



Parameters of the 'Honor and Dignity' Element in the Criminal Act of Sexual Violence

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Abstract

Law Number 12 Year 2022 concerning the Criminal Acts of Sexual Violence (*UU Tindak Pidana Kekerasan Seksual*/"Sexual Violence Law") seems to provide a moment of calm amidst the high number of sexual violence cases that occurs in Indonesia, but does Sexual Violence Law really adhere to the principles of utility, justice, and especially, certainty? One of the focuses of the Authors' research is the element of 'honour and dignity' (*harkat dan martabat*) contained in Articles 5 and 6 of Law Number 12 Year 2022 on Criminal Acts of Sexual Violence regarding sexual harassment that is carried out physically or non-physically. Honor and dignity are abstract concepts and cannot be measured because they are parts of the nature of human beings as God's creation. The assessment of what 'honor and dignity' is and its worth is highly relative and can be very different when viewed from not only the perpetrator and victim's perspectives. Therefore, this article seeks to assess whether there is a more definitive set of elements to define sexual violence. This article uses normative research study to investigate into and apply the concept of a "Reasonable Person", the application of which can also be useful in the ambit of criminology, especially victimology, especially to address sexual violence cases where the victim's position should be considered (pro-victim approach).

Keywords: Sexual Violence; Sexual Harassment; Honor and Dignity

A. Introduction

As the House of Representatives (*Dewan Perwakilan Rakyat*/"DPR") issued Law Number 12 Year 2022 on Criminal Acts of Sexual Violence ("Sexual Violence Law") on May 9, 2022, the long-awaited law was hoped to offer legal certainty in the protection against sexual violence. The fight against sexual violence in Indonesia actually dates back to pre-independence era and has stretched through various historic turning points. From the formulation of the 1945 Constitution, ratification of the International Convention on Elimination of All Forms of Discrimination Against Women ("CEDAW"), to promulgation

of Law Number 39 of 1999 on Human Rights (“Human Rights Law”), Indonesia has reiterated its commitment to ensure safety for all citizens, especially women as the vulnerable group of society. However, the specific legal spearhead to fight sexual violence in fact only came through recently with the issuance of the Sexual Violence Law after 6 years of discussion in the Parliament.

Despite such breakthrough, the Sexual Violence Law is neither perfect nor entirely free from polemics. An example of such polemic is the discourse regarding the definition of sexual violence itself, particularly surrounding the concept of ‘consent’ (*persetujuan*) included in the initial draft¹ as an element of sexual violence. Religious factions adamantly argued that the inclusion of the phrase ‘consent’ would be equivalent to condoning extramarital sexual relationship that was strictly prohibited by religious and cultural norms in Indonesia.² Meanwhile, concurrent to the intense Sexual Violence Law drafting, the Ministry of Education, Culture, Research, and Technology issued Regulation Number 30 of 2021 on the Prevention and Handling of Sexual Violence in Tertiary Education as a response to the influx of reports on sexual violence cases in universities.³ This groundbreaking regulation bypassed the discussion in the Parliament and became the first national instrument to include ‘consent’ as a crucial element of sexual violence. As expected, this regulation has similarly faced consistent oppositions from religious factions to date, albeit defenses from legal experts.⁴ Eventually, the concept of ‘consent’ was completely removed in the final version of the Sexual Violence Law.⁵

In fact, when seen more closely, many of the discourses surrounding the Sexual Violence Law comes from differing perceptions surrounding sexual violence, which in Indonesia, are significantly influenced by religious and cultural values. Such polemics and

¹ Dewan Perwakilan Rakyat Republik Indonesia, “Rancangan Undang-undang Republik Indonesia Nomor... Tahun... tentang Penghapusan Kekerasan Seksual” (Jakarta, January, 2017), Article 1 section 1, Draft Bill.

² Merdeka, “PKS Protes Frasa “Tanpa Persetujuan Korban” pada Aturan Pencegahan Kekerasan Seksual,” Merdeka, November 7, 2021, <https://www.merdeka.com/peristiwa/pks-protas-frasa-tanpa-persetujuan-korban-pada-aturan-pencegahan-kekerasan-seksual.html>.

³ Anugrah Andriansyah, “Komnas Perempuan: Kasus Kekerasan Seksual di Lingkungan Pendidikan, Paling Tinggi di Universitas,” VOAINdonesia, April 12, 2022, <https://www.voaindonesia.com/a/komnas-perempuan-kasus-kekerasan-seksual-di-lingkungan-pendidikan-paling-tinggi-di-universitas/6525659.html>.

⁴ Sri Wiyanti Eddyono, “Konsep “Persetujuan” dalam Kekerasan Seksual,” Kompas, November 23, 2021, <https://www.kompas.id/baca/opini/2021/11/23/konsep-persetujuan-dalam-kekerasan-seksual>.

⁵ Article 1 section 1, *Sexual Violence Law*.

discourses then beg the question of: has the Sexual Violence Law managed to provide legal certainty of the protection against sexual violence?

There are many ways and indicators one could use to investigate into whether such legal certainty has been provided by the Sexual Violence Law. Particularly herein however, the substantive focus of the Authors is the existence of the element of 'degradation of honor and dignity' (*harkat dan martabat*) as one of the elements of sexual violence. Specifically, 'honor and dignity' are mentioned in Articles 5 and 6 regarding "physical and non-physical sexual harassment as a form of sexual violence", which reads as follows:

Article 5

"Every person who commits a non-physical sexual act that is aimed at the body, sexual desires, and/or reproductive organs with the intention of degrading a person's honor and dignity based on their sexuality and/or morality, shall be punished for non-physical sexual harassment, with a maximum imprisonment of 9 (nine) months and/or a maximum fine of Rp10,000,000.00 (ten million rupiah)."

Article 6

"Punishable for physical sexual abuse:

- a. Any person who commits physical sexual acts directed against the body, sexual desires, and/or reproductive organs with the intention of degrading the honor and dignity of a person based on his/her sexuality and/or morality that is not included in the provisions of other more severe punishments shall be punished with imprisonment of 4 (four) years and/or a maximum fine of Rp50,000,000.00 (fifty million rupiah).
- b. Any person who commits a physical sexual act directed against the body, sexual desire, and/or reproductive organs with the intention of unlawfully placing a person under his/her control, either inside or outside of marriage shall be punished with a maximum imprisonment of 12 (twelve) years and/or a maximum fine of Rp300,000,000.00 (three hundred million rupiah)."

The existence of the phrase 'honor and dignity' in the regulation indeed gives rise to a question on how to measure such honor and dignity, which is an abstract and non-measurable concept. Given that this relates to a person's nature as a human being rather than something concrete and can be measured, the interpretation of honor and dignity is also deemed to provide relativity⁶ and consequently diminish legal certainty for victims of sexual violence.

⁶ The meaning of relativity is that everything has a relative value depending on the perspective of each person looking at something. For example, the cost of education of five million rupiah for some people is expensive and for others is cheap.

Such relativity may hinder legal certainty in the protection against sexual violence, especially in the just and effective enforcement of enforcement against sexual violence.

First of all, when viewed in terms of definition, dignity (*harkat*) in the Great Indonesian Dictionary (*Kamus Besar Bahasa Indonesia*/"KBBI") is defined as degree level; quality; value; price; or can also be interpreted as energy; strength; motion.⁷ Meanwhile, honor (*martabat*) is defined as the level of human dignity (*tingkat harkat kemanusiaan*), and self-esteem (*harga diri*).⁸ Based on the definition in KBBI, the Authors find that the scopes of dignity and honor are narrow, where dignity is a word attached to anything, be it an inanimate object or something alive, for example in the sentence "batik also raises the dignity of wooden furniture". From this sentence, it is found that batik culture raises the value or price and degree of wooden furniture, be it in the form of tables and so on. In contrast, honor can only be attached to human nature according to its definition, so inanimate things such as tables do not have honor.

To understand this, the Authors provide two examples of the conditions that give rise to the relativity of the element of 'honor and dignity':

First, if A (a man) sees a mosquito on B's (a woman) chest, and A proceeds to pat and touch B's breast which is considered a sexual part of B, B may not feel that her 'honor and dignity' is degraded. In this case, a question arises whether there is a commission of sexual violence because B does not feel victimized by the incident. In other word, B feels that her honor and dignity have not been degraded even though A has clearly committed an action with an intention, regardless of whether such intention is sexual or not sexual.

Second, in another case, if the same incidence occurs where A proceeds to pat and touch B's breast but B ends up feeling that that her honor and dignity are being violated, can A then be considered conducting sexual violence? In both conditions, the relativity of each victim's perspective may depend on the feeling of being humiliated or not feeling humiliated – something that is considered highly subjective, and may be influenced by myriads of relative factors (such as culture and religion). It is also important to look at 'honor and dignity' through the lens of Pancasila, which prescribes looking the 'honor and dignity' of

⁷ "harkat," Kamus Besar Bahasa Indonesia, accessed September 1, 2022, <https://kbbi.web.id/harkat>.

⁸ "martabat," Kamus Besar Bahasa Indonesia, accessed September 1, 2022, <https://kbbi.web.id/martabat>.

human beings as creatures of God Almighty.⁹ This is in accordance with the First Article of Pancasila where “Belief in God Almighty” becomes the utmost principle to determine the rest of Pancasila-related precepts. With the view that human ‘honor and dignity’ is related to creations of God, ‘honor and dignity’ becomes a harder concept to define and limit. Such difficulty comes from the fact that religious perspectives in Indonesia come from six different religions, with their own respective views of what ‘honor and dignity’ is.

Based on such similar subjectivity, for the purpose of this writing, the phrases ‘honor’ and ‘dignity’ is often considered as a holistic concept and clumped together as ‘honor and dignity’. In fact, the phrase ‘honor and dignity’ is commonly used together to define a concept, for example, in defining what Human Rights is ‘honor and dignity’ is used correlated with the fact that human rights is “attached to the inherent¹⁰ existence of human beings as creations of God Almighty and becomes His blessing that needs to be respected, upheld, and protected by the state, law, government, and all people for the sake of human respect, honor and dignity.”¹¹

In this Article, the Authors will look into the concept of ‘honor and dignity’ and its relation to sexual violence, and venture into looking at the context of ‘honor and dignity’ under Indonesian Law. Eventually, through this Article, the Authors seek to gain more understanding of whether the parameter of ‘honor and dignity’ ends up providing the crucial legal certainty pertinent to ensure that there is protection against sexual violence in Indonesia.

B. Discussion

B. 1. Human ‘Honor and Dignity’ in Indonesian Legal Instruments

To understand how the rather ambiguous term of ‘honor and dignity’ gives meaning to legal protection, it is pertinent to understand the contexts in which this phrase is used throughout Indonesian legal instruments. Of course, the element of ‘honor and dignity’ is not found for the first time in the Sexual Violence Law, although in the formulation of other laws it may not be in the form of an element of crime, especially in the scope of criminal law as

⁹ Suroto, “Harkat dan Martabat Manusia dalam Pandangan Kenegaraan Pancasila dan UUD NRI Tahun 1945,” *Jurnal Pembaharuan Hukum* 2, no. 3 (2015): 313, <http://dx.doi.org/10.26532/jph.v2i3.1508>.

¹⁰ Michael Rosen, *Dignity: Its History and Meaning* (United States of America: Harvard University Press, 2012), 137.

¹¹ A. Bazar Harahap dan Nawangsuh Sutardi, *Hak Asasi Manusia dan Hukumnya* (Jakarta: Pecirindo, 2007), 104.

public law. With the existence of 'honor and dignity' in the formulation of other laws, the Authors conduct cross-reference research to look at how such phrase is used in different contexts of these laws.

The phrase 'honor and dignity' can be found in a number of legal provisions, among others:

1. Law Number 39 Year 1999 concerning Human Rights

The finding of the word 'honor and dignity', 'honor or 'dignity' independently is found in various articles, such as Article 3, Article 5 paragraph (1), Article 13, Article 29, Article 33, Article 38, Article 42, Article 54, General Elucidation, and General Elucidation point c. Based on these articles, the Authors can see several uses of the word 'dignity', among others:

- a. As a standard, in this case evidenced by the use of the words "...in accordance with the dignity of...". An example is the right to be treated equally before the law in Article 5 paragraph (1).
- b. As an object of protection, in this case evidenced by the use of the words "...protection of...". This can be found in Article 3 and 29.
- c. As a sign of belonging to rights, which can be found in the General Elucidation, describing human reason and conscience, which are given by God and are the basis of free will and the responsibility that follows. A denial of these rights is a denial of human dignity. Thus, human dignity is the same as human rights as God's creation.

2. Law Number 23 Year 2004 concerning Elimination of Domestic Violence

In the regulation of Law Number 23 Year 2004 on the Elimination of Domestic Violence ("Domestic Violence Law") only provides a formulation of 'dignity' which stands alone without the word 'honor'. This element can be found only in 2 (two) sections, namely in "Considering" section letters b and c and in Article 20 letter b. In essence, in this formulation, 'honor and dignity' is seen as a noun or object, which is characterized by domestic violence (DV) being seen as a form of crime.

3. Law Number 23 Year 2002 *jo.* Law Number 35 Year 2014 concerning Child Protection

In this Child Protection Law, 'honor and dignity' can be found in Article 1 paragraph 2 which can be interpreted that the 'honor and dignity' of a child is a guarantee and protection to live, grow, develop, and participate optimally. The element of 'honor and dignity' used as a standard, namely the standard for children as human beings created by God. When viewed separately, there is also an element of 'dignity' that can be found in Article 64 letter e, Article 70 letter a, and the Explanation of Article 12 of Law 35/2014, sometimes attached to the word '*derajat*' that may be translated to the word 'honor' as well.

4. Law Number 11 Year 2008 *jo.* Law Number 19 Year 2016 concerning Electronic Information and Transaction

In this Electronic Information and Transaction Law, 'honor and dignity' is only found in the Explanation of Article 2 regarding actions that harm the interests of Indonesia, which includes one of the 'honor and dignity' of the nation. In this case, 'honor and dignity' can be seen as a form of self-esteem of a nation. For example, the dissemination of electronic information that causes Indonesia to be viewed badly by the people of other countries is included in harming the 'honor and dignity' of the nation.

5. Law Number 11 Year 2012 concerning Juvenile Judicial System

In this regulation, as the aim is to emphasize the protection of children, the scope of regulation is also for children. The 'honor and dignity' can be found in the section "Considering" letters a and b, Article 71 paragraph (4), Elucidation of Article 71 paragraph (2) letter b. In essence, the 'honor and dignity' of children must be protected even in the justice system. It is even emphasized that the punishment given must be considering the 'honor and dignity' of children, in this case 'honor and dignity' is used as a standard where children must be guaranteed and protected to live, grow, develop, and participate optimally as stipulated in the child protection law.

6. Law Number 21 Year 2007 concerning Eradication of Human Trafficking Crime

The element of 'honor and dignity' in this law can be found in the section "Considering" the formation of this legislation. However, the explanation of 'honor and dignity' is found in the General Elucidation section, which states that trafficking persons is a form of the worst treatment of human dignity. Continued in the academic

paper, the classification of trafficking in persons, especially women and children, as the worst treatment of human 'honor and dignity' is based on the fact that in the act of trafficking, there are elements of threats, torture, confinement, sexual violence, and objectifying people or treating them like commodities that can be traded, all of which are violations of human rights. Based on the explanation of this academic paper, the violation of 'honor and dignity' is an inherent nature of the offense.

7. Regulation of the Minister of Women's Empowerment and Child Protection of the Republic of Indonesia Number 13 Year 2020 on the Protection of Women and Children from Gender-Based Violence in Disasters

In this regulation, there is a repetition of what has been regulated in the child protection law, and the emphasis that 'honor and dignity' shall be respected in the case of a disaster (specific reference to the victims' honor and dignity). This can be found in the Explanation of Children's Special Situations section where in the event of an incident or suspected incident of sexual violence, the approach used by investigator must respect their dignity. In this case, if children are the victims, they should not be viewed as ordinary victims but as children who are vulnerable to trauma and must be protected fully.

From the abovementioned cross-references, it can be commonly derived that the phrase 'honor and dignity' in its regulations can be viewed as follows:

1. 'Honor and dignity' can be seen from several perspectives, namely as a standard, an object of protection, and a sign of belonging to rights.
2. 'Honor and dignity' should particularly be emphasized in specific circumstances pertaining vulnerable groups like children, women, or victims.

Unfortunately, in both the Sexual Violence Law and the regulations there is no explicit or specific definition of 'honor and dignity' despite its importance as a breakthrough legislation in the field of anti-sexual violence and anti-discrimination as a whole. As a comparison and to understand the importance of providing clarity in regard to 'honor and dignity', we may refer to how countries like, but not limited to, Australia and United Kingdom have tried to do so.

First, as one of the leading countries in coming up with the most comprehensive and effective sexual violence law through the 1984 Sex Discrimination Act, Australia defines sexual harassment taking place when:

- “ (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;
in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.”¹²

If dissect the elements, will be found the following points:¹³

1. Unwanted conduct, which is defined as behavior that is unwelcome, unwanted, or without consent by others;
2. Sexual nature;
3. Based on the threshold of a reasonable human, the victim would likely to feel offended, intimidated, or humiliated.

Here, the law seriously considers the victim's feelings of being offended, intimidated, or humiliated and explicitly states it. To be clearer, the law also specifies the circumstances to be taken into account when analyzing whether sexual harassment has been conducted, such as:

- a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, color, or national or ethnic origin, of the person harassed;
- b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- c) any disability of the person harassed;
- d) any other relevant circumstance.

Second, the United Kingdom classifies sexual harassment as a form of discrimination in its 2010 Equality Act, prescribing that harassment occurs when: “...there is unwanted conduct on the ground of a person's sex or unwanted conduct of sexual nature and that

¹² Article 28A, *Australia's 1983 Sex Discrimination Act*.

¹³ “Sexual Harassment, Different Countries,” whatishumanresource, accessed October 31, 2022, <https://www.whatishumanresource.com/sexual-harassment-different-countries>.

conduct has the purpose or effect of violating a person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.”¹⁴

In all the above mentioned case, the most basic element underlying the harassment is unwanted conduct. Then to categorize in the sexual realm, the unwanted conduct must be based on a person's gender or of a sexual nature. As for fulfilling it, there are also impacts that must occur with alternative concepts, namely between affecting a person's dignity, creating intimidation, assault, humiliation, or an unpleasant environment for the victim.

From the above comparisons, we may derive that although Indonesian Law has tried to incorporate 'honor and dignity' as a crucial element of sexual violence, such legal definition lacks further elaboration and thus, may create ambiguities in understanding what conducts will amount to honor and dignity. In contrast, other jurisdictions like Australia and the United Kingdom have tried to elaborate on the concrete and more measurable impact of sexual harassment.

B.2. Analysis of the Formulation and Parameters Related to 'honor and dignity' as an Element of the Crime of the Sexual Violence Law

B. 2. 1. 'Honor and Dignity' Under Sexual Violence Law as Public Law

The Sexual Violence Law is specifically formulated to provide legal protection against the act of sexual violence to all citizens,¹⁵ especially women as the vulnerable groups in the society. Sexual Violence amounts to a criminal act, and thus, the Sexual Violence Law is a law that is under the ambit of Criminal or Public Law of Indonesia.

Public Law has a special characteristic to regulate public interest.¹⁶ Therefore, based on the nature of the Sexual Violence Law as a law regulating public interest, the fulfillment of elements of crime under the Sexual Violence Law shall consider the ultimate aim to regulate public security and interest as well. For example, a man gropes a non-consenting woman's breast in public, not only violates the women's honor and dignity, but can also create shock, fear, and trauma to the rest of the public.

¹⁴ Section 26, Part 2, Chapter 2, *UK's 2010 Equality Act*.

¹⁵ Badan Legislasi Dewan Perwakilan Rakyat Republik Indonesia, "Naskah Akademik Rancangan Undang-Undang Republik Indonesia Nomor...Tahun...Tentang Tindak Pidana Kekerasan Seksual," Dewan Perwakilan Rakyat Republik Indonesia, 2021, 1, Academic Manuscript.

¹⁶ C.S.T. Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka, 1989), 257.

Therefore, the understanding of 'honor and dignity' should extend beyond the victim's perspective of her 'honor and dignity' being violated, but also take consideration of the society's perception of what 'honor and dignity is', which may greatly be influenced by prevailing religious and cultural perceptions.

B. 2. 2. 'Honor and Dignity' Under the Sexual Violence Law in Religious and Cultural Spheres

Concern about the relativity that can arise in religion and culture spheres is especially pertinent in Indonesia, as not only that Indonesia is a multicultural nation where various culture coexists, but also it operates under the unique circumstance of legal pluralism where state and non-state law persist. As a result, sociologically, cultural and religious backgrounds influence various responses in recognizing and understanding types of sexual violence. Therefore, victims of sexual violence are often in a difficult situation to be recognized as victims.¹⁷

When viewed from a religious perspective, each religion recognized by the state has a different understanding on what 'honor and dignity' is, for example: the Muslims have a more detailed and firm view of dignity, especially for women. Islamic teachings consider that a woman has honor on her whole body such as hands or hair that should not be touched by the opposite sex called *aurat*.¹⁸ Although there are many followers of Islam who do not object to physical touch by the opposite sex, there are still groups that uphold Islamic principles and norms that prohibit physical touch intentionally and without reason.¹⁹ Based on this premise, if the opposite sex touches or looks at the *aurat*, such acts can certainly be considered as forms of demeaning 'honor and dignity' of a woman through physical actions.

Therefore, it can be derived that based on the beliefs of Islamic norms, a touch of the hand can also be considered as physical sexual harassment aimed at the body based on Article 6 paragraph (a) of the Sexual Violence Law if the victim feels that his/her 'honor and

¹⁷ Badan Legislasi Dewan Perwakilan Rakyat Republik Indonesia, "Naskah Akademik Rancangan Undang-Undang Republik Indonesia Nomor...Tahun...Tentang Tindak Pidana Kekerasan Seksual," Dewan Perwakilan Rakyat Republik Indonesia, 2021, 102, Academic Manuscript.

¹⁸ "Women's Aurat According to Various Mazhabs," Universitas Islam An Nur Lampung, accessed September 28, 2022, <https://an-nur.ac.id/aurat-women-according-to-various-mazhabs/>.

¹⁹ "Prohibition of Touching a Woman who is not Mahram," Muslim.or.id, August 24, 2021, <https://muslim.or.id/27058-larangan-menyentuh-wanita-yang-bukan-mahram.html>.

dignity' is violated. Such perception may be different in the lenses of the other 5 (five) religions that may not adhere as strictly to the prohibition of physical contact with the opposite sex. Again, this raises the question of how to consolidate, if possible, these differing views to provide certainty in gauging what violation of 'honor and dignity' is.

Apart from religion, culture can also provide relativity related to the element of dignity. Being an archipelago of more than 16.000 islands, Indonesia is extremely rich and diverse in culture – and by extension, customary laws – of various customary societies. Yet, Indonesia remains as a unitary republic per its national motto, '*Bhinneka Tunggal Ika*' or 'Unity in Diversity'. However, such unity is not necessarily equivalent to harmonization and smooth-sailing implementation of the coexisting legal forms (namely state and non-state laws) pertinent to "build the rule of law" designed to eradicate sexual violence.²⁰ In this case, this means that each culture's understanding of what 'sexual violence' is, based on their unique understanding of what 'violation of honor and dignity' is, will have impact on the uniform enforcement of the Sexual Violence Law, which ironically aims to offer legal certainty.

Different types of sexual violence arise in the context of situations where it is clearly recognizable as a crime, but can also take the form of cultural situations that exist in society, which are often considered normal and not a form of crime. For this reason, sharpening sensitivity to the types of sexual violence can be done through case patterns, perpetrators, and the adverse effects experienced by victims.²¹ An example that is closely related to the Sexual Violence Law is the culture of the Sasak Tribe in West Nusa Tenggara. The Sasak tribe recognizes the custom of eloping as '*merarik*', which is socially acceptable. This culture is generally carried out to avoid the burden of dowry for the male party, but in its development this practice can provide lieu way for men to force women to marry (*kawin paksa*). Unfortunately, in some cases the woman is not taken to a safe house or the home of the man's family but is taken elsewhere and raped until she is 'forced to marry the man'. With no guilt,

²⁰ Brian Z. Tamanaha, "The Rule of Law and Legal Pluralism in Development," in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, ed. B. Tamanaha, C. Sage, & M. Woolcock, (Cambridge: Cambridge University Press, 2012), 34, <https://doi.org/10.1017/CBO9781139094597>.

²¹ Badan Legislasi Dewan Perwakilan Rakyat Republik Indonesia, "Naskah Akademik Rancangan Undang-Undang Republik Indonesia Nomor...Tahun...Tentang Tindak Pidana Kekerasan Seksual," Dewan Perwakilan Rakyat Republik Indonesia, 2021, 101, Academic Manuscript.

the man can be considered to have committed '*merarik*' or elopement which is common in the Sasak Tribe.

A similar culture can be found in Sumba, East Nusa Tenggara (NTT), namely the *Yappa Maradda* or *Kawin Tangkap* tradition, a common practice of bride kidnapping. On Tuesday, June 16, 2020, R, who was 21 (twenty-one) years old woman and working in Bali, returned to Sumba to collect her diploma so that she could continue his studies while working. While at her uncle's house, R was arrested by a group of men and taken to the house of 28-year-old N to marry him. R was carried for one kilometer without the consent of R and her family. After this happened, R's family could only accept the gifts of the perpetrator's family in the form of a buffalo, a horse, and a machete which was then followed by a traditional marriage in, all within less than a month. The case became controversial because the degradation of R's 'honor and dignity' was so extreme, but could not be legally enforced because it was a culture that had existed in the community since ancient times. In short, it has become a 'local wisdom'.

Such cultural practices certainly cause astonishment for people who do not adhere to these cultures. It can even invite public reaction and anger. However, the state, which has recognized the existence of culture and indigenous peoples, cannot solely interfere with the resolution of these cases, and worse, such cases can only be used as 'lessons learned', not something that can be changed or processed legally. This is a classic example of the clash between state law, which aims to uphold human rights protection, with the non-state laws (customary laws) that may not be in line with the spirit of human rights protection. The main parameter for a religious and cultural law to be implemented alongside positive law in Indonesia is its harmony. As stipulated in Article 18B paragraph (2) of the 1945 Constitution that the traditional rights of customary law communities are recognized and respected only those that are still alive and must be in accordance with the principles of the Republic of Indonesia in accordance with the law.²² The phrase 'in accordance with the law' means that written regulations take precedence over unwritten regulations in the sense of customary law'. Thus, it can be concluded that a customary law can be enforced as long as it does go against the existing legal enforcement mechanism.

²² Mahdi Syahbandir, "Kedudukan Hukum Adat Dalam Sistem Hukum (The Structure of Customary Law in Indonesia's Legal System)," *Jurnal Kanun* 12, no. 1 (2010): 10, <https://jurnal.usk.ac.id/kanun/article/view/6285/5176>.

Additionally, on top of these customary laws, Indonesian legal system as a whole is also filled with discriminatory regional regulations that are counterproductive and contradictory to the protection of human rights mandated by the 1945 Constitution and prevailing national legislations. Regional regulations are the legislative products of the regional governments based on the autonomy vested by the 1945 Constitution.²³ With 37 provinces, each divided further into regencies and cities, Indonesia's legal system is loaded with a massive repository of regional regulations (18.651 regional regulations are available for reference in the website of the Ministry of Law and Human Rights).²⁴ According to Law Number 23 of 2014 on Regional Government, these regulations deal with various affairs, including the empowerment of women and protection of children.²⁵ In relation to this function, the Sexual Violence Law mandates the cooperation between the central and regional governments to conduct an "integrated service for the handling, protection, and rehabilitation" in the case of sexual violence.²⁶ Ideally, there should have not been any regional regulations that are discriminatory in character or "go against the norms, standard, procedure, and criteria"²⁷ prescribed by the central government aiming for gender equality.

All in all, these observations lead to a conclusion that the Government has absolute power to interpret what 'honor and dignity' is due to the supremacy of the positive law over diverse religious or cultural perspectives. However, this finding does not in any way lead to the 'perfect' interpretation of what 'honor and dignity' is. The Government must therefore address this issue and come up with a definitive and certain interpretation of what 'honor and dignity' or come up with a definitive standard like what Australia and the United Kingdom has implemented in order to guarantee legal certainty.

C. Conclusion

The existence of 'honor and dignity' element in the formulation of Article 5 and Article 6 of the Sexual Violence Law actually provides ambiguity or multiple interpretations for the enforcement of physical and non-physical sexual harassment, which can come from

²³ Article 18, part 5 – 6, *The 1945 Constitution of The Republic Indonesia*.

²⁴ Sistem Informasi Peraturan Perundang-Undangan, "Peraturan Daerah," Kementerian Hukum dan HAM RI, accessed October 12, 2022, <https://peraturan.go.id/perda.html>.

²⁵ Article 12, part 2b, *Local Government Law*.

²⁶ Article 73, *Sexual Violence Law*.

²⁷ Article 17, part 2, *Local Government Law*.

the perspectives of the perpetrator and victim, and very much dependent on various indicators like religious and cultural values. The formulation of sexual harassment in Article 5 and Article 6 of the Sexual Violence Law may instead adopt the use of the element of unwelcomeness or unwanted behavior as has been implemented by other jurisdictions, which is characterized by the absence of consent between the two interacting parties. In addition, an alternative that can be used is to make the element of 'honor and dignity' as an impact arising from a sexual harassment behavior seen from how concrete, extensive, or massive the degradation of the victim's 'honor and dignity' is, so that it can be used as a consideration for aggravating criminal sanctions for the perpetrator. After the formulation is adopted, in order to strengthen the criminal law as the *ultimum remedium*, there must be a restorative justice solution for harassment that does not have a concrete, widespread, or massive impact through a peace agreement with the relevant victim. Thus, the perpetrator is given the opportunity to return to society not as a criminal offender. A statutory formulation is needed to provide some legal certainty with substance that is easy to understand, clear, and can be easily applied. That way, all aspects of the legal provisions that can trigger broad and non-standard interpretations must be eliminated. The reason is, when talking about different ways of interpreting the law in Indonesia, there are certainly many triggers for this diversification of views, one of which being the diverse cultures and religions in Indonesia, in the context of legal pluralism. In order for victims of sexual harassment to be able to get the rightful justice as mandated by the Sexual Violence Law, pro-victim perspective shall be emphasized. Amidst the ambiguity of 'honor and dignity' definition under Article 5 and Article 6 of the TPKS, legal enforcers shall uphold the respect for victim's 'honor and dignity' by treating the victims respectfully and honoring their perspectives, i.e., how the conduct has degraded their 'honor and dignity' and thus could be categorized as a sexual violence. In order to ensure implementation of protection against sexual violence, the Government shall work effectively by implementing a bottom-up approach, by being sensitive and responsive to the procedure to respond to sexual violence reports in all parts of Indonesia, even the most remote ones.

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