya who was gang-raped, it motivated the rage of the Indian community and then the government made changes to the Indian Penal Code related to sexual offense [22].

To date, Indonesia is using the old Criminal Code, namely the Dutch Criminal Code. The sanction in the Indonesian Penal Code regarding the crime of rape is only a single sanction, which only includes imprisonment and no additional sanctions. Imprisonment for the crime of rape in Indonesia is regulated in conjunction with articles 285 to 289 of the Indonesian Penal Code. The most severe sanction is imprisonment for 12 years. The sentence of 12 years in prison is given if the rape results in death.

Imposing punishment is not sufficient if it is only on a criminal act in law and/or the Criminal Code but in the doctrine or teaching of criminal law that has been recognized by the world community. It is necessary to have conditions for punishment. The requirements are based on the legality principle and the fault principle. These two principles are interrelated and cannot be separated. The legality principle shows the basis for which the act should be punished, while the fault principle shows that the activities carried out are measured normatively and have fulfilled the elements stipulated by law besides it also shows that the perpetrator must be held accountable for such action. According to these Principles which protect the perpetrators' human rights, therefore they are referred to as pillars of human rights. [23]

5. CONCLUSION

The formulation of the act of rape in the Indonesian Penal Code is way simpler and firmer than the Indian Penal Code. The Indian Penal Code stipulates that rape can take place with and without consent, which means that women do not wish to have intercourse. Consent in an act that is qualified as rape is basically a forced agreement, women are not free to decide; only one option is available, which is to have intercourse with the man.

The prohibition against committing rape is aimed at everyone under the Indonesian Penal Code, while the Indian Criminal Code is not only addressed to everyone but also people with certain qualifications. The imposition of a crime on the perpetrator of rape should

take into account and consider the interests of the perpetrator and the victim so that the legality principle and fault principle cannot be ignored for the realization of the protection of the human rights of victims and perpetrators.

AUTHORS' CONTRIBUTIONS

Each author has their own role in writing this journal. The first and second authors conducted journal writing, made comparisons, and multiplied the data in this journal, while the third author provided directions regarding the format and writing procedures. All authors also contributed to the revision. All authors have agreed to the results of the writing of this journal and are responsible for writing in it.

ACKNOWLEDGMENT

The author expresses his gratitude to the Faculty of Law, University Muhammadiyah Surakarta, which has provided socialization regarding journal writing, to those who organize journal writing, to the committee that reviews journals, and also to parties who have been involved in writing this journal so that this journal can be published.

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